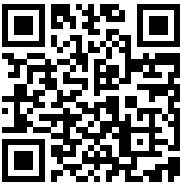

LECAL

THE

# LEGAL OBSERVER,

OR

## JOURNAL OF JURISPRUDENCE.

PUBLISHED WEEKLY.

NOVEMBER, 1830, TO APRIL, 1831,

INCLUSIVE.

——"Quod magis ad nos
Pertinet, et nescire malum est, agitamus."

HORAT.

VOL. I.

LONDON:

PUBLISHED FOR THE PROPRIETORS BY

JOHN RICHARDS,

LAW BOOKSELLER AND PUBLISHER, 194. FLEET STREET:

ADAM BLACK, EDINBURGH;

AND R. MILLIKEN AND SON, DUBLIN.

1831.

London:
Printed by A. & R. Spottiswoode,
New-Street-Square.

# PREFACE.

We have now the pleasure of presenting our First Volume to the Profession and to the Public; and we are happy in the opportunity of expressing our sense of the manner in which the Legal Observer has been received.

It was indeed surprising, that, among the many publications representing, or professing to represent, the different interests of the community, there should be no one which expressed the feelings and advocated the interests of the profession of the law. We have attempted to supply the deficiency. Our professional brethren of all classes, and on all sides, have come forward to support us, and we have thus been able to pursue our design with success.

We reflect on this with the greater satisfaction, because, although many other legal periodicals have been commenced, none has ever met with the same good fortune as ourselves. They have usually lingered on some few months, and have then been, to use the language of an eloquent judge, "entombed in the urns and sepulchres of mortality." The plain reason of this want of success appears to be this;—they have been devoted exclusively either to speculative opinions, forming a mere bundle of essays, emanating only from one branch of the profession; or have been filled with dry details and lists.

It has been our pride to bring forth a work which should be useful alike to the practical as to the speculative man; which should represent no section of the profession, no exclusive opinions. We saw that it was impossible to supply the demand without uniting all the services which each of its branches could afford. It is on this broad ground that we have taken our stand; and we now look back upon our labours with increasing pleasure. We have presented a varied page. The speculations of the jurist—the details of the lawyer—the bold discussion of legislative measures affecting the law—the experience of age—the vivacity of youth—have all lent their aid to render our work useful and interesting. We confess an honest pride in our chosen band of supporters; each in his place to assist us; each filling the department allotted to him with advantage. It has been our glory to demand and receive their united assistance—

> ——————"firm to retain
> Their gather'd beams."

Nor do we despair of being able to continue the quotation—

> "Hither, as to their fountain, other stars
> Repairing, in their golden urns draw light."

We are happy in being able to remind our readers that we have kept faith with them. No one promise in our original Prospectus has been left unfulfilled. But with this we have not contented ourselves. We have commenced and carried through a much more extensive plan than we at first proposed. It has been our aim to furnish a complete legal library; and, with the help of our MONTHLY RECORD and QUARTERLY DIGEST, we think we have succeeded.

We can only mention a few of the features which have distinguished our weekly publication. They are these:—We have been able to lay before our readers the earliest and most authentic information on all changes contemplated or effected in the Law, and on all professional appointments. We have given a series of original Reports in all the Courts of Law and Equity, which will well supply the place of the more expensive Law Reports; particularly as we have been able to give reports of the decisions of Courts of which there is at present *no other report*, as in the Practice Court of the King's Bench, and the *nisi prius* cases on the Home Circuit.

The friends and advocates of all moderate and practical reforms, we have been zealous in our opposition to those measures which would have inflicted on the country the evils of change without any of its benefits. From the earliest period of our existence, therefore, we have not ceased to expose and endeavour to defeat the Bill for the introduction of Local Courts into this country; and we take some credit to ourselves for enforcing and promulgating the true principles on which that pernicious proposal was founded. Our success has been complete; for the Bill is withdrawn, if not altogether abandoned.

We have fearlessly censured the conduct of public men, when we have thought it necessary to do so; but we have not stooped to personality, nor have we suffered ourselves to be made the vehicle either of mere idle gossip or of ill-natured remark.

These are the principles which have hitherto guided us; these are the principles which will continue to guide us. When we deviate from them, let our friends depart from us, and our enemies, if we have any, rejoice. And now we have only further to say, that as since our first appearance many new ways have opened to us for making our pages useful and interesting, so we doubt not that, as we shall pursue our course, cheered by the approbation and support of the Profession, new lights will break in, and we shall be able to render our work still more deserving of that favour which has already been so unsparingly bestowed.

# CONTENTS OF VOLUME I.

# The Legal Observer.

VOL. I. SATURDAY, NOVEMBER 6, 1830. No. I.

"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## INTRODUCTORY ADDRESS.

IN tracing the means and mode of imparting amusement and communicating knowledge at different stages of society, it is curious to observe, that each is distinguished by some peculiar characteristic. The taste of these latter days is in nothing so remarkable as in its attachment to PERIODICAL LITERATURE. Not only the tales of sentiment and passion,—of wit and humor,—of adventure and romance,—each in their turn make their wonted appearance, with the punctuality of the merchant upon the Exchange; but the tomes of history and science, of biography and morals, are all presented in like revolutions of time. Instruction and entertainment are thus conveyed to countless multitudes, with a rapidity resembling the progress of light; and knowledge, which in former times could only be communicated personally by the preceptor to the pupil, is now circulated simultaneously, weekly, and even daily, in every town and village through the land.

Amidst this circulation of practical and scientific information through the medium of the periodical press pervading every class of the community, it would be singular that so large a body as the practitioners of the law should longer neglect to avail themselves of its striking advantages. The intellectual spur which has been applied to all classes of society, renders it necessary that the members of every liberal profession should adopt correspondent means to retain the rank and station to which, as learned bodies, they are entitled, and which it would be the last disgrace to forfeit.

In this view, it has been long matter of regret amongst several of the most active members of the profession, that there was no medium by which they could communicate their sentiments to their brethren in general; for, although the newspapers have frequently inserted professional articles, yet they are necessarily confined to subjects affecting the public in some important particular, and those which are of less general interest, however essential to the legal practitioner, are unavoidably omitted.

A work, therefore, of this description, has been contemplated for many years by several members of the profession, zealous for its good; and a large store of materials is already collected for insertion. The time at which the work should commence has hitherto remained undetermined, but in the present state of legal affairs—amidst the changes which are projected, so extensively both in the law and its practical administration—it is deemed peculiarly appropriate to commence the publication without further delay.

It is thus intended to establish an effectual channel of communication between professional men throughout the British dominions: enabling them, at whatever distance from the capital, not only to receive information of all passing events which may be generally interesting, but stimulating them in return to contribute the result of their own experience and reflection, and thus congregating a mass of legal information and research, which, scattered amongst men in all parts of the empire, could in no other way be so advantageously collected, or so generally diffused.

It is a saying, hacknied as an ordinary proverb, that "the law is a *dry* study:" and it may appear therefore singular to announce the association of *amusement* with legal knowledge. Yet the professional antiquary well knows that his labour is often richly rewarded, as well by the solid instruction which he derives from his researches, as by the discovery of curious and interesting matter, calculated to

engage the attention, not only of the philosopher and historian, but of the humorist and the man of the world.

Above all other subjects, in the universality of its stirring interest, we may notice the *Biography* and *Anecdotes* of eminent lawyers, —of men whose labours have conducted them to wealth and independence, and the highest honours of the state; whose profession at all times has stood high in political importance; and whose leading members have always been intimately connected with public affairs.

It is our intention, therefore, to insert a series of articles, comprising not only those recently deceased, but the worthies of past times. We shall principally select such as have been distinguished for their meritorious elevation from the *humbler* to the *higher* ranks of the profession. Our reasons for this preference are obvious. These instances, by their striking vicissitude, will afford to the youthful student the strongest inducement to exertion. We shall especially note *the early life* of these ornaments of the law, trace the means by which their rise was promoted, and detail the difficulties they overcame. Even the general reader will feel interested in such a career; will admire the progress, and rejoice in the successful termination of a course, thus commenced in learned industry, conducted with well-applied talent, and arriving ultimately at the highest judicial honours.

Nor, whilst we pay deserved respect to the bench and the bar, should we neglect that more numerous branch of the profession for which this work is principally designed, many of whose members have attained the highest station in their several departments of practice with the greatest integrity and honour, whose skill and industry have been rewarded with well-earned fortune; and the general esteem for whom has been abundantly testified, not only by their frequent appointment as the trustees and executors of the noblest and wealthiest families, but by the important and responsible offices which they have held in the public service.

These sketches of early perseverance and final excellence will not fail to be acceptable, and we trust in no small degree advantageous, to the younger members of the profession, to whom we must look for the support of its future honour and independence, and the maintenance of its character for learning and intelligence. The first steps in their career must always be attended with difficulty, and often encountered with reluctance. We believe that genius and industry are often united, but it would be vain to conceal that many, whose natural talents fit them for high attainments, are often lamentably indolent: these, we hope, in some degree to attract, and by our lighter articles to allure to more extensive and vigorous researches. Our limits enable us only to point the way, as the popular lecturer renders himself more useful whilst he seems to descend from the dignity of the professor's chair.

It is also one of our pleasing anticipations that we shall be enabled to relieve, by the short and lighter articles of our *Miscellanea*, the anxieties of professional life, and the labours of professional duty. This department of our task, though less solemn than others, we trust will not be unproductive of agreeable reminiscence; and that, by the wit and vivacity of our contributors, we shall be enabled to beguile our brethren of their severer meditations, and to scatter over the walks of professional life a few of the flowers of literature.

To our *contributors* and *correspondents*, we would address a few hints which may tend to the greater efficacy of their labours. It is remarked by Lord Bacon, that "to use too many circumstances, 'ere one come to the matter, is wearisome; to use none at all, is blunt." Gold is excellent, but it may be beaten over too large a surface. Our friends will allow us to condense their materials when they are too expanded, and we shall be well content to forego the accustomed homage to "our known impartiality," and "the wide circulation of our Journal." We have the most conciliating intentions, but we must execute our honourable trust with due discretion and firmness.

We are desirous of avoiding whatever is petty and frivolous. Let the improvements which are suggested, through the medium of these pages, be important and comprehensive. Even the parliamentary and judicial summary should be confined to prominent points; all trifling and uninteresting details should be strictly avoided. If we dwindle into the recital of insignificant and paltry circumstances, we shall cease to be read with attention, and deserve the fate that will await us.

We are also especially desirous that our pages should be free from *personality*. Let

improvements be proposed, and abuses pointed out, without acrimony towards individuals. The latter are often less reprehensible than is generally supposed: they are the mere instruments of the system. It is too much to expect the heroism of voluntary sacrifice; and until the system be changed, the abandonment of a lucrative office by one man would be instantly followed by the appointment of another of less scrupulous character. Let us sternly denounce the offence, but be merciful to the offender.

The final Editor of the publication, to whom its general supervision has been confided, claims no merit in its composition. His duty is to suggest, to advise, and to collect the sentiments of his brethren. He may occasionally furnish some of the "raw material" of the work, but the skilful manufacture, the polish, and completion of the fabric, he leaves to his learned and able coadjutors. He claims only the possession of a zeal in behalf of his profession, which no exertion can tire, and no difficulties intimidate; which will cause him to rise with the first freshness of the morning, and to linger late in the silent hours of night:

"The labour we delight in, physics pain."

He is proud to promote the interests of a body of men who require from him nothing but justice and a fair hearing; who inculcate a strict integrity of purpose, and who leave him free to the exercise of the most determined impartiality; who are willing that the door of temperate discussion should be thrown open to all parties, and that the most liberal preference should be given to communications in which the interests of the public are in any way affected in the administration of justice,—satisfied that the welfare of the community is identical with the best interests of the profession.

## ADMINISTRATION OF JUSTICE IN THE SUPERIOR LAW COURTS.

During the last session of parliament, Sir James Scarlett brought in a Bill, entitled "An Act for the more effectual Administration of Justice in England and Wales," which received the Royal assent on the 23d of July last. The changes effected by the Act, both in the law and in the practice of the courts, are numerous and important. First, the increase of the *number of the judges*, from twelve to fifteen, by the appointment of an additional *puisne* judge in each of the superior courts of Westminster, with the same powers as the others. Second, the alteration and fixing of the commencement and conclusion of the *terms*. Third, the limiting of the *sittings* after term. Fourth, the fixing the Exchequer chamber as the *Court of Appeal*, by writ of error, from the judgment of all the superior courts of common law at Westminster, and the regulation of the mode of proceeding. Fifth, the empowering the judge, before whom persons may be convicted of *felony or misdemeanour*, on records of the King's Bench, to *pass sentence* at the *Assizes*, or sittings, instead of deferring judgment until the ensuing term. Sixth, the admitting *attornies* of the other superior common law courts to practise *in the Exchequer*. Seventh, the *assimilation of the practice* of all the superior common law courts, by agreement between the judges. Eighth, the permission of *bail to be justified at chambers*, in term and vacation, whether the defendant is in custody or not. Ninth, the *abolition of the Welsh and Chester local jurisdiction*. Tenth, the change of the mode of *rendering* defendants in discharge of their *bail*. Eleventh, the alteration of the times of holding the *quarter sessions*. Twelfth, the providing for landlords a more speedy mode of proceeding by *ejectment*, and for the recovery of their premises, when their right accrues during, or immediately after, Hilary or Trinity terms.

We here subjoin an analysis of the Act, and in our next number we shall offer some remarks on the changes effected by it.

### The Act is the 1st Wm. IV. c. 70.

Sec. 1. gives power to the king to appoint an additional puisne judge in each of the superior law courts, to sit with the other judges in rotation, or as they shall agree among themselves in term, so that no more than three at a time shall sit in *Banc*, for the transacting term business, unless in the absence of the chief justice or chief baron; and one judge, while the others of the same court are sitting in *Banc*, may sit apart for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes, and business depending in the court to which such judge shall belong, in the same manner, and with the same force and validity, as may be done by the court sitting in *Banc*.

Secs. 2 and 3 provide the amount of the additional judges' salary, and of their allowances on retiring.

Sec. 4 empowers every judge to whatever court he may belong, to sit in London and Middlesex, for the trial of issues arising in any of the said courts, and to transact business at chambers, or elsewhere, depending in any of them, relating to matters over which those courts have a common jurisdiction, and which might, according to the practice of the court, be transacted by a single judge.

Sec. 5, repeals the act of 3 Geo. IV. c. 102, for facilitating the despatch of business in the court of King's Bench, except so far as that act repeals the act of 1 and 2 Geo. IV. and except so far as relates to the last warrant issued.

Sec. 6 appoints the commencement and limits the duration of the terms. This provision begins to operate in Hilary term, 1831.

Sec. 7 limits the time for sittings at *Nisi Prius* in London and Middlesex, after the alteration of the terms has taken effect, to twenty-four days, exclusive of Sundays, after Hilary, Trinity, and Michaelmas terms; and to six days, exclusive of Sunday, after Easter term, to be reckoned consecutively immediately after the terms. The judges may appoint a day or days for trials at bar, and the time so appointed, if in vacation, shall for the purpose of such trial be deemed part of the preceding term, and a day or days may be specially appointed, not being within the twenty-four days, by consent of the parties, their counsel, or attorneys, for the trial of any cause at *Nisi Prius*.

Sec. 8 provides that writs of error shall be returnable before the judges, or judges and barons of the other two courts, and a transcript only of the record to be annexed to the return; the court of error, at a time appointed by the judges in term, or vacation, may review the proceedings, and give judgment; the proceedings and judgment, as altered or affirmed, to be entered on the original record, and further proceedings awarded by the court in which the original record remains, from which judgment in error, no writ of error shall lie, except to Parliament.

Sec. 9 empowers the judges before whom any person is tried and convicted for felony, or misdemeanour, upon a record of the court of King's Bench, to pass sentence at the assizes, or sittings, and points out the course of proceedings in such cases.

Sec. 10 enables attorneys of the King's Bench and Common Pleas to be admitted, and allowed to practise in the Court of Exchequer, without employing a clerk in court, in the capacity of an attorney of the court of Exchequer.

Sec. 11. Eight or more of the judges, including all the chiefs, are exclusively to make rules for the future regulation of the practice of the three courts, and the court of error.

Sec. 12. Bail may be justified before a judge in chambers, or other place appointed by him, as well in term as in vacation, and whether the defendant be actually in custody or not.

Sec. 13. The king's writ shall be directed and obeyed, and the jurisdiction of the King's Bench, Common Pleas, and Exchequer, shall extend and be exercised over and within the county of Chester, the county of the city of Chester, and the several counties in Wales, *in the same manner as the jurisdiction of such courts is now exercised over the counties of England, not being counties palatine;* and all original writs to be issued in Chester and Wales, shall be issued by the cursitors for London and Middlesex.

Sec. 14. This section abolishes the jurisdiction of the courts of Chester, and of the chamberlain and vice-chamberlain thereof, and of the judges and courts of Great Sessions in law and equity in Wales, and directs all suits depending in those courts, if in equity, to be transferred to the court of Chancery, or Exchequer; if in law, to the court of Exchequer, to be decided according to the practice of those courts, or of the court whence the same shall be transferred, according to the direction of the court to which the same shall be transferred.

Sec. 15. Saving of the rights of the mayor and citizens of the county of the city of Chester; writs of error, or false judgment, hitherto brought before the courts abolished, shall hereafter be returnable in the King's Bench.

Sec. 16. Attorneys of great sessions for Chester or Wales, may, on paying one shilling, have their names entered upon a roll, to be kept in each of the superior courts at Westminster, and then practise in such courts, in all actions against persons residing, at the commencement of the suit, within Chester or Wales. And persons having served, or now serving, as clerks, under articles, and otherwise entitled to be admitted attorneys of the courts of great sessions, may, on or before six months from the passing of this Act, be admitted attorneys of the courts at Westminster, to practise there in like manner only without payment of any greater duty than that payable on their admission as attorneys of the court of great sessions.

Sec. 17. Attorneys and solicitors now practising at great sessions, may be admitted in the superior courts at Westminster, on paying such sum for duty as shall, together with the sum already paid, amount to the full duty on admission of attorneys or solicitors in the latter courts. Clerks having served, or serving under articles, to attorneys or solicitors of great sessions, may, at the expiration of their clerkship, be admitted attorneys of the courts at Westminster, as if they had served attorneys of those courts.

Sec. 18. Commissioners for taking affidavits, or masters extraordinary in chancery of any of the abolished courts, may, on producing their appointment to the proper officer, and paying one shilling, have their names entered in a list kept for that purpose, and exercise, within the limits of their existing commissions, the same power and authority as if their commission had issued from the courts at Westminster.

Sec. 19. Assizes shall be holden in Chester and Wales under similar commissions to those used in the counties of England, and in a similar manner.

Sec. 20. Till further provision, one of the two judges appointed to hold assizes for Chester and Wales, shall hold such assizes at the several places where the same have heretofore been most usually held within South Wales, and the other judge shall hold such assizes at the several places where the same have been most usually held in North Wales; and both of such judges shall hold the assizes for Chester.

Sec. 21. Defendants arrested on process from the superior courts, may be rendered in discharge of bail, to the prison of the court out of which the process issued, or to the common gaol of the county in which they are arrested, in a certain manner prescribed; and the sheriff, or other person responsible for the custody of debtors in such county gaol, shall, on perfecting such render, be charged with the custody of such defendants, and the bail be exonerated.

Sec. 22. Defendants in custody in any county gaol of England or Wales, on process out of the superior courts, may be rendered in discharge of their bail in any other action depending in any of the said courts, in the manner before provided, for a render in discharge of bail; and the sheriff, or other person responsible for the custody of debtors, shall, on such render, be charged with the custody of the defendant, and the bail exonerated.

Sec. 23. Provides that the salaries of the judges of Chester and Wales, shall, when their offices terminate, form part of the consolidated fund, and a similar sum retained in the Exchequer as part of such fund, and no part carried to the account of the civil list.

Sec. 24. Compensation to certain of the Welsh judges, on their offices being abolished, by annuities to continue during their lives, or until appointed to another office, the emoluments of which shall be equal to, or greater than, such annuities in amount;

if less, the annuity to abate proportionably, so that the whole received may equal, but not exceed, the annuity.

Sec. 25. Compensation to persons having a freehold interest in the offices abolished, or affected by the Act, to such an amount as directed by commissioners or Act of Parliament.

Sec. 26. No person entitled to compensation whose appointment was qualified by any condition expressed in the patent, or otherwise made known to the person, that the office was holden without claim to compensation, in case it should cease: the manner of ascertaining the emoluments, so as to fix the compensation as pointed out, and a provision similar to that in sec. 24, in case of an appointment to another office.

Sec. 27. The records of the courts abolished, shall, until otherwise provided for, be kept in the same places, and by the same persons as at present; the court of Common Pleas shall have like authority to amend records of fines and recoveries heretofore passed in any of those courts, as if levied or suffered in the Common Pleas. If the person in whose custody the records are should die before further provision made, the clerk of the peace of the respective counties shall have the custody of those records.

Sec. 28. On fines which now are, or before the operation of this Act shall be, duly acknowledged in Chester or Wales, proclamation may be made at the successive assizes, within Chester or Wales, before the judge of assize, during the continuance of his commission, in the same manner and form, and with the same force and effect, as if proclaimed before the justices of Chester and Wales.

Sec. 29. Fines and recoveries, levied and suffered after the commencement of the Act, of lands, &c. in Chester or Wales, shall be levied and suffered in the same manner; and the same officers employed as in fines and recoveries, levied or suffered of lands, &c. in any county of England, not a county palatine.

Sec. 30. Act not to affect the rights of any lessee by patent under the crown, or any pensioner, or other person entitled to part of the money payable on fines and recoveries in Chester and Wales.

Sec. 31. In those cases where any trust for charitable uses, or of a public nature, shall have been cast on the judges of the courts abolished, by virtue of their offices, the lord chancellor, or keeper of the seals, or the judges of assize upon their circuits in Chester or Wales, are empowered to appoint other trustees with the same power and authority as those for whom they were substituted.

Sec. 32. Where by law, charter, or usage, any corporate or other officer or person, ought to take any oath, before any judge or other officer of the courts abolished, he may take it before the judge during the assizes, or at the quarter sessions, in open court.

Sec. 33. For passing the accounts of the sheriffs of Chester and Wales, for the future, it is enacted that the clerk of assize, within ten days after the assizes for Chester, and each county in Wales, shall make out a list of the names and residences of persons liable to fines, issues, amercements, recognizances, compositions, or other sums imposed or forfeited during the assizes, and transmit the same to the sheriff, with an order signed by the judge of assize, to levy the same; and the sheriff, upon its receipt, shall levy, and be accountable for the same, and all arrears thereof, and pass his accounts before the same officer as heretofore.

Sec. 34. The attorneys-general of the counties of Chester and Wales, shall, until the king's pleasure shall be otherwise declared, continue to have, in person only, and not by deputy, the same rank, name of office, privileges, fees, and emoluments, as heretofore, except such fees as would necessarily cease on the courts being abolished.

Sec. 35. The general quarter sessions, in the year 1831 and afterwards, are to be held in the first week after the 11th of October, the first week after the 28th of December, the first week after the 31st of March, and the first week after the 24th of June.

Sec. 36. In case of the right to enter on lands, or hereditaments accruing to landlords, in or after Hilary or Trinity terms, the landlord may serve a declaration, entitled of the day next after the day of the demise, in the declaration, whether in term or vacation, with a notice requiring the tenant to appear within ten days, and the cause shall proceed in the same manner, as nearly as may be, as if the declaration had been served before the preceding term. No judgment, however, shall be signed against the casual ejector, until default of appearance and plea within such ten days, and six days' notice of trial at least shall be given to defendant before the commission day; and defendant may, before trial, apply to a judge, by summons, for time to plead, or for staying or setting aside proceedings, or for postponing the trial until the next assizes, and the judge may make such order therein as he shall think fit.

Sec. 37. In making up the record in such cases, the declaration shall be entitled specially of the day next after the day of the demise, whether in term or vacation, and no judgment shall be avoided or reversed by reason only of such special title.

Sec. 38. In all cases of trials of ejectment at *Nisi Prius*, when a verdict shall be given for the plaintiff, or he shall be nonsuited for want of defendant's appearing to confess lease entry or ouster, the judge may certify his opinion on the back of the record, that a writ of possession ought to issue immediately, and upon such certificate a writ of possession may issue forthwith, and costs be taxed, and judgment signed and executed afterwards at the usual time, as if no such writ had issued. The writ, instead of reciting a recovery by judgment, will recite shortly that the cause came on for trial at *Nisi Prius*, at a certain time and place, and before such a judge: and that thereupon the said judge certified his opinion that a writ of possession ought to issue immediately.

Sec. 39. The Act will take effect upon and from the 12th of October, in all matters not otherwise provided for.

## THE DUTIES AND CHARACTER OF AN ATTORNEY AND SOLICITOR.

[FROM A CORRESPONDENT.]

WHOEVER will take even a cursory view of the numerous and important occasions on which resort is had to the members of this profession, the magnitude of the interests which are intrusted to them, the delicate and confidential nature of the communications which they continually receive, and the judgment, the skill, and intimate knowledge of mankind, as well as the high honour and integrity which they must possess, will at once perceive how considerable a share of public attention this profession must occupy.

If the duty which the attorney or solicitor had to perform were no other than that of preparing his client's case for the day of *trial*

or *hearing;* it would involve a responsibility, and require qualifications, which must necessarily excite no inconsiderable solicitude in selecting the person by whom that duty should be performed. He cannot arrive at a knowledge of his client's case, without becoming acquainted with secrets of vital importance to his character, or fortune, or peace of mind. Interests of the greatest magnitude are thus committed to his honour, professional skill, and discretion. As he proceeds, he has to bestow patient and discriminating attention in the collection and arrangement of evidence, and he must bring to the discharge of every part of this duty, sound judgment, and an intimate knowledge of the world, as well as great professional skill.

It is quite impossible that a judicial investigation could be conducted with the order, the despatch, and the accuracy, by which it is at present distinguished, if this service were not previously performed. It must be performed, too, by a branch of the profession distinct from that of the *barrister*, whose avocations do not allow him the requisite time, and whose habits do not afford him the requisite qualifications for engaging in it.

Important as these services are, there are other duties, of a more serious and responsible nature, which the attorney has to perform. He is consulted by his client on transactions connected with the transfer of *family property*. Those who reflect on the various occasions which render such a consultation necessary, will perceive that confidential disclosures of the most delicate nature must be made, and thus he may place in the power of the attorney his credit, his property, and interests of even a higher nature. These communications daily and hourly take place, and with such perfect confidence in the integrity of him to whom they are made, that the obligation of secrecy is implied in the fact alone of making them. It is naturally desired by most men, that the number of those to whom they intrust their confidential communications should be as limited as possible. If the attorney confined himself to the conduct of suits in particular courts alone, he would compel the client to resort to another member of the profession when he required advice on a different subject. The education and habits of the attorney are therefore directed to the union of the qualifications which may enable him to be the adviser of his client on every occasion which requires professional assistance.

It is not necessary to enter into a minute detail of the services which are rendered by this branch of the profession. The experience of every man will suggest to him their nature, variety, and importance, and will lead him to consider that they become, in the present complex state of society, altogether indispensable. It is obvious, therefore, that the public have a direct and immediate interest in the character of the members of this department of the profession. It has been truly said, that "the degree of estimation in which any profession is held, becomes the standard of the estimation in which the professors hold themselves, (*a*)" and, it may be added, that it will also become the standard of the estimation in which they *deserve* to be held.

When it is perceived, that the most honourable conduct in *individuals* cannot protect the profession from the indiscriminate reproach with which it is *collectively* assailed, there is too much reason to apprehend that its members may become indifferent to the value of those qualities by which they are, and ought to be, distinguished. The habit of extending to a whole profession, the censures which are merited only by a few of its members, is fatal to that just discrimination of character which it becomes so much the public interest to make. Those who are accustomed to bestow their censures on *all*, when they are merited only by a *few*, will incur the risk of bestowing their confidence where it is the least deserved.

The more elevated, indeed, the profession stands in public estimation, the more secure is it against the introduction of unworthy members. The character which a society maintains, operates as much in repelling the bad, as in attracting the good: men judge of the intrinsic worth of a society from the reputation it maintains; if that be high, it is not the sphere of which bad men will make choice. It is with this, and with every other profession, as it is with society at large, public opinion, by the tone and character it gives to the latter, exercises a direct influence in forming its real intrinsic worth. The standard of national morals is formed by the degree in which the boundaries of right and wrong are recognized and preserved. It is depressed as much by withholding an honourable sanction, where it ought to be given, as by giving it where it ought to be withheld. It is still more depressed when undistinguishing censures become so general as to affect those who deserve commendation and support.

---

BIOGRAPHICAL SKETCH OF

## THE LATE LORD GIFFORD.

As example is more influential than precept, so the biography of those who have excelled in any science or profession is better adapted than didactic treatises, to excite the emulation of the student. While it makes no concealment of difficulties, it discovers the means by which they may be; nay, have been, overcome; and, divesting science of its mystery and abstraction, presents it embodied and realized in the actions of an individual. Discrimination is requisite, on the part of the reader, to mark in what respects, the character brought before him can be imitated, in a manner conducive to his advancement towards that particular end, which his own proper business requires him to keep steadily in view. The assiduity and perseverance of Lord Gifford may be contemplated with profit, by those whose destination does

---

(*a*) 5 Burke, (8vo. ed.) page 93.

not call upon them to seek the honours of the judicial bench, or the peerage. The rewards they have to look for, are skill, respectability, independence, and the consciousness of having rendered useful services to others; rewards, at least as capable of enjoyment in the quiet of private life, as in the distraction and fatigues of public situations.

Robert Gifford was born at Exeter, on the 24th of February, 1779. His father was a man of respectability, as an extensive dealer in hops; and, likewise, carried on the trade of a grocer and linen-draper: he was twice married, and had, by his second wife, four children, of whom Robert was the youngest. It is said that the house in which the subject of this memoir was born, and in which his father carried on the grocery business, was the very same in which the father of Lord Chancellor King resided, and carried on the same trade; employing his son Peter, as an assistant in the shop till he attained the age of eighteen, when his bright parts recommended him to the attention of his illustrious kinsman, Locke, who used his influence to release him from an occupation to which his talents rendered him superior. Whether or not the parallel between these two distinguished lawyers can be traced with accuracy to such minute particulars, is a matter rather curious than instructive: for the encouragement of the diligent, it is enough to know that both of them, by the force of unwearied application to legal studies, emerged from obscurity, overcame great obstacles, and attained the high honours of their profession, without the aid of wealth, or the advantages of powerful connexions.

Robert Gifford was a boy of quick apprehension, and attentive to all opportunities of acquiring information. His education commenced at a small school kept by a dissenting minister, in Exeter, who appreciated the excellence of his capacity, and pronounced him the cleverest boy he had under his care. The learned Dr. Halloran, better known for the possession of abilities, than for their useful application, claimed the honour of having had young Gifford for a pupil.

His predilection for the courts of law manifested itself at an early age: even in his boyhood he would contrive to be present at the assizes, held in his native city, and there he attended from day to day, paying the closest attention to the several causes. His fondness for law must have led him into the courts, and the proceedings which he witnessed there,—the exertions of counsel, the dignity of the bench, kindled the latent ambition of his youthful breast, and made him desirous to enter upon the same career as that in which he saw the actors in the court engaged. His inclination for the bar was deemed too expensive to be encouraged, yet his taste for legal pursuits was so far consulted that he was designed for the other branch of the same profession; and was, at the age of sixteen, articled to Mr. Jones, a respectable solicitor, of Exeter.

As a clerk he was distinguished by sedulous application in the study of the science and theory of the law; and it was probably at this period that he laid the foundation of that knowledge of the laws of property, which became so highly useful to him in his after life. His attention to the practical business of the office was equally unremitting; and thus, sparing no exertions to deserve, he did not fail to obtain, the esteem and confidence of his principal; at the same time he enjoyed within the limits of his circumscribed sphere, the agreeable tribute of respect which is cheerfully paid to good character in all the useful stations and degrees of society. The ill health of Mr. Jones gave young Gifford an opportunity of taking an active part in the management of the office, for which he was already well qualified by his acquirements and his habits. His quickness in unravelling legal difficulties, his sound judgment in giving advice, and his skill in conducting causes, are still in the recollection of his early acquaintances. The late Mr. Baring, the member for Exeter, once called on Mr. Jones to consult him on a case of great importance, and legal nicety: Jones, though a clever man, was somewhat perplexed, and turned to his clerk, Gifford, for his opinion; this he gave with a readiness and clearness which perfectly satisfied the client, who immediately after met a friend in the streets of Exeter, to whom he said, "I have just been consulting with a young man who, if he lives long enough, will some day be lord chancellor." In the second year of Mr. Gifford's clerkship, his father died, and his elder brothers succeeding to the business, watched over his interests with fraternal kindness. He had reason to expect that on the expiration of his articles, he should be admitted into partnership with Mr. Jones, but circumstances happened to prevent it; and now, finding himself free from engagements, he determined, with the concurrence of his brothers and the encouragement of his friends, to adopt that walk of the profession, which he had long ardently desired; but which he had prudently refrained from entering upon, while it was opposed to the wishes of his father, and inconsistent with existing obligations.

He repaired to London in 1800, and entered himself of the Middle Temple. He became a pupil of Mr. Robert Bayly, a special pleader, in whose office he applied himself with his habitual industry to the study of that subtle branch of legal knowledge, for the space of two years; and it is believed that he placed himself for some time longer in the office of the late Mr. Godfrey Sykes, the a special pleader, afterwards solicitor to the Stamp office. About 1803 Mr. Gifford took chambers in Essex court, Temple, and commenced practice for himself as a special pleader; and, though his connexions in London could not have been at first very numerous, he gradually came into an extensive practice.

On the 12th of February, 1808, he was called to the bar: he joined the western circuit, the Exeter and Devon sessions. The high opinion entertained of his abilities in his native city, soon led to his employment in that part of the country; and the success which attended his efforts in the local courts, proved that the interval of his absence from Exeter had not been idly spent: for his good natural abilities were developed by assiduous cultivation; his store of legal learning was solid and extensive; while his attention and his method rendered his acquisitions immediately available on all occasions. A constant preparedness and vigilance seem to have been his characteristics through life: and these appear to have constituted the secret power which enabled him, without any extraordinary pretensions to greatness of genius, to seize alike every favorable turn in the progress of a cause for the interests of his clients, and every auspicious juncture in the course of events for the advancement of his own fortunes. He soon obtained a considerable share of business both in the country and in London, and he was not long without an occasion for distinguishing himself in the eyes of the profession. He was retained to argue the cause of Mogg v. Mogg, in the King's Bench, a cause which involved many abstruse and important points in the law of real property, with which law he had early in his career, rendered himself familiar: his intimate acquaintance with the subject, and the

dexterity with which he applied his cases to the points in question, attracted the notice of the late Lord Ellenborough, then chief justice of that court. His lordship shewed him many marks of favor, invited Mr. Gifford to his house, and evinced a disposition to promote his advancement. The next case in which Mr. Gifford particularly excelled, was on a commission of lunacy, to inquire into the state of mind of a Mr. Baker, which commission was executed at the Castle at Exeter. The late Mr Dauncey, with Mr. Abbott, the present lord chief justice, were specially engaged on the occasion, and Mr. Gifford alone was opposed to them. The ability of his deceased competitor will not soon be forgotten: the rare acumen of the dignified survivor is the subject of daily observation: the investigation lasted nine days, and produced a mass of various and complicated evidence. In reducing this to order, and placing the facts in a judicious point of view; by the aptitude of his comments, his cogency of argument, and facility of expression, Mr. Gifford excited the admiration of all who heard him, and proved that his powers were equally applicable to the difficulties of facts, and of law. Henceforward he was regarded as an advocate qualified for all the trials of his profession: on the circuit he was trusted to compete with Lens and Pell; and in Westminster hall he enjoyed the favor of the judges, and the friendship of many estimable members of the bar. Among the latter were the late Sergeant Lens, Mr. Horner, and Mr. Mallet, the two last of whom were prematurely cut off before him; too early to realize the high, but just anticipations of their friends.

Among the judges, the late Sir James Mansfield, chief justice of the Common Pleas, was a zealous patron of Mr. Gifford; Sir Vicary Gibbs, who, it is said, was a relative of his, and at first opposed his going to the bar, at length did justice to his merits, and was heard to affirm that since the death of Dunning, he had not known any man equal as a general lawyer to Gifford. Lord Ellenborough still continued his friend, and at one time expressed a wish that he should be made a king's counsel; but though this was not complied with at the time, the strong recommendation of his lordship is supposed to have had much weight in the subsequent appointment of Mr. Gifford to the office of solicitor general.

This honour was conferred upon him on the 9th of May, 1817; he owed it to his professional celebrity, and to the evidences he had given of being a useful and steady man of business; for he was personally unknown to the ministers. Sir Samuel Romilly, an impartial judge, expressed in the House of Commons, his satisfaction that the appointment had been made on the fair principle of professional merit. Mr. Gifford bestowed too much time on his professional avocations to take a prominent part in politics: his political principles, when he first went to the bar, were not congenial with those of the administration whose officer he now became; but at what time, or on what grounds, his sentiments underwent a change, is an inquiry foreign to these pages. On the 16th of the same month of May, he was made a bencher of the honourable society of the Middle Temple; and soon afterwards, he took his seat in the House of Commons, for the borough of Eye, in Suffolk. In parliament he did not make a conspicuous figure; he lacked the fire of genius, and the general knowledge, which are requisite to give ascendancy in a popular assembly, containing many severe and competent judges of oratory; yet he was clear in elucidating the legal measures of the government; and when a suitable subject presented itself, he displayed with effect the same talents which he employed with such dexterity and success in forensic discussions.

After his appointment to the post of solicitor general, he left the courts of common law, to practise at the Chancery bar: a transition which nothing but a quickness of apprehension, and an indefatigable perseverance like his, could have rendered easy; seeing the differences in the course of study, in principles and practice, and in the style of speaking, which law and equity require according to the mode of their respective administration in this country. His practice in his new sphere was soon considerable; and he became the principal leader of appeals in the House of Lords: here he availed himself of every opportunity to make himself acquainted with the laws of Scotland, from whence so many causes are brought for the final decision of the peers. This accession to his stock of legal knowledge proved highly valuable to him at a subsequent period of his life. He was officially engaged on the trial of Watson and others for high treason in 1817, on which occasion Sir James Mansfield attended in the Court of King's Bench, on purpose to hear the solicitor-general's reply. On the resignation by Sir Vicary Gibbs of the recordership of Bristol, the corporation of that city chose Sir Robert Gifford for his successor. This office has been held by men of great legal eminence: Sir Robert discharged its duties so much to the satisfaction of the corporation that, as a mark of their esteem, they requested him to sit to the late Sir Thomas Lawrence, for a whole-length portrait, to be placed in their Town Hall.

In July 1819, Sir Samuel Shepherd retired from the station of attorney general, to become chief baron of the Exchequer in Scotland; and Sir Robert Gifford was appointed to fill the vacancy, being then only forty years of age. In discharging the duties of this office he was moderate and discreet, not putting the formidable machinery of state prosecutions in motion without necessity, and without the strongest probability of obtaining a conviction. The most important duty that devolved upon him, was to conduct the investigation, which took place in the House of Lords in 1820, into the conduct of Queen Caroline. His introductory speech on that great occasion did not produce a very strong impression; but in his reply, which occupied two days in the delivery, he surpassed all expectations. His energies seem to have been roused by the ability of his adversaries, by the magnitude of the task; perhaps by the recollection of the comparative inefficiency of his opening, and the consciousness that his reputation was at stake. He concentrated the multiplicity of facts which were scattered through a voluminous body of evidence, grasped them with great power, and brought them to bear upon the question with the happiest effect. A great impression was produced upon the noble judges, which some attributed to the strength of the case, and others to the ingenuity of the advocate.

The year 1824 brought him a rich harvest of dignity; but attended with a weight of care and fatigue which tended to impair his constitution, and which serves to shew that the honor of high public stations is sometimes purchased at the expense of tranquillity and health. On the 8th of January in that year, he was appointed Chief Justice of the Court of Common Pleas: he was created a peer of Great Britain, under the title of Baron Gifford, of St. Leonard's, in the county of Devon; and was appointed deputy speaker of the House of Lords, for the special purpose of determining appeals from Scotland; for which his knowledge of its laws rendered him fully compe-

tent. His dispatch of business was great, and his decisions were held in high estimation by the Scotch lawyers; so that when he visited that country in the autumn of 1825, he was treated with marked respect by the judges of the Court of Session and other persons of legal eminence. The University of Edinburgh conferred on him the honorary degree of doctor of laws, (as the University of Cambridge had previously that of master of arts,) and he was admitted to the freedom of the metropolis of Scotland.

On the death of Sir Thomas Plumer, master of the Rolls, in March 1824, Lord Gifford quitted the bench of the Common Pleas, and became his successor. This remove subjected him to increased labour: in addition to the business of the Rolls, he had to give his particular attention to the appeals before the privy council, as well as to discharge the duty of deputy speaker in the House of Lords, and to determine the Scotch appeals. All this he did without any other remuneration than that attached to the office of master of the Rolls, till the 6th of George IV. Unhappily his spirits were oppressed with his laborious occupations: his health declined: in the latter end of August 1826, he was affected by a bilious attack, while at Dover, and on the 4th of September following he expired. His remains were interred in the Roll's chapel, on the 12th of that month, attended to the grave by many dignitaries of the law, and other eminent men, who were forward to testify their respect for his memory.

He married in April 1816, and had issue, while living, three sons and three daughters: his lady was delivered of another son, nine weeks after his decease.

His professional and public character have already been considered in the course of this imperfect sketch: his private character is faithfully pourtrayed in the following extract from the *Morning Chronicle*, which, though opposed to his politics, has rendered justice to the man:

"His own affectionate nature secured for him the warm regard of those who were near enough to see his character. His mind, unstained by vice, had no need of concealment, and was at liberty to indulge its native frankness. He was unassuming, unaffected, mild, friendly, indulgent, and in intimate society, gently playful. His attachments were constant, his resentment (for he had no enmity,) was hard to provoke, and easily subsided. In his last moments he was sustained by the domestic affection and religious hope which had cheered his life.

"Among the numerous body who have risen from the middle classes to the highest stations of the law, it will be hard to name any individual who owed his preferment more certainly to a belief of his merit than Lord Gifford, or who possessed more of those virtues which are most fitted to disarm the jealousy naturally attendant on great and sudden advancement."

## COURTS OF LOCAL JURISDICTION.

We subjoin an abstract of the bill lately brought into parliament, by Mr. Brougham, for the establishment of local courts for *Kent*, and for *Durham* and *Northumberland*, and which it is designed should be extended to the other counties of England and Wales. This epitome of the proposed Act accompanied the printed copy of the Bill, and is, of course, an accurate summary of its contents.

The bill proposes to facilitate the trial of causes, and to diminish the *expense, delay, and inconvenience*, attending them. To accomplish these objects, five species of tribunal are to be established.

The 1st would resemble a *County Court*, limited to actions in some cases for £100, and in others for £50. The 2d would be a kind of £5 *Court of Requests*. The 3d a court for *Legacies*, not exceeding £100. The 4th a court for actions of any amount tried by *Consent*. The 5th, an *Arbitration* court, and the 6th a *Reconcilement* court.

Although the bill only provides for two courts, one for Kent, and one for Durham and Northumberland, its provisions may be extended to the other counties of England and Wales, as soon as it can be ascertained how large each juridical district should be.

The object of the bill being to afford the means of trying causes at as *little expense*, and with as *little delay and inconvenience* as possible to the suitors; district courts are established under the revision of superior courts in most cases.

The judge of each district is called the judge in ordinary, and he has a registrar, with a clerk, crier, usher, and messenger. The judge must be a sergeant or a barrister of ten years' standing. He and the registrar are appointed by the crown, the clerk by the registrar, and the other officers by the judge.

The judge, registrar, and clerk, are paid partly by *salary*, and partly by a proportion of *fees* collected on the business done; but those fees do not depend upon the number of steps, or the length of the procedure in any case, they depend only on the number and value of the causes. The crier is paid by salary, and the usher and messengers by salary, and fixed fees on the service of process Extra messengers are to be appointed, when necessary, from the sheriffs' bailiffs, and these are to be paid by fees on the service of process. The constitution of the court is laid down in the first twelve sections, and rules of practice are to be laid down by the judges of the courts of Westminster hall, sec. 106.

The court thus established has six branches of jurisdiction, three compulsory, and three voluntary, or prorogated. The compulsory jurisdiction is in certain actions, in small debts, and in legacies; the voluntary, in all actions, in arbitration, and in reconcilement.

The court is to sit once a month at least, except in August, and in different parts of the district.

The judge ordinary is to be a justice of peace of that and the adjoining counties, and in the commission of Oyer and Terminer, and Gaol delivery.

1. The court has authority to try all actions where the defendant resides within the district, and the cause of action, if on a debt, does not exceed *one hundred pounds*, or if on a tort, *fifty pounds*, and where *title* to real estate, tithe, or by bankruptcy, or to toll, market, or other franchise, does not come in question.

2. It has authority to try, in a summary way, small debts not exceeding *five pounds*, under the like restriction as to real estate, &c.

3. It has authority to try claims of legacy not exceeding *one hundred pounds*.

4. It has authority to try all actions at law, of all kinds, and to any amount, by consent of parties.

5. It has authority to try all matters, whether at law, or in equity, by way of arbitration, the parties consenting.

6. It has authority to hear, and advise upon all

disputes, with consent of the parties, for the purpose of reconcilement.

1.—ACTIONS.

The proceeding here is by statement, answer, reply, and rejoinder. Sections 13, 14, 15, 49, 51, treat of the jurisdiction under this head. The manner of serving the defendant with the statement, which stands both for writ and declaration; of putting in the answer, which serves for plea or demurrer, as the case may be; of putting in the reply, which serves for both replication and demurrer; and of putting in the rejoinder, which may be either rejoinder or demurrer, is laid down in sections 16, 17, 18, and 19, and the consequences of making default are laid down in section 86. The manner of pleading, in its different stages, is laid down in sections 16, 17, 18, and 19, and Schedule (C.) gives various forms, according to which the pleading is to be conducted, as nearly as may be. Precautions are taken to prevent *prolixity and misstatement of facts*, by making *practitioners liable for the consequences* of the same, at the discretion of the court; but the parties have a direct interest in putting these discretionary powers in motion; sections 21, 22, 23, 36, 37.

The process for summoning jurors and witnesses is laid down in sections 30, 31, 34, 35, and schedule (D.); the mode of trial in sections 29, 32, 33.

The judge is authorised to give time to parties for pleading, and to put off trials; and he is also authorised to hear parties and their attornies, and on oath if he pleases, on the matter of such applications. Sections 21, 87, 88, 89.

The judge is authorized to decide points of law raised before him on the pleadings.

The general mode of proceeding in trying matter of fact is by jury; but the judge, with the consent of both parties, may try any matter of fact *without a jury*, with power, if in the course of the trial he finds the matter, or any part of it, more fit for a jury, to impanel one. He may also, with consent of both parties, exclude strangers, and try the action in *private*, with or without a jury, as the case may be. These powers are defined in sections 25, 26, 27, 28, and 93.

Any matter tried before a judge, whether of law or fact, may be *reviewed by a motion before the judge of assize* for the county, the judge in ordinary sitting with him, but not having a vote in the decision of the appeal. If the judge of assize pleases, he may hear it with the other judge of assize.

The judgment of the judge in ordinary, in matter of law, may be reviewed by the judge, or judges of assize; and the sentence of the judge in ordinary and verdict of the jury, in matter of fact, may be set aside, and a *new trial* ordered, by the same judge or judges. Powers are given, under certain restrictions, as to costs and securities, of carrying the matter before the courts of Westminster, from the decision of the judge of assize; and a discretionary power is also given to the judge in ordinary, to require securities before appeal by motion to the judge of assize. Powers are also given, under certain restrictions, to both the judge in ordinary, and judges of assize, to *reserve points*, and order cases for the opinion of the superior courts.

The subject of *appeal* is treated of in sections 41, 42, 43, 44, 45, 46, 47, 48, and 51. Upon all final judgments execution is to be taken out, and the process thereof served, according to rules laid down in Sections 38, 39, and 40. The judge has power to order payment by *instalments*, section 39, and debts may be assigned in satisfaction, section 40.

2.—PLAINTS.

The proceeding in the Small Debt Court *(for sums not exceeding five pounds)* of the judge in ordinary, is by plaint and plea. The rules relating to the service, pleading, and notices, are laid down in sections 52, 53, 54, and 55, and forms are given in schedule (C.)

The judge is to sit for the trial of plaints at each place immediately after the sittings for trials of actions.

He may *examine on oath the parties* before him, and these parties may *appear by others*, if prevented from attending.

The execution is summary, by warrant; and there is *no appeal* or revision, unless the judge deems it fitting.

The trial is by the judge, *without a jury*, unless he thinks it fit to have a jury.

The trial of plaints is treated of in sections 56, 57, 58, and 60; the judgment and execution in sections 59, 61, and 62.

3.—LEGACY.

The proceeding in legacy is by citation and claim, serving the office of both subpœna and bill; and by article, serving the office of answer, plea, and demurrer.

The citation must be not less than six months after the executor or administrator's title accrued, and twelve months after the death of the testator.

The rules for proceeding and pleading in legacy are laid down in sections 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, and 78, and forms are given in schedule (C.)

Wherever the executor, or administrator, has free assets, he must either pay the legacy as far as his assets go, or he must show cause why he does not, stating the claims against the estate, which he apprehends may be made; and, in that case, he must pay the money claimed into court, to await the coming in of such claims.

An appeal, by way of motion, lies from decisions in legacy, to the courts of law and equity, according to rules laid down in sections 70 and 73.

4.—GENERAL JURISDICTION BY CONSENT.

This extends to all actions at law. The consent of parties must be given in writing, and filed with the statement, answer, &c. or at whatever other stage of the cause, the necessity arises of extending the jurisdiction beyond its ordinary limits. This is laid down in section 14, and the forms are given in schedule (C)

The forms of pleading under such parts of this head as are not exemplified under the head of Actions, are given in schedule (C.)

5.—ARBITRATION.

The judge ordinary is a judge of arbitration also, and may proceed, upon any matter at law or in equity referred to him, after the manner of an arbitrator.

The mode of proceeding is laid down in sections 79, 80, 81, 82, and 83.

The judge is to raise any question of law on the face of his award, that either party desires to carry before one of the superior courts of law or equity.

He has also power to try any part of the matter referred to him by a jury, subject to certain rules.

The reference to him is irrevocable; witnesses are compellable to attend him; false swearing before him is punishable as perjury; and his *award can only be impeached if it exceed the terms of the reference.*

Judgment and execution on the award is to be had, as laid down in sections 84 and 85.

6.—RECONCILEMENT.

Any party may cite another against whom he has any claim or complaint, or from whom he *apprehends any claim or complaint*, before the judge ordinary, at a time and place specified in the citation, and allowed by the judge.

The judge is to hear the parties themselves, *without any attorney or council*, and to advise them on the matter of their differences, subject to certain rules laid down in sections 95, 96, 97, 98, 99, 100, and 101.

If they agree to abide by his advice, a memorandum of agreement is to be signed by them, and this shall be binding, according to rules laid down in section 100.

Execution may issue on whatever agreement is signed for payment of money.

---

All fees, after paying the proportions of the officers of the court, are to be paid into the consolidated fund, section 103.

There are clauses for punishing perjury, with a power given to the judge ordinary of directing prosecutions at the expense of the county, sections 91, and 92.

There are clauses for regulating proceedings against persons acting in execution of the Act, and for prosecuting persons for extortion, sections 102, and 104.

---

Schedules (A.) and (B.) prescribe the fees of the court and messengers.

Schedule (C.) the forms of pleading.

Schedule (D.) the forms of summons to jurors and witnesses.

Schedule (E.) the forms of oaths to jurors, parties, and witnesses.

Schedule (F.) attorney's fees [*in blank*]

Schedule (G.) forms of judgment.

It may be useful for the information of our readers, to add to this abstract the following details, extracted from the bill.

The judges and registrars are not removable except by address from both houses of parliament. The clerks are removable without assigning a reason, at the pleasure of the registrars. The criers, messengers, and ushers, are removable in the same way by the judges.

The salary of the judge, including fees, is not to exceed £2000 a-year; that of the registrar, £700; the clerk one fourth of the amount of the registrar's salary; the crier, £80; and the messenger and usher £50 each, with the fees of serving process.

Causes of action are not to be split, so as to bring them within the jurisdiction of the court, but the excess of amount may be abandoned, and the judgment shall be a discharge for all demands on the same cause of action.

The defendant's place of residence to determine the *venue*, unless by consent.

The *responsibility of attorneys*, under section 19, is as follows: "that in all cases, the judge before whom such action shall be tried, shall be empowered to direct the jury to take into consideration any *plain and wilful departure* from the *real truth of the case*, in the written statements of the parties, and to diminish the amount of the damages given to the party guilty of such misrepresentation, if he be plaintiff, or increase the amount of the damages given against such party, if he be defendant; and, if it shall, at any time within *six months* from the trial of the cause, be made to appear, to the satisfaction of the judge, that such *misrepresentation* was made through the *fault of the attorney*, the judge shall call upon him in a *summary way to answer* the matter of the complaint, and *fine* him in such reasonable sum as he shall think fit to be paid to the said plaintiff or defendant, for whom he was employed respectively.

In the Reconcilement court, the party cited, shall, *at his own election*, appear or not, and shall, within one week, serve notice of his intention; and such notice, with proof of citation, may be given in evidence, to prove the refusal to appear: sec. 97.

It shall be in the option of the parties to follow, and abide by the advice of the judge, or not, as they shall think fit: sec. 100.

We postpone our observations on the policy of this measure. We consider it one of such vast importance to the interests of the community, as well as of the members of the profession, that we are desirous to collect the opinions of men of experience, and we therefore invite a temperate discussion of its merits and demerits.

---

## MR. JUSTICE BLACKSTONE.

*To the Editor of the Legal Observer.*

SIR,

I HAVE read with great pleasure the Prospectus of your intended publication, which appears to me calculated, under judicious management, to render considerable service, not only to the legal profession, but to the public at large, who are deeply interested in whatever tends to promote the knowledge and respectability of practitioners of the law. As your pages are open to biographical notices, I send for insertion a letter, which will probably not be devoid of interest to many of your readers, being the composition of one of the most elegant scholars and most useful judges that ever adorned the English bench—I mean Sir William Blackstone. It appears to have been addressed to a relation, soon after the young candidate for legal honors had commenced his professional studies in London, and exhibits, if I mistake not, the germ of that singularly beautiful style which afterwards adorned his Commentaries.

I am in possession of one or two more of the judge's letters, which may possibly, at some future time, be communicated to your readers.

I am, &c.

J. J. J. S.

---

DEAR SIR,

You have been so kind as to tell me, yt a Line now & then from me wd not be unacceptable to you. 'Tis this that has drawn upon You ye present Trouble, for wch You have Nobody but Yourself to blame.

I have been in Town about ten Days, & am tolerably well settled in my new Habitation (wch is at Mr. Stokes's a Limner in Arundel-Street). The People of ye House seem honest, civil, & industrious; & my Lodgings are in themselves chearful, retired, &, as every Body tells me, extremely reasonable. Nor do I want Opportunities of Gallantry (if I have inclination to improve them) there is

lodging in ye same House a young Lady of extraordinary Accomplishments & a very ample Fortune; but alas! She has, together with ye Riches, ye Complexion also of a Jew. So that She is not like to prove a very formidable Rival to — — Coke upon Littleton.

Coke I have not yet ventured to attack, but have (according to Ch. J. Reeves's Plan) begun with Littleton only. Two together wd be too much for a Hercules, but I am in great Hopes of managing them one after ye other. I have stormed one Book of Littleton, & opened my Trenches before ye 2d; and I can with pleasure say I have met with no Difficulty of Consequence; There is one thing indeed, & but one, I cd not understand in ye first Book, wch is a mere matter of Speculation: & is in short this. The Donees in Frank-Marriage shall do no Service (but that of Fealty) to ye Donor or his Heirs till ye 4th Degree be past. Of wch 4 Degrees ye Donee shall be said to be ye first. §. 20. To prove wch last Assertion Littleton produces a Writ of Right of Ward (as you may see Pag. 23. b.) Now with me ye Question is, how the Writ wch he produces proves ye Point he wd have it do, viz. that ye Donee in Frank-Marriage is ye first of ye four Degrees. You will observe that this is a Point of mere Curiosity, Frank-Marriage being now out of Use. But I don't love to march into an unknown Country, without securing every Post behind me: & it is a greater Slur upon a General to leave a slight Place untaken, than one more hard of Access. Besides, in my apprehension, (and I shd be glad to know your opinion of ye matter) ye Learning out of use is as necessary to a Beginner as that of every Day's Practise. There seem in ye modern Law to be so many References to ye ancient Tenures & Services, that a Man who wd understand ye Reasons, ye Grounds, & Original of what is Law at this Day must look back to what it was formerly; otherwise his Learning will be both confused & superficial.

I have sometimes thought that ye Common Law, as it stood in Littleton's Days, resembled a regular Edifice: where ye Apartments were properly disposed, leading one into another without Confusion, where every part was subservient to ye whole, all uniting in one beautiful Symmetry: & every Room had its distinct Office allotted to it. But as it is now, swoln, shrunk, curtailed, enlarged, altered, & mangled, by various & contradictory Statutes, &c; it resembles ye same Edifice, with many of its most useful Parts pulled down, with preposterous Additions in other Places, of different Materials and coarse workmanship: according to ye Whim, or Prejudice, or private Convenience of ye Builders. By wch means the Communication of ye Parts is destroyed, and their Harmony quite annihilated; & now it remains a huge, irregular Pile, with many noble Apartments, tho' awkwardly put together, & some of them of no visible Use at present. But if one desires to know why they were built, to what End or Use, how they communicated with ye rest, and ye like; he must necessarily carry in his Head ye Model of ye old House, wch will be ye only Clew to guide him thro' this new Labyrinth.

I have trespassed so far on yr Patience, that I am almost afraid to venture any farther. But I happen'd t'other day upon a Case in a Civil Law Book, wch I should be glad to know how you imagine Chancery wd decide. A Man dies & leaves his Wife with Child: & by his Will ordains that, if his Wife brought forth a Son; ye Son shd have 2 3ds & ye Mother one 3d of the Estate: If a Daughter, then ye Wife to have 2, & ye Daughter 1 3d. The Wife brought Twins, a Boy & a Girl. Qu. How shall ye Estate be divided? N.B. We must suppose a Jointure, or something, in Bar of Dower.

We are quite in ye Dark as to Intelligence here in Town; You must observe what strange, perplexed, incoherent Accts ye Gazette affords us. I fear our Loss in Scotland was greater than they care to own. But at ye same time, even Victory must lessen ye Number of ye Rebels, while we are continually recruiting. There is a Talk of assessing all personal Estates, & raising thereby 3 millions. If so ye Assessment must run high.

I was sensibly concerned at hearing of Mar. Richmond's Illness; but hope, by not hearing lately any thing further, that all is well again. My hearty Good wishes attend him, & my Cousin, who I shd think might take a Trip to Town this Spring. My Aunt of Worting will be at Lincolns-inn-fields about Easter; and probably wd be glad of a Companion to partake of some of ye gay Diversions

Excuse, Sir, this tedious Length, wch I promise never to be guilty of again, & when You have an idle hour, be so good as do think of, Sir,

Your most obliged humble Servant,

WILL. BLACKSTONE.

Arundel-Street, Jan. 28, 1745.

(Superscribed)

To MR. RICHMOND, at Sparsholt, near Wantage, Berks.

## RECENT DECISIONS IN THE COURTS OF EQUITY.

### SOLICITOR AND CLIENT—SOLICITOR AND TOWN AGENT.

*Livesey and others* v. *Livesey and and others.*
1 Russell and Mylne, 10.

By the direction of A. a bill was filed for the administration of a testator's assets, in which James W. Livesey and his infant brother and sister by James W. Livesey, as their next friend, were plaintiffs; Edmund W. Livesey, their elder brother, who had an interest adverse to theirs, and was one of the defendants, acted as solicitor in the country for the plaintiffs, and the suit was conducted by his town agents (Ellis and Co.): after the sister had attained her full age, Edmund W. Livesey died, having appointed her his executrix. J. W. Livesey gave notice to the persons who had been the town agents of Edmund W. Livesey, not to take any proceedings in his name, and the sister appointed them to act as solicitors for her.

On the motion of James W. Livesey, the Vice Chancellor had made an order that Ellis and Co. should deliver up the papers to him on the payment of what, on taxation, should be found due to them in respect of the costs of the suit. The sister now moved that the order might be discharged.

The *Lord Chancellor.* I consider E. W. Livesey as having been, in point of fact, the solicitor of the plaintiffs, and the propriety of his appointment does not come into question for the purposes of this motion. Whatever impropriety there might be in the appointment, it was the act of J. W. Livesey. Ellis and Co. were the agents of E. W Livesey, and these papers came into their possession as agents. They are, therefore, held by them for the benefit of their clients, and one or two of the plaintiffs are not entitled to demand the delivery of them without the concurrence of the third. Let the order of the Vice Chancellor be discharged.

—

### WHERE WITNESS IS PRIVILEGED FROM ARREST.

*Gibbs* v. *Phillipson.*—1 Russel and Mylne, 19.

A person who is served with a *subpœna ad testifi-*

*candum* in London, and is at the time resident there, is not protected from arrest in the interval between the service of the *subpœna* and the day appointed for his examination. But it would seem that a witness not resident in London, but who comes there in order to be examined, is protected from arrest during the whole time that he remains in London *bonâ fide* for the purpose of giving evidence. But a witness is not protected in going three days before the day appointed by the examiner to the solicitor's office to look at the interrogatories with a view to prepare himself to give his evidence accurately.

—

CUSTOMARY TENEMENTS.

*Bingham* v. *Woodgate.*—1 Russell and Mylne, 32.

Where a customary tenement is freehold, and the lord being only tenant for life of the manor, purchases the fee of the customary tenement, the seignory is suspended during the life of the lord, but revives at his death, and the customary tenement descends to his heir. Where the custom of a manor requires a bargain and sale, as well as a surrender and admittance, to pass the customary tenement, the freehold is in the tenant, and not in the lord. The judgment of the Master of the Rolls is as follows:

A lord of the manor, who was tenant for life only, purchased the fee of three customary tenements which were holden of the manor, and which, according to the custom of the manor, were conveyed to him by bargain and sale, and also by surrender. The custom of the manor required a bargain and sale, as well as a surrender and admittance, to pass the customary tenements; they are plainly freehold; and —— Paul *v.* Lord Dudley, 15 East, 167, and Doe *v.* Danvers, 7 East, 299, have therefore no application. The necessity of surrender and admittance is probably a remnant of the ancient tenure of villenage, and does not affect the freehold nature of the interest, although it prevents the customary tenement from being strictly of freehold tenure,—a distinction which is well established.

The question then is, what is the effect of the union of the fee of the customary tenements, with the estate for life of the lord. If the lord had been seised in fee of the manor, then the union would have extinguished the customary tenements; but extinguishment takes place only when the two estates have the same duration. The lord being tenant for life, the effect of the union was to suspend the seignory during the life of the lord, for a man cannot at the same time be lord and tenant: but, at the death of the lord, the seignory was revived, and the fee of the customary tenements descended to his heir at law. This doctrine is fully stated in Littleton, sections 559, 560, 561; and in Lord Coke's commentary on those sections.

The master's report is, therefore, correct, and the exceptions must be overruled.

—

VENDOR AND PURCHASER.

*Miles* v. *Langley.*—1 Russell and Mylne, 39.

Under an agreement of exchange between Hellicar, who held lands under a college lease, and Trenchard, the owner of the adjoining estate. Trenchard occupied part of the college lands, and Hellicar had occupied, along with the residue of the leasehold, part of Trenchard's estate. Hellicar having become bankrupt, the college leasehold was sold, and was described in the particulars of sale as "late the residence of Hellicar." It was held that the purchaser was not to be considered as having implied notice of the agreement of exchange, and that he had a right to recover by ejectment that portion of the leasehold which was in Trenchard's occupation. It was also determined, that where the possession is vacant, a purchaser is not bound to inquire of the late occupier what was the nature of his title.

—

PARTNERSHIP—USURY—MINES.

*Fereday* v. *Wightwick.*—1 Russell and Mylne, 45.

Where a lease of mines is taken by six persons for the purpose of working them in partnership, and the managing partner, in the course of his management, becomes indebted to the concern, his interest in the partnership is in the first place applicable to satisfy his debt to the concern. Where an annuity is granted for a term of years, to be paid half yearly, and at the same time promissory notes are given to the grantee for the payment of each half year's annuity when it becomes due, and it appears that the several half-yearly payments will repay the purchase money with interest, exceeding the rate of £5 per cent. the transaction is usurious.

The judgment of the Master of the Rolls on both points is as follows:

"The general principle is, that all property acquired for the purpose of a trading concern, whether it be of a personal or real nature, is to be considered as partnership property, and is to be first applied accordingly, in satisfaction of the demands of the partnership. It is true, a mining concern differs in some particulars from a common partnership: the shares are assignable, and the death or bankruptcy of a holder of shares does not operate as a dissolution: but it has been repeatedly held to be in the nature of a trading concern. In *Crawshay* v. *Maule*, 1 Swanst. 495, Lord Eldon expressed a doubt whether if persons previously entitled as tenants in common to mines, were to form a mining concern, the general principles of a partnership would apply to such a case, and I am not aware that the particular point has ever been decided; but the distinction here is, that the interest in the mines was expressly acquired for the purpose of a partnership, and the general principle is therefore to be applied to it.

"With respect to the question of usury, I shall not refer to the old cases which have been cited. This, in effect, is an agreement to pay the principal sum of £4000, with interest, by twenty-three instalments; and, as it appears that the interest thus paid will exceed legal interest, the transaction is plainly usurious."

—

PURCHASE BY AGENT.

*Lees* v. *Nuttall.*—1 Russell and Mylne, 53.

If an agent employed to purchase an estate becomes the purchaser for himself, he will be considered by a court of equity as a trustee for his principal.

—

JURISDICTION—SPECIFIC PERFORMANCE.

*Brough* v. *Oddy.*—1 Russell and Mylne, 55.

A court of equity will not entertain a bill for the specific performance of an agreement to pay in a certain event, which has happened, an annual sum by quarterly instalments. The remedy is by an action at law.

—

BILL TO ASCERTAIN BOUNDARIES.

*Godfrey* v. *Littell.*—1 Russell and Mylne, 59.

In order to sustain a bill for a commission to ascertain boundaries, the plaintiff must establish by

the admission of the defendant, or by evidence, a clear legal title to some land in the possession of the defendant, and also a ground for equitable relief: and where the quantity of the land of the plaintiff in the possession of the defendant is doubtful upon the evidence, the court will direct a commission, or an issue, as will best answer the justice of the case.

*The Master of the Rolls.* It appears by the authorities which have been referred to, that to sustain a bill of this nature, it is necessary that the plaintiff establish a clear title to some land in the possession of the defendant; and, according to the case in Bumbury, (Bunb. 322,) the court will not direct an issue to try the title, if it be left in doubt upon the evidence in the cause. It has been argued, that the title of the plaintiff must appear from the admissions of the defendant, and that it is enough that it is established to the satisfaction of the court by the evidence in the cause. That proposition is not countenanced either by authority or by principle, and is manifestly untenable; for, if such were the rule, there never could be a decree for the plaintiff in a suit of this nature, as no defendant would admit the plaintiff's title. In this case I am of opinion, that the plaintiff has established by evidence a clear title to some land in the possession of the defendant.

According to the doctrine of Lord Northington, in Wake v. Conyers, (1 Eden's ca. temp. Lord North, 331,) and of Sir William Grant, in Speer v. Crawter, (2 Mer. 410,) the plaintiff must also make out that he has some equitable ground upon which to call for the assistance of this court, and he will otherwise be left to seek his remedy at law. The confusion of boundaries by the defendant, or those under whom he claims, is an equitable ground. Here the boundaries are certainly confounded; the confusion must have been intended to have been the act of those who for centuries have been in possession of the land. It is in evidence, that the hedge, which now separates the land on the left side from the Chase-way, has been made within the last sixty years, and there is now no boundary to distinguish the particular parts of the land on the left of the Chase-way, to which the plaintiff and defendant may respectively be entitled.

When the court is satisfied with the plaintiff's title, and that he has equitable ground for the assistance of this court, the authorities will justify the court in affording relief, either by a commission or by an issue, as will best advance the justice of the particular case: and as an issue might not finally settle the question between the parties, I am of opinion that the proper proceeding will here be, to direct a commission to inquire and ascertain, what part of the lands in the possession of the defendant on the left side of the Chase-way is the property of Queen's College, and to set out the same, with the usual directions in that behalf.

—

EXECUTOR—AGENT—SETTLED ACCOUNT—ANSWERS.

*Davis* v. *Spurling.*—1 Russell and Mylne, 64.

An executor, who is employed by his co-executor as his agent to sell an estate, which, under the will of the testator, the co-executor alone had power to sell, and who hands over the price of his estate to his co-executor, is not accountable for the misapplication of that price by the co-executor, because he had no legal right to retain it, although, by the will of the testator, the price of the estate, when sold, was to be considered as part of his personal estate. If an error in a settled account is discovered and corrected before suit, and a bill be subsequently filed to surcharge and falsify, the corrected error is not a ground for a decree to surcharge and falsify. If the plaintiff read a passage from the defendant's answer, as evidence of a particular fact, the defendant has no right to read subsequent matter connected with it, by such words as, "but," and "and," unless the subsequent matter be explanatory of the passage read by the plaintiff.

—

COSTS OF TRUSTEE.

*Knight* v. *Martin.*—1 Russell and Mylne, 70.

If a trustee refuses to pay a legacy without the direction of the court in a case which admitted of no doubt, he will be refused his costs, but will not be made to pay the costs of the suit, because he might have acted from ignorance, and not from any improper motive.

—

MORTMAIN—LEGACY.

*Harrison* v. *Harrison.*—1 Russell and Mylne, 71.

Where a testator who has given his personal estate to charitable uses contracts to sell real estate, but the sale is not completed in his life-time, his lien upon the estate for the amount of the purchase money is an interest in land within the statute of mortmain, and the purchase money will not pass by his will to a charity. A testator bequeathed "to the two sons and the daughter of A. B. 50l. each;" at the date of the will, and the death of the testator, A. B. had one son and four daughters; each of these five children is entitled to a legacy of 50l.

—

PIRACY OF COPYRIGHT—INJUNCTION.

*Bailey* v. *Taylor.*—1 Russell and Mylne, 73.

A plaintiff who complains of a piracy of his work has no remedy in equity unless he establish a title to an injunction, and then the account will follow. The court will not grant an injunction, but will leave the plaintiff to seek his legal remedy, where the matter which is the subject of the alleged piracy, forms but a very inconsiderable part of the plaintiff's work, and merely contains calculations, and when the work complained of has been published some years.

The *Master of the Rolls* observed, "I agree, that, although the plaintiff failed upon the answer of the defendant to obtain an injunction, he is at liberty to claim it at the hearing. The question then is, whether the court ought to grant an injunction as the case now appears? Considering the very inconsiderable part of the defendant's work which is complained of, and that this may be calculated in a few hours, so as to give the defendant an unquestionable right to its republication; and considering the difficulty which would be imposed on the Master, if an account were directed of ascertaining what part of the defendant's profits ought to be attributed to the plaintiff's tables; and considering also the distance of time at which the injunction is now sought, being nine years after the publication of the defendant's second edition, I am bound to refuse the injunction, and to leave the plaintiff to seek his remedy at law; and the injunction being refused, there can be no account. The bill must therefore be dismissed, with costs."

—

VENDOR AND PURCHASER.

*Fellowes* v. *Lord Gwydyr and Page.*—1 Russell and Mylne, 83.—See 1 Sim. 63, S.C.

It is no defence to a bill for specific performance by the vendor, (Fellowes,) that during the treaty

he falsely assumed the character of agent for another, (Lord Gwydyr,) when, in fact, he was dealing on his own behalf, and that he thereby deceived the purchaser, (Page,) as to the party with whom the contract was made, provided the purchaser does not show that the deception induced him to enter into the contract, or occasioned any loss or inconvenience to him otherwise. The judgment of the lord chancellor was as follows: "Mr. Page, I am satisfied, had every reason to believe he was contracting with Lord Gwydyr, but the only question here is, what loss or inconvenience has he sustained in consequence of acting under that mistake? There is nothing in the cause that can lead me to suppose that he would not have contracted with the plaintiff, or that he would have declined to offer the sum of 1,500 guineas, had he been aware of the party who was really the owner of that property. It was strongly pressed upon me in the argument, that the parties should be left to proceed at law. But from the situation in which they respectively stood, as well as from the form of the agreement, they could not have obtained an effectual adjudication upon their rights at law, and it was necessary for the plaintiff, therefore, to come into this court. Mr. Fellowes says, that the name of Lord Gwydyr was not used for any improper purpose; but even if it were otherwise, that circumstance alone would furnish no reason why Mr. Page should be released from his contract, without showing that the deception has in some way operated to his prejudice.

Decree confirmed, without costs.

## PRACTICE.

COURT OF EXCHEQUER.—*Oxenham* v. *Esdaile.*

28th June, 1830.—The bill having been dismissed on the hearing, with costs to be paid by the plaintiff, the master allowed the following items in the defendant's bill of costs.

| | | | |
|---|---|---|---|
| Paid clerk in court for Decree . | £18 | 5 | 0 |
| Paid for Office Copy thereof . . . | 6 | 8 | 0 |
| | 24 | 13 | 0 |

*Mr. Jacob*, on the part of the plaintiff, now moved the court that it might be referred back to the master, to review his taxation, and reduce the above charges to such sum as the decree would have amounted to, if the recital of the pleadings had been omitted. In support of the application he cited the 33d rule of the court, from Fowler, p. 164, by which it is stated "*that every decree and order is to be drawn up as short as with conveniency can be, without reciting the former orders and proceedings at large.*" And he contended, that as nothing more was to be done under the order, than simply to tax and enforce payment of the defendant's costs, there was no necessity whatever to have recited any of the pleadings, which were very long, in consequence of the bill having been amended several times, by reason of disclosures made by the defendant's answers, and separate answers having been put in on the occasion of each amendment, which were recited verbatim in the order, and that it was not the practice in the court of chancery, on a mere order of dismissal, to recite the pleadings, and that a similar order in that court would cost only 15s. whereas it here amounted to the enormous sum of £24 13 0.

*Mr. Jervis*, on the part of the defendant, relied on the practice of the court of Exchequer, being to recite the pleadings at length.

The *Lord Chief Baron* said he felt bound by the practice, and dismissed the application, but gave directions to the Registrar to draw up a general order, to prevent a similar occurrence in future; and, although he dismissed the application, yet, as it had been the means of reforming the practice of the court, which required alteration in this respect, he refused to give the defendant the costs of it.

## MISCELLANEA.

### A MODEST LAWYER.

LORD KEEPER GUILFORD'S composition of temper was extraordinary, for he had wit, learning, and elocution, and knew it, and was not sensible of any notable failings whereof to accuse himself; and yet was modest, even to weakness. I believe a more shamefaced creature than he was, never came into the world: he could scarce bear the being seen in any public places. I have heard him say, that, when he was a student, and ate in the Temple-hall, if he saw any company there, he could not walk in till other company came, behind whom, as he entered, he might be shaded from the view of the rest; and he used to stand dodging at the screen till such opportunity arrived, for it was death to him to walk up alone in open view. This native modesty was a good guard against vice, which is not desperately pursued by young men without a sort of boldness and effrontery in their natures. Therefore, ladies and other fond people are greatly mistaken, when they desire that boys should have the garb of men, and usurp assurance in the province of shamefacedness. Bashfulness in the one hath the effect of judgment in the other: and where judgment, as in youth, is commonly wanted, if there be not modesty, what guard has poor nature against the incentives of vice? Therefore it is an happy disposition; for when bashfulness wears off, judgment comes on; and by judgment, I mean a real experience of things that enables a man to choose for himself, and, in so doing, to determine wisely.—*North's Life of Lord Guilford, Vol. I. pp. 46, 47.*

### THE LAWYER WITNESS.

A bold and zealous defender of prisoners belonging to the home circuit, had, in a late trial at Chelmsford, several times told a witness, whose character was not too high, that he must state nothing which did not pass in the presence of the prisoner. At length, the time for cross-examination arrived. The learned gentleman began by asking: "Pray how often have you been transported?"—"Nay," answered the witness, "I must not tell you that, for it was not in the presence of the prisoner."

### VULGAR ERRORS.

That leases are made for 999 years, because a lease for 1000 years would create a freehold.

That deeds executed on a Sunday are void.

That in order to disinherit an heir-at-law, it is necessary to give him a shilling by the will, for that otherwise he would be entitled to the whole property.

That a funeral passing over any place makes it a public highway.

That the body of a debtor may be taken in execution after his death.

That a man marrying a woman who is in debt, if he take her from the hands of the priest clothed only in her shift, will not be liable for her engagements.

That those who are born at sea belong to Stepney parish.

That second cousins may not marry, though first cousins may.

That a husband has the power of divorcing his

wife by selling her in open market with a halter round her neck.

That a woman's marrying a man under the gallows will save him from execution.

That if a criminal has been hung and revives, he cannot afterwards be executed.

That the owners of asses are obliged to crop their ears, lest the length of them should frighten the horses.—*Barrington's Observations on Ancient Statutes* (1775) *p.* 474-5, *Note.*—*Retrospective Review, Vol.* 9, *p.* 262-3.

QUA-KINGS.

A determined politician of the chancery bar, some time since, observed to an inveterate punster, of the common-law bar, "Before twenty years are over, there will be no kings in Europe. There will, I doubt not, be chiefs of republics—protectors—consuls, but there will be no king at that time *qua* king." "Pardon me," answered the punster, "if what you say be true, every one of them will be *qua*-king."

Mr. JEKYLL,

—"the wag of law," who, whilst at the bar went the western circuit, was once concerned for the defendant on the trial of an action of ejectment, at the assizes for Devonshire, for breach of covenant in a lease not to cut down timber without the landlord's consent. A witness was called to prove the cutting down of the trees, and he added that to conceal the fact, they covered the stools with moss: on which Jekyll observed, "That is, you made them into close-stools."

THE DOCTOR AND LAWYER.

The late Doctor Brodum, of *nostrum* celebrity, was once a witness in a case at Exeter. After he had gone through his examinations in chief, in which he had displayed something of the marvellous, the late Abram Moore commenced the cross examination thus:—"Your name is Brodum?" to which the doctor having nodded assent, the barrister proceeded—"Pray how do you spell it, Bro-dum, or Broad-hum?" at which there was, of course, a loud laugh, but louder still when the doctor very coolly gave the following answer: "Vy sare, as I be but a doctor, I spells my name Bro-dum; but if I vas a barrister, I should spell it Broad-hum."

ANCIENT LEGAL POLICE.

About St. Clement's church, and in the parts adjacent, were frequent disturbances by reason of the unthrifts of the Inns of Chancery, who were so unruly on nights, walking about to the disturbance and danger of such as passed along the streets, that the inhabitants were fain to keep watches. In the year 1582, the recorder himself, with six more of the honest inhabitants, stood by St. Clement's church to see the lanthorn hung out, and to observe if he could meet with any of these outrageous dealers. About seven at night they saw young Mr. Robert Cecil, the lord treasurer's son, who was afterwards secretary of state to the queen, pass by the church, and as he passed gave them a civil salute: at which they said, "Lo! you may see how a nobleman's son can use himself, and how he putteth off his cap to poor men; our Lord bless him." This passage the recorder wrote in a letter to his father, adding, "Your lordship hath cause to thank God for so virtuous a child."—*Strype.*

THE SOLICITORS OF ANCIENT ROME.

In *Cicero's* oration upon the question of conducting the prosecution of *Verres*, reference is made to the expert and eloquent solicitors ["subscriptoribus exercitatis et disertis,"] who it was presumed would support *Cæcilius*. The solicitors alluded to by the great orator are not treated very respectfully; but it is evident that a class of lawyers similar to the solicitors of our courts, were in the habit of assisting the principal pleaders, and addressing the tribunals.

Cicero characterizes the first solicitor as a man of years, but a novice in the forum. Another he describes as concerned only in petty trials, though well exercised in clamour: and others he assumes will be taken from the common herd of retainers. The weight of the prosecution, he considers, will be sustained by *Allienus* (the clamourous solicitor); yet he maintains that Allienus will not exert his utmost power in pleading, but restrain his eloquence that Cæcilius may be enabled to shine.

It appears that the solicitors were appointed to assist the accuser to manage his prosecution, and none were allowed to take the office upon them until they were empowered by the judges; and it is obvious, that, however it suited the purpose of Cicero to undervalue the persons selected on this occasion, they possessed, in common with the profession to which they belonged, not only the right of assisting and prompting the principal advocates, but the privilege of pleading personally before the court. —*Maugham's Law of Attornies, p.* 349.

ATTORNIES AT LAW IN THE SIXTEENTH CENTURY.

Attornies at common law, men verie honest and learned, yea, and also verie necessarie for the practice of the common lawes of this realme, and finishing of other civill businesses; insomuch that by no means their labour and services may want. And yet such is the unthankfulness of this age, that even their owne clients(of whom they have best deserued) when they have served their turns, so that they see no present occasion to use them any longer, for the fault of some few will uneth afford the best of them one good word for many good deeds. Nay, which is worse, they will generally slander and condemne them as covetous persons and disturbers of the common peace and quietnesse of all men by unnecessarie suites. Where, in verie truth, the most part of the said attornies being very peaceable, do oftentymes dissuade their clyents from the same, so much as they can, by means whereof they greatly offend their minds, insomuch they will for that onely cause suspect them of affection towardes the adverse parties, and threaten earnestly that if they will not intermeddle therewith others shall.—*West's Symbolæography*, sec. 352, [1590].

THE EXACT COACHMAN.

The late leader of the northern circuit was employed, some time before he left it, in an action against the proprietors of the Rockingham coach. On the part of the defendant the coachman was called. His examination in chief being ended, he was subjected to the leader's cross-examination. Having held up the fore-finger of his right hand at the witness, and warned him to give "a precise answer" to every question, and not to talk about what he might think the questions meant, he proceeded thus: "You drive the Rockingham coach?" "No, sir, I do not." "Why, man, did you not tell my learned friend so this moment?" "No, sir, I did not." "Now, sir, I put it to you once more; upon your oath, do you not drive the Rockingham coach?" "No, sir, I drive the horses."

# The Legal Observer.

VOL. I. SATURDAY, NOVEMBER 13, 1830. No. II.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## ON THE STUDY AND PRACTICE OF THE LAW,

*In a Letter addressed to a Gentleman intended for the Bar, passing through a Solicitor's office, and which may be useful to Articled Clerks.*

[FROM A CORRESPONDENT.]

BEFORE I proceed to point out the course of study which I advise you to pursue, and the elementary works which I recommend you to consult, I consider it useful to commence with some preliminary instruction regarding your *general conduct in the transaction of business*; the best means of obtaining a *practical knowledge* of the routine of professional duty, and the details which will enable you to combine the skill of a man of business with the learning of a lawyer.

You will do well to avail yourself of all leisure hours to understand and make yourself master, as soon as possible, of those elementary books to which your attention will be directed. When tolerably well understood, they will enable you to comprehend the details of business in the office, and elsewhere, with much greater facility than the mere routine of such details alone could otherwise afford. But though elementary knowledge and elementary books are absolutely essential in the commencement of your studies, you must never forget that it is detail, and *detail alone*, that must ultimately be the business of your life, the source of your professional gains and professional honours; and that even elementary knowledge is by far the most valuable, the best understood, and the most lasting on the memory, when it is acquired through the medium of detail.

In this office you may see a certain routine of business, which, after you have left it for the Bar, you will have no further opportunity of observing. During the period that you are here, therefore, consider the detail, the practice, and the routine, that are passing before your eyes, as the primary objects; and do not esteem any thing as too insignificant for your attention. Having observed it, endeavour, by research, and by inquiry and conversation, to trace its meaning, its history, and use, in all the ways that occur to you. You will often find those who know the routine without the least apprehension of its principles; but it should be your anxiety never to rest satisfied with such a state of information. You will find, hereafter, that it will be of the very essence of your profession to pass beyond the surface into the elements and foundation of these uninteresting minutiæ. To pursue the same observation: whenever an instance of business occurs in the office which engages your attention, or becomes a part of your duty, do not be satisfied with the particular part which you are to transact,—trace it from the beginning, unravel its complexities, pursue it watchfully to its termination, endeavour to throw an interest around it, and, as much as you can, to make it your own. You may often, in this way, succeed in suggesting something material, that others have not observed; you may prevent mistakes, and guide the affair to a more useful or more advantageous conclusion. Your own experience is, in the mean time, growing with your labours: not to mention in how high a degree your zeal and industry may be cultivated by habit, and how firm and how warm it makes those friends on whose behalf they are exerted.

Let it be therefore your first care always to master the principles of that which immediately engages your exertions; next to this, pass two or three hours daily in reading the elementary books which I shall hereafter recommend. There are various others to be afterwards read, but those I refer to will suffice for the present. Do not be alarmed at their number. Three hours a day, for a year, would make you thorough master of them all, without trenching upon more active labours; and a man who would devote that time steadily to reading in his profession, would become, in seven years, one of the first lawyers in the kingdom.

I add but a word more on your ulterior pursuits. When you have acquired as much as will be useful to you here, you will find the same observation applicable, in another shape, to your subsequent studies. You will go to a Pleader's office; when there, attend, as the first object, to the details of that office; collect, from the business of the office, and, at your leisure, from books, the precedents and forms of pleading; and not merely collect, but observe and understand them, with all the

attention of which you are master. Disentangle the obsolete and tautologous language of which they are made up. Observe the points they put in issue—the strictness and logical accuracy with which they bring out the matters to be tried in the cause, and with which they reject and cut off the extraneous and collateral confusion that belong to all questions in dispute. Observe the evidence, and the rules of evidence, as applied to these forms of pleading. And afterwards, those forms of records which follow upon the verdict and the judgment, till the suit is terminated.

The reading of Cases, and search after them, will be the ultimate stage of your professional studies. This, again, is but the detail of that study which you will never relinquish while in the profession. The sooner you are in a situation to give up elementary reading, and devote yourself to these details and practical researches, the better. Lastly, remember that yours is a profession of incessant competition. Your competitors are daily and nightly at their labours in the closet; and it may be stated, as a proposition true, as a general one, that professional diligence, and professional honour and profit are corresponding and co-equal.

I now proceed to enumerate the several departments of study and practice, which it will be your duty to pursue, in order to obtain a thorough knowledge of your profession.

1. DEEDS AND AGREEMENTS, noticing their forms, and particularly the forms of covenants and agreements, and of the mode of deducing titles to estates. You will have an opportunity of seeing deeds, agreements, and abstracts; and while directing your attention to this subject, you should read and digest the second volume of *Blackstone; Watkins's* Principles of Conveyancing; *Watkins* or *Scriven* on Copyholds; *Littleton's* Tenures; *Preston* on Estates and Abstracts; *Sugden's* Law of Vendors and Purchasers; *Coke* upon *Littleton; Sanders* on Uses; *Shepherd's* Touchstone; *Burton's* Compendium; and *Platt* on Covenants. The references in these and the other books, after mentioned, should be consulted.

2. SUITS IN CHANCERY, the forms of pleadings, and the jurisdiction and practice of that court, will next deserve your attention, particularly as regarding Injunctions, which connect themselves with Actions at Law. You will also have an opportunity of seeing bills, answers, and proceedings in Chancery; and while directing your attention to this point, you should read *Milford's, Cooper's,* or *Lube's* Pleadings; *Van Heythuson's* Forms, a Synopsis of the Practice of the Court; and *Maddock's* Principles of Equity.

3. Acquire correct knowledge regarding ACTIONS AT LAW, and their different sorts, the modes of prosecuting and defending them, and particularly of the pleadings and the practice of the courts of King's Bench, Common Pleas, and Exchequer. You will also have an opportuinty of seeing proceedings in actions, and you will be materially assisted by reading the third volume of *Blackstone; Boote's* Suit at Law; *Stephen* on Pleading; *Tidd's* Practice; and *Chitty's* Pleadings. You will do right, if, in term time, you go through the different offices, and make yourself well acquainted with the business transacted at each, take as much responsibility upon yourself as you are able, and copy all forms, adverting particularly to the number of days necessary to be observed in the different proceedings, on which the practice wholly depends.

4. Observe the TRIALS of causes, study the rules of evidence, and the minor points necessary to be attended to in preparing for trial. This you will obtain by attending to causes as they proceed,—by a close consideration of the pleadings, and of the precise facts, and the exact evidence necessary to be, and which can be adduced,—and of the notices proper to be given; and, by reading *Peake's, Phillips's,* and *Starkie's,* Evidence, the Nisi Prius Reports, and *Selwyn's* Law of Nisi Prius. The different text books will materially help you, viz. *Bailey* or *Chitty* on Bills of Exchange, *Ross's* Law of Vendors, *Long's* Law of Personal Property, *Abbott* on Shipping, *Paley's* Principal and Agent, *Lawes* on Charterparties, *Montagu* and *Whittaker* on Lien, *Caldwell* on Arbitrations, *Montagu* and *Gow* on Partnership, *Parke* or *Hughes* on Insurance, *Holt's* or *George's* Law of Libel, *Fell* on Guarantees, and *Adams* on Ejectment.

5. Obtain a knowledge of BANKRUPTCY. This will be acquired by actual business, and by seeing the proceedings which are kept under all commissions, and by reading and digesting all the bankrupt statutes and general orders in bankruptcy. You will also peruse *Cooke's, Eden's, Montagu's, Christian's, Cullen's,* or *Whitmarsh's,* Bankrupt Laws. The examination of bankrupts and witnesses before commissioners, forms a material part of business in bankruptcy, and deserves particular attention.

6. Acquire a general knowledge of the law relating to EXECUTORS AND ADMINISTRATORS. This will connect itself more or less with the foregoing. *Toller's* Law of Executors and Administrators, and *Preston* on Legacies, should be well digested.

7. Acquire a thorough knowledge of merchants' accounts, and of the habits, manner, and forms, of business in general, not only in, but out of the profession, and of every subject connected with the LAW OF MERCHANTS. In *Beawes'* Lex Mercatoria, by Chitty, you will find much useful information.

8. The practice of SESSIONS is very necessary to be attained, and this you will find in the fourth volume of *Blackstone, Nolan's* Poor Laws, and *Chitty's* Criminal Law. Of this practice I profess no particular knowledge, and therefore am unable to promise you any insight into it in our office.

9. The practice in ELECTION CASES it is also desirable you should be acquainted with, and this you will find in Mr. *Roe's* or Mr.

*Rogers's* publication, and in Sergeant *Peckwell's* cases.

10. The common lawyer may have frequent occasion to be employed in matters connected with the courts of Admiralty, and Ecclesiastical courts. The ADMIRALTY business is divided into that of the Prize court, and that of the Instance court. The general forms of proceeding in both are to be collected from *Clarke's* Practice, and *Marriott's* Formulary. The forms of proceeding in the ADMIRALTY court are those of *Robinson, Edward,* and *Dodson:* in the ECCLESIASTICAL courts, those of *Phillimore* and *Haggart.*

11. Some knowledge of the law of SCOTLAND may be desirable in the more advanced periods of study with a view to practising before the House of Lords.

12. The LAW OF NATIONS is incidentally touched upon in many courts; on this subject, *Vattel's* Law of Nations is the most approved authority.

In the hope that these suggestions, which are of a practical description and the result of experience, may be of use to you in your professional career, I remain, &c. &c.

S.

We insert this article on account of its peculiar utility to our junior readers. We publish it by the permission of a solicitor of long experience and extensive practice. From the same source we are promised numerous other contributions on the conduct of business, and the management of an office, which, we think, will be valuable, not only to articled and other clerks, but to the principals of every professional establishment.

## ADMINISTRATION OF JUSTICE IN THE SUPERIOR COMMON LAW COURTS.

ALTERATIONS IN THE PRACTICE.

WE proceed to notice the principal changes which have taken place under the recent Act of 1 Wm. IV. c. 70, "for the more effectual administration of justice in England and Wales." We shall arrange the subjects according to the order of their general importance.

We particularly congratulate the profession upon the authority conferred on the judges, TO ASSIMILATE THE PRACTICE OF ALL THE COURTS, in matters over which they have a common jurisdiction. We consider this to be one of the most beneficial improvements that has been effected. Henceforth one system will be established by the judges, either unanimously, or by *eight* or more of them, including the *chiefs of each court.* The mode of proceeding will thus be rendered more certain; the practitioner will more easily acquire a knowledge of its details; and much expense, delay, and annoyance, will be avoided on points of practice, and technical forms and usages, which formerly prevailed in the different courts.

The alterations in the TERMS and SITTINGS will have the effect of facilitating legal proceedings, and rendering the arrangements for the trial of causes less dependent on contingencies. Thus the sittings and assizes being nearly free from the uncertainty of their commencement and duration, the suitors will be better enabled to calculate the probability of the coming on of their trials on any given occasion. This will be no small advantage to the public, and will diminish not only the expense and trouble of preparing for trial, but mitigate the evils of postponement.

The future modes of procedure adopted by the Act regarding BAIL, both in town and country, are also great improvements, curtailing the expense to the debtor, and relieving the bail from much inconvenience, and often from considerable risk.

We are enabled to lay before our readers a variety of practical observations and instructions, which, we trust, will be found generally useful in the commencement of the operation of the Act.

---

*Admission of Attornies in the Exchequer.*

By the 10th section, the court of Exchequer is thrown open to the profession at large, but many attorneys are not aware that, before they can avail themselves of the privilege, they must be admitted "in open court" as *attorneys;* and, it is remarkable, that at the time the alteration commenced, namely, on the 12th of October last, [*vide last section,*] no person could avail himself of the intended benefit, for there was no court sitting to admit him.

Perhaps it was not intended to compel the attorneys of the courts of King's Bench and Common Pleas to go through the ceremony of an admission in the court of Exchequer, and particularly as many attorneys have been admitted, and sworn in as *solicitors* of that court. A correspondent, who has reminded us of this part of the Act, suggests that, by a liberal construction of the clause, it might thus be read: "All attorneys of the courts of King's Bench or Common Pleas shall be *permitted* to practise in the court of Exchequer, without being obliged to employ a clerk in court."

However, the attorneys of the other courts may be admitted in the following manner: Take the admission in either of the other courts, to a baron, at chambers, and obtain his fiat, for which a fee of half a guinea is required, but it is customary to pay a guinea. Then attend at the sitting of the court at Westminster, and produce the admission of the other court, and the party applying will be sworn in, and receive his admission as an attorney of the court of Exchequer (*a*).

*Abolition of the Courts of Wales, and of the City and County of Chester.*

These local courts are abolished by the 14th section, and the 16th and 17th sections enable the attorneys of these courts to be admitted in the courts of Westminster under certain re-

(*a*) Before this statute, the prosecution and defence of actions was carried on by four sworn clerks, or attorneys, who were appointed by the clerk of the Pleas for life, and sixteen side clerks, or clerks in court, four of whom were appointed by each of the attorneys or clerks. *Tid.* Pr. p. 58, 9 edit. 5 *Price,* 559, note *Man.* ex. Pr.

gulations, which are specified in the Act of which we have given a summary.

After the Act shall have taken effect, the suits, whether in law or equity, pending in any of the abolished courts, are to be transferred to Chancery or the Exchequer, if in equity; and to the Exchequer, if in law. No directions, however, are given, as to the mode of transferring them. If they are at law, the following suggestions may be useful:

If process has been served, but the defendant has not appeared, the copy of the process should be sent to the London agent of the defendant.

If, in the same stage, the defendant does not appear, an affidavit of the service of the writ should be sent by the plaintiff's attorney to his agent.

If the defendant has appeared in the court below, and the declaration has been delivered, but the defendant has not pleaded, the plaintiff's attorney should transmit the *draft* declaration, and the defendant's attorney the *declaration* as delivered to their respective agents.

Should interlocutory judgment have been signed below, the whole proceedings should be sent to the plaintiff's agent.

If the cause be at issue, proceedings must then be transmitted respectively to the agent of each party.

If final judgment has been obtained by the plaintiff, but has not been satisfied, execution must issue from the Exchequer.

If the defendant's attorney in the court below has not instructed his London agent, then all notices, rules, and orders in the inferior cause may be delivered to the defendant, or his attorney in the court, until notice of an agent be given him. After such notice, all rules, orders, and notices must, according to the present practice, be delivered to the agent.

Bailable process will, it is presumed, be subject to the same rules. If bail has not been put in, it must be put in and perfected in the Exchequer, and justification must be compelled by that court (*b*).

By 7 and 8 Geo. IV. c. 71, s. 7, "No sheriff within the principality of Wales, or the counties palatine of Chester, Lancaster, or Durham, shall, upon any mesne process issuing out of any of his majesty's courts of Record at Westminster, arrest or hold any person to special bail, unless such process should be duly marked and indorsed for bail, in a sum not less than fifty pounds." It is conceived that the words of s. 13 of the present Act, "That from and after the commencement of this Act, his majesty's writ shall be directed and obeyed within the county of Chester, and the county of the city of Chester, and the several counties in Wales, in like manner and to the same extent, and to and for all intents and purposes whatsoever, as the jurisdiction of such courts (King's Bench, Common Pleas, and Exchequer,) respectively is now exercised in and over the counties of England not being counties palatine," will have the effect of taking, for the future, all the inhabitants of Chester and Wales out of the protection of s. 7, of 7 and 8 Geo. IV. c. 71, and rendering them liable to arrest for 20*l.* according to s. 1 of that statute.

*Terms and Returns.*

The principal object of the 6th section of this Act, was to fix the commencement and conclusion of Easter and Trinity terms: but this is not very precisely attained, for, "if the whole, or any number of the days intervening between the Thursday before, and the Wednesday after, Easter-day, shall fall within Easter term, there shall be no sitting in banc on any of such intervening days, but the term shall, in such case, be prolonged for an equal number of days, exclusive of Easter-day, and the ensuing Trinity term shall begin and end the same number of days later." The commencement and conclusion of those terms are, consequently, still variable, though comparatively in a small degree.

Before this enactment, Hilary term always began on the 23d of January, and ended on the 12th of February. Easter term began the Wednesday after Easter Sunday fortnight, and ended on the Monday three weeks after that Wednesday. Trinity term began on the Friday after Trinity Sunday, and ended on the Wednesday after that Friday fortnight. Michaelmas term began on the 6th of November, and ended on the 28th. If, in this last, or Hilary term, the day of the month on which it began or ended happened to be a Sunday, it began or ended on the Monday after. 1 *Bl. Com.* 278; *Spelman Jan. Ang.* 1, 2, s. 9; *Tid. Prac.* p. 105, edit. 9; *Archb. K. B. Prac.* vol. 1, p. 41. Hilary term always began eight weeks after the day on which Michaelmas term ended, and ended fourteen weeks after the day on which Michaelmas term began. *Man. Exch. App.* 2.

The general return-days were, before this Act, marked by their distance from certain holy or feast days. Anciently, when any of these days fell on a Sunday, the court actually sat on that day. This mode had, however, long been disused; and no judicial act was done, or supposed to have been done, till the Monday. *Tid. Prac.* p. 106, edit. 9.

*Sittings at Nisi Prius, and on Special Cases.*

The 7th section, which limits the sittings at *nisi prius* to twenty-four days after the three terms of Hilary, Trinity, and Michaelmas, and to six days after Easter, contains a proviso, that a day or days *may* be specially appointed, not being within the twenty-four days, by consent of the parties, their counsel, or attorneys, for the trial of any cause at *nisi prius*.

This provision, which might have the effect of nullifying the restriction of the length of the sittings, (which is a material object of the Act,) will of course not be resorted to except on occasions of great importance, or at seasons when the general business of the circuits and the sessions will not be impeded by these individual arrangements.

The sittings of the judges of the King's Bench for the despatch of term business out of term time, are now abolished, by s. 5, which repeals 3 Geo. IV. c. 102, for facilitating the

(*b*) For instructions to the London agents on this subject, vide *Mr. Chapman's* useful book on the present "Practice of the Superior Courts," pp. 31-3.

despatch of business in the court of King's Bench.

*Bail in Town.*

The time of the court will now be considerably saved by the justification of bail at the chambers of one of the judges.

Before the late Act, this proceeding could not be taken at chambers during the term, except by consent of the opposite party (*b*). And in vacation, only, when the defendant was in custody (*c*).

*Bail in the Country.*

The 21st and 22d sections contain valuable provisions as to the surrender by bail, of their principal.

Before this enactment, it was necessary to bring the party up from any part of the country in which he might be, in order to surrender him in court, or at a judge's chambers (*d*).

If he were already in custody, he must be brought up by *habeas corpus*, in order to render him (*e*).

The clauses on this subject, and the mode of proceeding, are so material at this time to practitioners in the country, that we subjoin them with the necessary practical directions.

By the 21st section it is enacted, that a defendant, who shall have been held to bail upon any mesne process issued out of any of his majesty's superior courts of Record, may be rendered in discharge of his bail, either to the prison of the court out of which such process issued, according to the practice of such court, or to the common gaol of the county in which he was so arrested, *and the render to the county gaol shall be effected in the manner following;* that is to say, the defendant, or his bail, or one of them, shall for the purpose of such render obtain *an order of a judge* of one of his majesty's superior courts of Westminster, and shall *lodge such order with the gaoler* of such county gaol, *and a notice* in writing of the lodgment of such order, and *of the defendant's being actually in custody* of such gaoler by virtue of such order, *signed by the defendant, or the bail,* or either of them, *or by the attorney or agent* of any or either of them, *shall be delivered to the plaintiff's attorney or agent,* and the sheriff, or other person responsible for the custody of debtors in such county gaol, shall, on such render so perfected, be duly charged with the custody of such defendant, and the said bail shall be thereupon wholly exonerated from liability as such.

The following course must be pursued to effect the render, and enter the exoneration.

*Requisites to obtain the judge's order.*—The name of the court out of which the process issued—the christian and surnames of the plaintiff and defendant, and of the bail to the action—whether the application is at the instance of the defendant or his bail—and if, by one of the bail only, which of them—the sum for which the defendant is held to bail—the state of the cause—whether before or after declaration, or after final judgment; and, if after judgment, the amount of the damages and costs, and the gaol to which the defendant is to be rendered. [*A copy of the order should be kept.*]

*To enter the exoneretur* on the bail piece—An affidavit, and the gaoler's certificate in the following forms, must be sent to the agent in town:

[Court] [Name of Cause.]

A. B. of , &c., maketh oath and saith, that the above-named defendant was, on the day of , rendered to the custody of the sheriff of the county of , in discharge of his bail in this action, pursuant to an order of the right honourable Charles Lord Tenterden, dated the day of , obtained for that purpose; and, at the time of such render, the said order was lodged with the keeper of the said sheriff's prison at , in the said county of , and that the said defendant is now in the actual custody of the keeper of the said prison, by virtue of such order. [This affidavit must be before a commissioner *not* concerned as attorney in the cause.]

This is to certify that A. B. rendered himself to the custody of the sheriff of , on the day of , 183 , in discharge of his bail at the suit of C. D. under and by virtue of an order of the right honourable Charles Lord Tenterden, dated the day of 183 .

E. F.

Keeper of the sheriff's prison for the county of , situate at .

The same forms (varying them according to the facts) are to be observed for rendering a defendant under the 22d section.

(*b*) 2 W. Bl. 1064. Tidd's Pr. 263, ed. 9. 1 *Archb. K. B.* 109.

(*c*) 43 Geo. III. c. 46, s. 6. 1 *Archb. K. B.* 118-9.

(*d*) *Archb. K. B. Prac.* vol. 1, pp. 313-4.

(*e*) *Ibid.* p. 313.

---

BIOGRAPHICAL SKETCH OF

## THE LATE MR. BRODRICK.

THE subject of the present short memoir was an only son, and was born at Union place, Newington, Surrey, in 1784. His family was originally from Yorkshire. His father was a captain in the East India Company's service. From his uncle, who was a wealthy ship owner, it is believed he inherited a considerable portion of property. At an early age he was sent to the school of Dr. Fletcher, at Beckenham, in Kent; where he remained until he was removed to Harrow, and at the latter place he was contemporary with the present Sir Robert Peel. We understand they were on terms of friendship with each other, their desks were near together, and those who visit the school will find the names of these two future ornaments of society cut by their own hands into one of the desks. In due season he was sent to University college, Oxford, where his progress was considerable, but we have not been able to ascertain whether he took honours.

In 1816 he was called to the bar: having a considerable private fortune, he did not at first propose to practise, with a view to following the profession as a source of emolument. For the first five years, therefore, of his practice, we do not find him brought in any remarkable degree under the notice of the public. During this period, however, he was known as a practitioner of great promise at the Hertford, Chelmsford, and Old Bailey sessions. He was first brought into celebrity by the trials of *Thistlewood* and the other Cato-street con-

spirators, for high treason; and his reputation was further advanced by his most able and ingenious argument against the conviction in the case of *Fauntleroy*. From that time forth his business increased rapidly. In consequence of this increase of practice, he had been repeatedly obliged to absent himself from the Hertford and Chelmsford sessions; and at the Michaelmas sessions, 1829, he took a step, which is always viewed as a certain proof of great success in the higher branches of the profession, namely, that of leaving his sessions. For some time before he came to this determination, he had given up his regular attendance at the Old Bailey, and he now declined to go there, except on special retainer. On the circuit he had the best business as a junior counsel; and, latterly, at Hertford and Chelmsford, he was almost always selected as leader; at Chelmsford, indeed, so great was the demand for his services, that it constantly happened that he was offered a retainer on both sides in any cause of importance. In the King's Bench his business steadily increased; and, it is believed, that few men behind the bar had better practice. It was generally understood, that, in the event of any addition to the number of king's counsel, his name would have been found among the first of the number to be promoted. Flattering as this success must have been to him, he suffered from private afflictions of no ordinary magnitude; within a short period, he had to mourn the loss of two of his daughters, the elder of whom had just attained to the age at which a child becomes an object of more than common interest to a fond and affectionate parent. These events left his spirits permanently depressed; those, with whom he was in habits of intimacy, could perceive that he never forgot the loss he had suffered; and affliction, added to the perpetual and severe labours attendant on his practice in the profession, gradually affected his health. During the last winter, he laboured under frequent attacks of indisposition; his avocations, and indeed his indefatigable temperament, would not permit him to adopt the means necessary for recovery; a continual cough soon attacked him, and he adopted temporary medicaments during the last term, and the summer circuit, to enable him to bear up against his labours until the long vacation.

At length this period of relaxation arrived, and he set out for the north, in order, if possible, to recruit his health; he went into Northumberland, and on the 10th ultimo was on his way home through Newark, when, as he stopped to change horses, he became so seriously ill, that he was forced to go to bed. Indeed, he had been growing gradually worse during the latter part of his tour: he lingered during that day and the next; and on Tuesday, the 12th of October, he expired, in the 47th year of his age. He retained his senses to the last, and after settling his worldly affairs so far as his state would permit, one of the last objects of his anxiety was his faithful clerk. This worthy man, whose attentions to him in his professional career had been unwearied, he knew would soon be left to begin the world again, with an invalid wife and seven children.

The immediate cause of Mr. Brodrick's death, it is understood, was rheumatic gout, the effects of which had extended to the heart. He has left a widow, a son, and four daughters: his mother, we believe, is still alive.

Of the talents of Mr. Brodrick, perhaps his great success at the bar is the best criterion; his knowledge of law was, for his standing, both extensive and deep, his industry was indefatigable, his mode of speaking, though perhaps never rising into eloquence, was always plain, clear, and persuasive. In the conduct of a cause he was firm, zealous, and undaunted: he always regarded the success of his client as his paramount object, and no exertions were spared by him which tended towards its attainment. The happy medium seemed to have been obtained by him, that, while he pressed his client's case with all necessary boldness, he never infringed on the proper rules of respect towards the court.

We have hitherto spoken of the subject of this brief memoir principally as regards the powers of his mind; it would, however, be hardly doing justice to his memory, if we were to pass over the qualities of his heart in total silence. Throughout his professional career, the conduct of the late Mr. Brodrick was marked by that high sense of honour, and correctness of feeling, which ought at all times to be inseparable from the character of an English advocate. Distinguished for those courtesies which mark the gentleman, and adorn and dignify the man of liberal education, he was simple and unassuming in the highest possible degree, and the kindness and benevolence of his disposition will be best attested by the deep and universal regret which his untimely death has spread through all ranks of the legal profession.

## REVIEW.

*Second Report made to his Majesty, by* John Campbell, William Henry Tinney, Francis Williams Sanders, Lewis Duval, John Hodgson, Samuel Duckworth, Peter Bellinger Brodie, *and* John Tyrrel, Esqs., *Commissioners appointed to inquire into the Law of England respecting real Property; comprising the subject of a general Registry of Deeds and Instruments relating to Land. Ordered by the House of Commons to be printed, June* 29, 1830. London, J. and W. T. Clarke, 1830; Pp. 102.

A general registry of legal documents has frequently engaged the attention, as well of the practical lawyer, as of the jurisprudent, from the date of the Statute of Enrolments, in the time of Henry VIII., to the present time. Local registers have been established by several Acts of Parliament in the two most important and wealthy counties of England, Middlesex (6 Anne, c. xx.) and Yorkshire (3 and 4 Anne, c. iv., 6 Anne, c. xxv., 8 Geo. II.,

c. vii.). In the sister kingdoms of Scotland and Ireland, and in the British Colonies, as well as in most of the countries of the continent, general registries have been also long known and acted upon.

Under these circumstances it became a matter of earnest and serious importance to inquire whether a measure of this nature might not be beneficially introduced into England. The establishment of a General Registry has been frequently proposed in Parliament, and is recommended to us by the venerable authority of Sir Matthew Hale, who, with the other Commissioners appointed in the time of the Commonwealth to inquire into the inconveniences of the law, prepared and recommended a bill for an establishment of this nature.

We naturally, therefore, turned to the report of the present learned Commissioners on this subject with much eagerness, anxious to learn the opinion of men so well entitled to guide our judgment on the subject. They have spared no pains to arrive at a right conclusion: they have industriously collected the opinions and experience of this and of other countries: and they have "unanimously come to the conclusion that the establishment of a General Registry would be expedient." p. 3.

We know, however, the difficulties which many able men have felt, and still feel, on this subject; and therefore, without offering any opinion ourselves, we think we cannot do better than state the principal arguments employed in the work under consideration in favour of a measure so sweeping and important as that which it recommends.

The evils of the present system, which a General Registry will remove, are thus stated:

"When the party, in whom a documentary title is shown, is in possession of the land, by occupation or receipt of the rents, and also has possession of the documents, by which his title is shown, a purchaser from him is furnished with all the grounds of assurance of which the law admits, that the title produced is the whole title, that is, in effect, the true title; all beyond this is mere confidence.

But possession of the land is no proof of the extent of the interest under which it was acquired; and when the interest acquired was the fee simple, the possession may continue, after a partial disposition, as a mortgage, or charge, or settlement. It is obvious, that with regard to all future interests, the presumption of title arising from possession is out of the question.

As to the title deeds, the possession of them is never conclusive, and in many cases it cannot be had. A change of the possession of the title deeds does not, and cannot, always follow the creation of an interest in land. In case of a settlement by a tenant in fee, who retains an estate for life, the deeds are not parted with: in this case the presumption from the possession of the title deeds altogether fails. There are other cases of the creation of partial interests in which the deeds are retained by the party entitled to the possession of the land. And where deeds relate to land which has become divided as to ownership, it is obvious that they can attend the possession of only one part of the land. So, secondary and reversionary estates or charges are not accompanied with the possession of the deeds. Besides, duplicates are often executed of important deeds, such as settlements; these sometimes afford to more than one party at the same time, the presumption of ownership arising from the possession of the deeds.

We shall proceed to mention some of the various cases, in which false titles are most easily made by suppression of documents.

The seller or mortgagor may have been the absolute owner of the fee simple, and may produce the instruments by which his ownership was constituted; but he may have executed some settlement, by which his interest has been reduced to a tenancy for life. The possession of the estate and of the title deeds will have remained unchanged; and in order to impose on a purchaser or lender of money, he need only keep back the settlement.

Again, the seller or mortgagor may be heir-at-law of the last proprietor, and may claim as such heir, and may suppress a will giving him a limited interest; or he may be heir-at-law, or general devisee, of some deceased proprietor, who may have made a settlement giving him a limited interest, and he may claim as such heir or devisee, and may suppress the settlement.

A proprietor in possession may have mortgaged the estate, and, having withholden or got back the deeds on some pretext from the mortgagee, and thus being in possession of the deeds, or else plausibly accounting for their non-production, and concealing the mortgage, he may offer the property as an unincumbered security.

Again, a settlement may have been executed, limiting a life-interest to the husband, with power to appoint the estate to the issue of the marriage as he may think proper, and giving it, in default of appointment, to the eldest son in fee or in tail. The eldest son, after the death of his father, may take possession of the property claiming under the limitation in default of appointment: he may sell it or mortgage it; yet an appointment may have been made, under which the seller or mortgagor may have no estate, or a life estate only, or an estate charged with portions for younger children.

Again, various instances may occur, in which revocations of former appointments may be suppressed, and the revoked appointments may be produced as giving a title." pp. 3-5.

The means now resorted to for giving security against the suppression of deeds are then adverted to. The protection afforded by legal estates and outstanding terms of years is minutely entered into, and its well known disadvantages are explained, although very little novelty is introduced into the discussion. The doctrines of equitable notice and legal presumption are also touched upon, their uncertain and fluctuating state pointed out, and the dangers attending them enumerated.

The difficulties of obtaining the production of deeds under the present system are next dwelt upon; the liability to loss and destruction is strongly enforced, and the consequent hazards affecting the title of lands forcibly depicted. The report then adverts to the facility of the forging and substitution of deeds, and the dangerous temptation to the holders of land to keep them concealed, and to subvert rights thus unprotected. A General Registry will be, in the opinion of the Commissioners, a *panacea* for all these evils, and the advantages are thus briefly summed up:

"1st. Titles will be rendered secure against the fraudulent suppression of documents, and against

their non-production through ignorance, mistake, or accident.

2d. Titles will be simplified; legal estates in trustees will not be kept on foot and transferred after the purposes of their creation shall have been answered; thus there will be only one title to an estate instead of many.

3d. Titles will not be exposed to the present hazard, from the equitable doctrine of notice.

4th. Titles will not be liable to be defeated by the subsequent acts of third parties.

5th. Titles will not be liable to be defeated in consequence of the loss or destruction of documents.

6th. Forgery of deeds will become more perilous.

7th. The difficulty and expense of giving deeds in evidence in courts of justice will be greatly diminished.

8th. Attempts at fraud by concealing prior estates and incumbrances; attempts at forgery of deeds; and attempts at supporting and defeating claims by false testimony will be prevented or materially checked.

9th. Titles will cease to be unmarketable from the owners not being able to produce or secure the future production of the title-deeds.

10th. Equitable and secondary estates will become marketable.

11th. The danger both to purchasers and sellers of entering into contracts without previous minute acquaintance with the title will be materially diminished.

12th. Both the delay and expense attending the investigation of titles previous to the completion of contracts will be materially diminished; abstracts will be shortened; there will be no tracing of collateral titles; no search after documents; no expense in procuring their production. These are now the chief causes of delay and expense in the transfer of real property.

13th. The expenses attending conveyance will be materially diminished; deeds will be shortened, and they will be lessened in number; such deeds as assignments of satisfied terms, and covenants for production of title-deeds will become unnecessary; copies of deeds will be required to much less extent, and, when required, will be furnished at a cheaper rate.

14th. Many causes of litigation as to titles, and as to the performance of contracts, and as to the possession and the production of deeds, and as to the necessary deeds of conveyance and the parties to them, will be avoided." pp. 98-100.

The principal objections to a General Registry are brought forward, and severally answered at considerable length. The expense of the Registry is thus dealt with:

"We were anxious, at an early stage of our inquiry, to form a probable estimate of the expenses of a General Register, considering that we could not recommend the adoption of the measure, unless it should clearly appear, that the amount of expense would be moderate, and that the advantages to be derived from a Register would fully compensate every expense attending it; for this purpose we carefully inspected most of the offices of the existing Registers in this country; and from the books, and an examination of the officers, we collected the number of instruments which are registered, and the causes and amount of different expenses. From these sources of information, and from the returns of the land-tax assessments, of the population, and the stamp duties, and from the communications of solicitors, we have been able to make some approach to a satisfactory estimate of the extent of the necessary establishment and charges; various details on this subject will be found in a paper subjoined to this Report. It will there be seen, that the necessary establishment will be moderate, both as to extent of building and number of officers; in fact we are satisfied, that the whole expense of the establishment would be less than the aggregate amount of the charges of the existing Local Registers, the enrolment office, and other offices, which may be consolidated with a Register office, or abolished. There are lucrative sinecures in most of these offices. In order to cover the expenses of the office, and the costs of registration, we think the average expense of registering may be fairly taken at 1l. 5s. and the average costs of searching the indexes and obtaining copies of them on the occasion of a purchase at 10s. These estimates include the expenses of transmission and postage. It is only in transactions of very small amount that these expenses would be at all felt: such cases are at present attended with more than usual risk, because the ordinary modes of investigation, and expedients for protection, which would often cost more than the value of the property, are usually omitted. We recommend, that, in these transactions, the charges for registration and for the transmission of the deeds to the office be considerably reduced, or entirely relinquished." pp. 29-30.

The objection usually made, and which has always seemed to us entitled to great attention—the disclosure of the private transactions of parties—is also met, and it is mentioned in answer to this objection to a General Registry, that it is the deliberate opinion of many eminent bankers and merchants of London, whose names are mentioned in the appendix to the Report, that a Register affording a complete disclosure of the affairs of private individuals will be beneficial to commercial credit.

The very important question whether it is expedient that actual notice of an unregistered deed should affect the priority of a registered deed for valuable consideration, either at law or in equity, is also discussed; and here the unanimity of the learned Commissioners seems to have been somewhat disturbed; however, the majority of them have decided in the negative, and the point is thus argued by them:

"The reasons against expressly denying effect to notice, seem to be in substance as follows: one of the chief ultimate objects of law, is to protect against fraud. Now it is necessary for the guidance of men in the ordinary conduct of their affairs, that the rules of law should be clear and strict; but to defeat contrivances in whatever form they may be devised for taking unfair advantages of the strict rule, the jurisdiction to relieve against fraud should not be strict, but large. The principal object of a Register is to protect fair purchasers against prior secret deeds; this protection is not wanted against a deed which is known. The man who assists a frudulent seller or mortgagor in defeating a fair purchaser, is not himself a fair purchaser, and a law which should assist him against a fair purchaser, would be a law in favor of fraud; the fraud indeed would be of an aggravated nature, as it would have the character of conspiracy. Although no person might be induced to pay the full value for an estate under such circumstances, or actually to advance money upon it as a security on lawful terms, ad-

vantages might be held out to a purchaser, and especially the property might be given in discharge of an existing debt or made a security for it; in which case the temptation to the debtor to release himself from immediate pressure might be irresistible, and the creditor might take without scruple whatever he could get from the debtor to satisfy a just demand. Ignorance, forgetfulness, improvidence, and hurry, frequently occasion the neglect of forms, though simple and of the utmost importance, such as inrolments of bargains and sales, surrenders and admittances in case of copyholds, presentments of customary deeds, the forms of execution of wills of land, and of powers, and many other forms; and such neglect is peculiarly liable to happen in small transactions, which are entitled to the protection of the law no less, and perhaps require it more, than those of magnitude. The registration of deeds, too, must be intrusted by parties to their professional agents, who, it is to be expected, would be sometimes careless or forgetful, and sometimes wilfully or corruptly negligent; so that whatever care were taken to make known the new law and to facilitate compliance with its provisions, neglect of registration would occasionally happen, and every instance in which a person with full notice should by means of the new law defeat a just purchaser, would be considered as a proof of the unjust rigour of the law, and tend to render it odious.

Again, as dealings in confidence would still be carried on without registration, a dangerous temptation to the abuse of such confidence would be created. Besides, there must be some form, however simple, essential to the validity of registration, and mistakes in this respect must be liable to happen, however rarely. Again, even although reasonable diligence were used, and especially if delay occurred in registering a deed, there might be an interval in which superior activity might gain priority for a subsequent deed. This, if done in order to defeat a just right acquired, would be fraud. On such grounds it is, that the courts of equity in this country, and also in Ireland, have determined that actual notice of an unregistered purchase deed shall deprive a purchaser of the benefit of his registry, fraud being by some of the judges expressly stated as the grounds of these decisions, and the same rule prevails generally in the United States of America.

As fraud is the ground on which it is proposed to give effect to actual notice against registry, it appears to be generally agreed, that no such effect ought to be given to notice by construction of law, which is no proof of knowledge, nor even raises a fair presumption of it; and it is contended by those who think that the effect of actual notice should not be taken away, that sufficient guard would be provided against effect being given to constructive notice, if the preference to be given to deeds according to priority of registration were enacted in strong terms, with an express saving of the jurisdiction of equity in cases of fraud; or if there were a provision, that notice simply, or notice by construction of law, should not affect the rule of priority without actual fraud: and further, that there are many cases of fraud, of which notice is an ingredient, which must escape the jurisdiction of equity, if, in consequence of an express enactment that notice should not have the proposed effect, it came to be considered as not an ingredient towards constituting a case of fraud.

It is contended, on the same side, that a statement which has been brought forward, that the effect given to notice has materially impaired the benefits of the Registers actually established, is not founded in fact; that cases in this country and in Ireland, in which an unregistered deed has prevailed against a registered deed, by aid of the doctrine of notice, are not so numerous as to have had much effect in producing neglect of registration, and that very few, if any of them, have worked injustice in the particular instance; and that other means beside the hope of obtaining protection from notice, have probably occasioned neglect of registering in Yorkshire, and Middlesex, and in Ireland; that the same neglect is not likely to happen when registering shall be universal, and shall be put on an improved footing, and its benefits shall be fully understood; that, in fact, the hope of escaping from the loss of an estate through the means of a chancery suit, and only in case knowledge of the deed shall be brought home to another party, is not likely to lead to many cases of neglect of registration; and further, that should such inconvenience be found to exist, the remedy will be easy, by increasing the rigour of the law; but that, if the rigour of the law now to be established shall be found to work injustice and mischief, there will be no remedy for the time past, and there may be danger that the remedy applied for the future may be to abrogate, or to annul, by gradual disuse, the whole law of registration." pp. 56-59.

It is proper to observe, that Mr. Bell sides with the majority.

We have thus adverted to what appear to us the most important portions of the Report. It is, however, replete with useful information in the details of the proposed plan. It is written with much clearness, and we think that, on the whole, it is creditable to the learned body from whom it emanates.

---

MEMOIR OF THE LATE

## MR. GILBERT JONES.

THE profession has lately sustained the loss of one of its most valuable members in Mr. Gilbert Jones, to whose memory we pay our earliest tribute of respect. He was a native of Bullingham, in Herefordshire; he came to London at an early age, and seems at once to have taken root at the very spot where he afterwards sprung up and flourished, till his

"——— way of life
Had fall'n into the sear and yellow leaf."

He served nearly the whole of his clerkship to Mr. Gwatkin, of Salisbury square, who died shortly before Mr. Jones's articles expired. That he well employed the many opportunities for improvement, which a well regulated attorney's office affords, is attested by the fact of his ultimately succeeding to the practice of his deceased master. He was admitted on the Roll in 1780, and those clients of Mr. Gwatkin who had witnessed his attention and ability in conducting that portion of the business which devolved upon him while a clerk, had no hesitation in confiding their affairs to his care, now that the entire management of them would rest in his hands. The importance of the interests which are of necessity committed to an attorney is sufficiently obvious to those who have occasion to seek his professional assistance, and as there is nothing in which men are more scrupulous than in the selection of their legal adviser, it might be said as a test of the character of the practitioner, "tell me who are his clients, and I will tell you what sort of an attorney he is." Were there

no other criterion than this by which to form an estimate of Mr. Jones, his character would stand high, for he had the honour to be concerned for many of the nobility, a class of clients whose affairs require an intimate knowledge of the laws and equities of property, with which their tenures, entails, settlements, and family arrangements are so closely interwoven; and who, well educated themselves, and accustomed to the prompt fulfilment of their wishes by their numerous dependants, expect in their solicitor a readiness to explain difficulties, and resolve doubts, in which the ignorance of a superficial lawyer would soon be detected. A proof of the high opinion entertained of Mr. Jones, by a body preeminently qualified to form a correct judgment of legal abilities, is, that he was solicitor to the honourable and learned society of Lincoln's Inn, which reckons among its benchers some of the most distinguished men that have graced the bench and the bar of this country. Among the clients of Mr. Jones were Sir Vicary Gibbs, and Sir James Mansfield, both of whom reposed such confidence in him, that he was appointed an executor in the will of each. He likewise enjoyed the confidence of two other eminent judges still living; the one whose early retirement from the Rolls court has always been regretted as a great loss to the public service, and the other who now so ably fills the same judicial seat. Mr. Jones was, with his partner, Mr. Green, appointed solicitor to his Majesty's Commissioners of Woods and Forests; the vast increase of business in this department of late years, must have given occasion to most solicitors of extensive practice in the metropolis, to have some transactions with that firm, so that the generality of our readers will not need to be informed of the satisfactory manner in which its business was and is conducted. It may easily be supposed, that, with such connexions and appointments, Mr. Jones was able to realize a competent fortune. He had the good sense not to make himself in his old age a slave to the continual acquisition of money; he retired from general practice in 1816, and from the post of solicitor of woods and forests five years afterwards. After his retirement he resided during the summer months at Footscray, in Kent. While riding out in that neighbourhood, at the age of 72, his horse fell with him, and he died in consequence of the injuries he received.

Mr. Jones sat in Parliament for Aldborough, in Yorkshire, from 1806 to 1812; he made no pretensions to oratorical fame, but his sound judgment and experience, with his habits of business, rendered him a very serviceable member on committees. He had much at heart the credit of that branch of the profession to which he belonged, and was anxious that the characters of all its members should stand as far above reproach as his own. He was for many years a member of the Society of Practitioners in the several courts of law and equity. He was a man of sterling integrity, and high honour; of good abilities, and solid attainments: his manners were amiable and polished, he was universally respected in the profession, and out of it he was favored with the esteem and confidence of many great and excellent men.

## IMPROVEMENTS IN CHANCERY PRACTICE.

We feel considerable difficulty in making a selection from our very ample store of Communications on the *improvements of the law.* There is, however, one intelligible principle which we intend to follow, so far as circumstances will permit. We shall give the preference to those suggestions which point out *practical inconveniences capable of being easily removed.*

It is on this principle that we insert the following paper for the improvement of the practice in the court of Chancery, with regard to swearing answers and the transmission of them from the country. The expense and inconvenience of the present mode are fully shewn. We think the facts cannot be disputed, nor the advantage of the alteration impugned.

—

[FROM A CORRESPONDENT.]

*Answers sworn in the Country.*

It is, of course, well known to every practising solicitor, that after an answer has been sworn to by a defendant in the country, if it is brought to London by one of the commissioners, it is left by him with the defendant's clerk in court, who indorses upon it: "Received from the hands of A. B., one of the commissioners," and then files it with the six clerks; but, if it is not brought by a commissioner, it is delivered by one of the commissioners to any one who happens to be coming to town, in order to be left by him at the public office; and, on leaving it there, he takes an oath before one of the masters in Chancery, that he received it from the hands of A. B., one of the commissioners, and that it has remained in his possession ever since, and has not been altered. The latter is the most usual course: answers being generally sent by the guard of the mail, or other coaches, who charges half a guinea, and often a guinea, according to his trouble, for if it happens that he attends at the public office between four and six o'clock, when it is closed, he is obliged to attend a second, or a third time, and charges accordingly.

An additional inconvenience is experienced in the northern counties of the kingdom, for as none of the guards go farther than the latitude of Liverpool, Manchester, Leeds, and York, if an answer happens to be taken beyond any of those places, one of the commissioners is obliged to proceed with it to one of them, to deliver it to a guard who may be going all the way to London. Within the last twelve months, three instances have occurred in my own experience, of its being necessary for a commissioner to take three journies on purpose out of Westmoreland, to Liverpool, Manchester, and Leeds, (each a distance in going and returning of 140 miles,)

to deliver answers to the guards of the mail coaches at those places, in order to prevent attachments in two of the cases, and an injunction in the third. And another instance also came under my observation during the sittings after last Trinity term, where an answer waited at Lancaster for about three weeks for want of an opportunity of sending it to London; and, if indulgence had not been given, one of the commissioners must have gone to Liverpool or Manchester (which is above 100 miles there and back,) to deliver it to the guard of the mail, or some other coach.

Now all this inconvenience, delay, and expense, may be avoided by the following very simple plan. Let one of the commissioners take the answer, carry it to the nearest Post-office, and deliver it to the Post-master. Let the Post-master, after marking upon it, "*Received from the hands of A. B. a commissioner,*" put it in an envelope; and, after sealing it with an official seal, and receiving the postage, address it thus,

"To

"The Six Clerks of the court of Chancery,

"Chancery lane, London,"

and transmit it to town by the next post. By this means the answer will arrive at the office, where it is to be filed, without having travelled to town in the pocket of the coachman, or guard, then to the public office, and thence to the Six Clerk's office.

The Six Clerk should mark the time of its receipt, in order that, when necessary, the fact may be proved.

*Town Answers*

should be sworn before one of the Six Clerk's with whom they are filed, instead of being sworn before a master at the public office, from whence (for the purpose of being filed,) they are generally taken by the clerk or agent of the defendant's clerk in court; and who, if he were so disposed, might with the greatest ease alter an answer, and subject a defendant to an indictment for perjury.

## SHAKSPEARE A LAWYER.

Though great obscurity hangs over the life of Shakspeare, it is certain that his early days were marked by considerable vicissitude. When he left school, it seems probable that he for some time assisted his father in his trade, either of a woolstapler or a glover. But, before he quitted his native country for the metropolis, it has been conjectured, and with great plausibility, that he passed some time in the office of an attorney, or the seneschal of some manor court. This conjecture rests principally on the frequent use which Shakspeare makes of legal terms and phrases; his familiarity with which appears to be so great as to indicate a professional acquaintance with the law. Had Mr. Malone, with whom the conjecture originated, been content to depend upon the evidence of the poet's works, he would have established a case of great probability; but, he rather weakened than added strength to his cause, by endeavouring to fortify it by something like testimony. Unable to find any directly to his purpose, he sought to avail himself of a tradition that Shakspeare had once been engaged as a schoolmaster; and arguing that such floating traditions, though not perfectly accurate, usually contain "an adumbration of the truth," he imagined that Shakspeare having in the manner just mentioned acquired a knowledge of the law, employed himself in teaching it to others. It is strange that this wild fancy should not only have satisfied Malone, but that it should have been adopted by Mr. Whiter and Dr. Drake. The latter writer supposes that Shakspeare, on his marriage, finding his income insufficient to meet his wants, adopted this method of "making the pot boil." The inconsistency of Malone is extreme. Aubrey, from whom the report is borrowed, says—and in the same sentence in which he states Shakspeare to have been a schoolmaster—that he understood Latin pretty well. Malone contends with Dr. Farmer that Shakspeare knew so little of Latin that he could not have taught that language; therefore, he must have taught law. But the assumption is perfectly unnecessary: Shakspeare must previously have acquired the knowledge which he is supposed to have communicated—and the question is, not what use did he make of his legal learning, but how did he obtain it. The supposition is improbable, as well as useless, since there is not the slightest reason to believe that there existed such a class of teachers as that to which Shakspeare is supposed to have belonged. The knowledge of the law was obtained then as it is now, in the office of a professional man: and we have no right, without evidence, to assume the existence of seminaries for sucking lawyers. The question must be determined upon other grounds; and it may be presumed that Malone became ashamed of this monstrous conjecture, since, in his life of the poet, prefixed to the edition of 1821, he does not revert to it.

The following passage is quoted by Malone, from an epistle to the gentlemen students of the two universities, by Thomas Nashe, prefixed to Green's Arcadia, which was published in 1589.

"It is a common practice now-a-days, among a sort of shifting companions, that runne through every art and thrive by none, to leave the trade of *Noverint*, whereto they were born, and busie themselves with the endeavours of art, that could scarcely Latinize their neck verse if they should have neede; yet English *Seneca* read by candle light yeelds many good sentences, as *bloud is a beggar*, and so forth; and if you intreat him fair in a frosty morning, he will affoord you whole *Hamlets*, I should say, Handfuls of tragical speeches."

Malone says, "Nashe seems to point at some dramatic writer of that time who had originally been a scrivener or attorney:

'A clerk foredoom'd his father's soul to cross,
Who penn'd a stanza when he should engross;'

who, instead of transcribing deeds and pleadings, chose to imitate Seneca's plays, of which a translation had been published many years before."

The allusion is unquestionably to a person educated to the law—*Novcrint* referring to the commencement of deeds *Noverint Universi*—*Know all men, &c.* In some respects it is not inapplicable to Shakspeare, as in the alleged want of scholastic learning. The writer also appears to sneer at the play of Hamlet, which word, in the original, is printed in a different character from the rest. Malone, however, decides that it does not apply to Shakspeare, principally because Shakspeare borrowed nothing from Seneca. The commentator is somewhat annoyed by the word Hamlet, but he is relieved by conjecturing that some one had written a play on the story of Hamlet previous to Shakspeare. And he not only satisfies himself of the play having been written, but even

fixes on the author, and speculates on what will probably be found in it, should "the old play of Hamlet ever be recovered." To affirm positively that Shakspeare was the writer alluded to by Nashe, would be to imitate Malone in the facility with which he converts fancy into fact; but, perhaps, it would be equally rash to decide, dogmatically, that Shakspeare was not meant; especially as we have no *knowledge* of any play on the story of Hamlet previous to that of Shakspeare. At any rate it is more reasonable to apply this passage to our great bard, than to conclude that he was a lawyer, because it had been said that he was a school-master.

The question of Shakspeare's connexion with the law must, after all, be decided by the internal evidence afforded by his writings; and in them we find the author recurring continually to the language of the law. He uses it with minute propriety, and like a man accustomed to it. The passages which might be produced to prove this are almost innumerable, and those which have been brought forward are neither few nor inconclusive. The following are given by Malone.

"—— For what in me was *purchased*,
Falls upon thee in a much fairer sort."
(*K. Hen. IV. P.* ii.)

"Purchase is here used in its strict legal sense, in contradistinction to an acquisition by descent.

"Unless the devil have him in *fee-simple, with fine and recovery*." (*Merry W. of Win.*)

"He is 'rested *on the case*." (*Comedy of Er.*)

"—— With *Bills* on their necks,
Be it known unto all men by these presents."
(*As you Like it.*)

"—— who writes himself Armigero,
In any *bill, warrant, quittance, or obligation*."
(*Merry W. of Win.*)

"Go with me to a notary, seal me there
Your *single bond*." (*Mer. of Venice.*)

"Say, for non-payment that the debt should double." (*Venus and Adonis.*)

"On a conditional bond's becoming forfeited for non-payment of money borrowed, the whole penalty, which is usually the double of the principal sum lent by the obligee, was formerly recoverable at law. To this our poet here alludes.

"But the defendant doth that plea deny;
To 'cide his title, is impannelled
A quest of thoughts." (*Sonnet* xlvi.)

"In Much ado about Nothing, Dogberry charges the watch to keep their fellows' counsel and their own. This Shakspeare transferred from the oath of a grand juryman.

"And let my officers of such a nature
Make an *extent* upon his house and lands."
(*As you Like it.*)

"He was taken *with the manner*."
(*Love's Labour Lost.*)

"*Enfeoff'd* himself to popularity."
(*K. Hen. IV. P.* i.)

"He will seal the fee-simple of his salvation, and cut the entail from all remainders, and a perpetual succession for it perpetually."
(*All's Well that Ends Well.*)

"Why, let her *accept before excepted*."
(*Twelfth Night.*)

"—— Which is four terms, or two actions; and he shall laugh without *intervallums*."
(*K. Hen. IV. P.* ii.)

"—— Keep leets and *law-days*.)
(*K. Richard* II.)

"*Pray in aid* for kindness." (*Ant. and Cleo.*)

No writer but one who had been conversant with the technical language of leases and other conveyances, would have used determination as synonymous to end. Shakspeare frequently uses the word in that sense. See vol. xvii. p. 188, n. 3; and vol. xx. p. 235, n. 8; "from and after the *determination* of such a term;" is the regular language of conveyancers.

"Humbly complaining to your highness."
(*K. Richard* III.)

"Humbly complaining to your lordship, your orator," &c. are the first words in every Bill in Chancery.

"A kiss in fee-farm! In witness whereof these parties interchangeably have set their hands and seals." (*Troilus and Cressida.*)

"Art thou a *fredary* for this act?" (*Cymbeline.*)

"See the note on that passage, vol. xiii. p. 100, n. 6.

"Are those precepts served?" says Shallow to Davy, in K. Henry IV.

"Precept in this sense is a word only known in the office of a justice of peace.

"Tell me what state, what dignity, what honour,
Canst thou *demise* to any child of mine?"
(*K. Richard* III.)

"—— hath demised, granted, and to farm let," is the constant language of leases. What poet but Shakspeare has used the word *demised* in this sense?

"This fellow might be in his time a great buyer of land, with his statutes, his recognizances, his fines, his *double vouchers*, his recoveries." (*Hamlet.*)

The references are made to Boswell's edition of Malone's Shakspeare, 21 vol. 1821.

The following are referred to, but not quoted by Malone:

"So should that beauty which you hold in *lease*
Find no *determination*." (*Sonnett* xiii.)

"Now where is he that will not stay so long,
Till his friend sickness hath *determined* me."
(*K. Henry* IV. *P.* ii.)

"O twice, my father! twice am I thy son;
The life thou gav'st me first, was lost and done,
Till, with thy warlike sword, despight of fate,
To my *determined* time thou gav'st new date."
(*K. Henry* VI. *P.* i.)

Mr. Chalmers, who made it a point of conscience to dissent from Malone in every thing, contends that the passages adduced prove nothing, inasmuch as Shakspeare might have acquired all the knowledge which he displays of legal language, from the perusal of three books, "Totell's Presidents, 1572;" "Pulton's Statutes, 1578;" and "Abraham Fraunce's Lawier's Logike, 1588." Granted, that he might—granted that he had read those books—a question arises, why did he read them? People seldom read such books for amusement, and Shakspeare was not a man to acquire knowledge for the mere purpose of displaying it. His genius placed him above the necessity of such expedients, and the noble simplicity of his mind would have disdained them. He was of those who "write what they think," not of those who "sit down to think what they shall write." Malone has on this subject expressed himself with culpable carelessness. Speaking of Shakspeare's knowledge of legal terms, "It has," says he, "the appearance of technical skill, and he is so fond of displaying it on all occasions, that there is, I think, some ground for supposing that he was early initiated in at least the forms of law." Shakspeare indeed displays the knowledge ascribed to him, but he is not *fond* of displaying it. He writes on these, as on all other occasions, from the fulness of his mind. He uses legal language, because early impressions had given his mind a bias which it would have required an effort to control. No one was ever more free

from petty vanity. He was not only one of the greatest, but one of the most unpretending of men. His carelessness of his literary reputation attests this. Such a man was not likely to read for the mere purpose of display. He had perhaps read the books named by Mr. Chalmers, but if so, he had read them in the course of professional study. Mr. Chalmers did not come to the controversy free from prejudice—he was one of the luckless individuals who were deceived by the Ireland forgeries. Malone, either from better judgment, or better fortune, stood aloof; and, when the imposture was exposed, enjoyed his triumph somewhat beyond the bounds of moderation. Mr. Chalmers could not bear this, and published an octavo volume, to show, that although the Ireland papers were now proved to be forgeries, he, and his brethren in misfortune, had been quite right in believing them to be genuine. It was in this volume that he sought to account for Shakspeare's legal knowledge in opposition to the opinion of Malone. Anger may sometimes make a man eloquent, but it seldom makes him impartial, and Mr. Chalmers was too much irritated to discuss the matter fairly: not to mention that his belief in the authenticity of the Ireland manuscripts is not peculiarly favorable to his character for critical discrimination. It is remarkable, too, that although Malone had published his opinion as early as 1790, Mr. Chalmers did not think of disputing it, until he found it necessary to apologise for his credulity seven or eight years afterwards. But dismissing the personal quarrels of Mr. Malone and Mr. Chalmers, it will be useful to advert to two other writers who have maintained the claims of Shakspeare to a legal education.

The Rev. Walter Whiter published, in 1794, "A Specimen of a Commentary upon Shakspeare," in which he proposed to illustrate the works of the poet by a reference to the doctrine of the association of ideas. His general principle will be found in the following quotation.

"I define therefore the power of this association over the genius of the poet, to consist in supplying him with words, and with ideas, which have been suggested to the mind by a principle of union unperceived by himself, and independent of the subject to which they are applied."

Malone conjectured that Shakspeare had passed a part of his early life in the office of the seneschal of some manor court. Some of this critic's conjectures were extravagant enough, but this was certainly a most happy one, and is sustained by the evidence of a great number of passages. The words "suit and service" are continually combined in the language of the feudal law, and those two words seem to have been associated by some recondite principle in the mind of Shakspeare. They do not always occur in *immediate* succession, but the former word seems almost constantly to suggest the latter, which follows it within a line or two.

"How in his *suit* he scorn'd you; but your loves
Thinking upon his *services*"—— (*Coriolanus.*)

"I know thee well, thou hast obtain'd thy *suit*,
Shylock, thy master, spoke with me this day,
And hath preferr'd thee, if it be preferment,
To leave a rich Jew's *service*, to become
The follower of so poor a gentleman."
(*Mer. of Venice.*)

"*Princess.* Biron did swear himself out of all *suit*.
*Maria.* Dumain was at my *service*, and his sword."
(*Love's Labour Lost*)

"What humble *suit* attends thy answer there;
Impose some *service* on me for thy love."
(*Love's Labour Lost.*)

Mr. Whiter's criticisms may be thought somewhat refined, but they emanate from an acute and cultivated mind, and open a new vein of inquiry which deserves to be followed up. Mr. Whiter adopts generally the opinion of Malone, and expresses surprise that he had not adduced a greater number of passages in proof of it. The opinion had also the support of Ritson and Stevens.

Dr. Drake follows on the same side; and, without discussing the question, gives the following passages in addition to those furnished by his predecessors:

"Immediately provided in that case."
(*Midsummer Night's Dream.*)
"Royally attornied." (*Winter's Tale.*)
"That doth *utter* all men's ware-a." (*Ibid.*)
"Thy title is *affeered*." (*Macbeth.*)
"Keep leets and law days, and in sessions sit."
(*Othello.*)

"Why should calamity be full of words,
Windy *attornies* to their *client* woes."
(*K. Richard* III.)

"But when the heart's *attorney* once is mute,
The *client* breaks, as desperate in his suit."
(*Venus and Adonis.*)

"So now I have confest that he is thine;
And I, myself, am *mortgaged to thy will*."
(*Sonnett* CXXXVI.)

"He learn'd but *surety-like* to write for me
*Under that bond, that him as fast doth bind*
The *statute* of thy beauty." (*Sonnett* CXXXIV.)

The two following are pointed out by Stevens:

"As it [the hailstone] *determines*, so
Dissolves my life." (*Anthony and Cleopatra.*)
"Our high plac'd Macbeth
Shall live the lease of nature." (*Macbeth.*)

These, which follow, may properly be added to the list:

"I am still
Attornied at your service." (*Meas. for Meas.*)
"Shall I be charg'd no farther than this present?
Must all *determine* here." (*Coriolanus.*)
"An I were so apt to quarrel as thou art, any man should buy the fee-simple of my life for an hour and a quarter." (*Romeo and Juliet.*)

"By the next new moon
The *sealing day* betwixt my love and me
For everlasting *bond* of fellowship."
(*Midsummer Night's Dream.*)

"And *seal* the *title* with a lovely kiss."
(*Taming the Shrew.*)

"Now must your conscience my *acquittance seal*."
(*Hamlet.*)

Such is the present state of the evidence on the subject, and the weight of it clearly inclines to the conclusion, which gives to the law the honour of so illustrious a disciple as Shakspeare. The establishment of this point might be beneficial in dispelling a very foolish prejudice, that the study of the law has a tendency to narrow the mind. Did it narrow the mind of Shakspeare, who *probably* received a legal education? Did it narrow the mind of Bacon, who *certainly* did! The study of the law upon enlarged principles must tend to expand and invigorate the mind, and the contrary position is either the dictate of prejudice, or the refuge of indolence.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

It appears probable, from the number of new statutes for altering the law, and regulating its administration, that we shall have frequent occasion to notice decisions, of which it must be particularly important to the general practi-

tioner to receive early information. We have therefore made arrangements for a regular report of such new decisions as may be deemed within the general scope of the work.

We also intend to accompany these new cases, and the abridgment of others, with *short occasional tracts* on the general branches of law to which they relate. This plan, we conceive, will be particularly serviceable, not only to every student, but in no small degree also to the older practitioners, amidst the alterations which are constantly taking place. And such a method, we trust, will somewhat relieve this otherwise heavy, though useful, portion of our pages.

AUTHORITY OF COUNSEL AND ATTORNIES.

The court will presume that counsel have authority to enter into such agreements as they make on behalf of their clients. It is for the client to disprove the authority. And especially where the party is present in court, and assents to an arrangement by himself or his attorney, the terms will be enforced.

Disputes having arisen between a husband and wife, and an assault having been committed by the former, for which he was convicted, an agreement was made in court, and signed by counsel, for the allowance of an annuity to the wife, and for other terms of compromise. The court then inflicted a nominal fine only. The husband afterwards refused to pay the annuity, or execute a deed to carry the arrangement into effect.

It was proved that the defendant's solicitor at the trial stated openly in court, in the defendant's presence, in reference to the arrangement, "we agree to it." The chairman of the Quarter Sessions confirmed this evidence.

For the defendant it was proved, by one witness, that he was within hearing of what passed between the defendant, and his attorney and counsel, and that the defendant refused to allow his wife anything, but the witness could not say whether the agreement was signed with, or without the privity or consent of the defendant.

—

It was contended for the defendant, that a party trusts his counsel as to the particular cause in which the brief is delivered to him, but does not make him his agent for a purpose foreign to the cause.

The *Master of the Rolls* said, in the absence of evidence, a court will conclude that counsel had authority. There is evidence on both sides. I think that counsel had authority which would bind his client. Though the defendant objected at first, did he not afterwards assent? The counsel swears that the arrangement was concluded, and that the attorney was present. The chairman said, "I impose a nominal fine upon you, because you have entered into the arrangement." The plaintiff is therefore entitled to a decree with costs. Let a deed be prepared. *Elworthy* v. *Bird*, 1 *Tamlyn*, 38.

—

SOLICITOR AND CLIENT.

It appears that where solicitors are in partnership, the knowledge of a defect by one of them regarding the title to property, will bind the other in a subsequent purchase, in which such knowledge is essential in the way of notice or privity. This point has been decided in the following case; but it is questionable whether it can be extended beyond the precise circumstances of that case.

In 1818, two solicitors in partnership were employed for the purchaser of an estate to investigate the title. It did not appear which of them personally conducted the investigation. The title, however, was allowed to pass, and after the death of the client, and the lapse of eight years from the former purchase, namely, in 1826, one of the solicitors contracted with the widow of the deceased for the purchase of the property, and paid part of the consideration money.

He afterwards objected to the title. It was a circumstance favorable to the bona fide character of the transaction, (though it might not affect its legal nature) that the solicitor had made the purchase for the Norwich Water Company, and this was publicly known at the office of the clerk of the peace, preparatory to an application to Parliament.

The defendant, in his answer, stated he did not recollect or believe that he personally examined the abstract, but that the conveyance was prepared and approved by his partner.

There was no stipulation in the agreement, that the solicitor should take the title as it stood; and it was contended on his behalf, that he was not bound to complete the purchase without a title.

The *Master of the Rolls* held, that a solicitor who had been employed to advise on the title should not, on purchasing the same property from his client, set up an objection which he did not think of any importance when advising his principal. *Beevor* v. *Simpson*, 1 *Tamlyn*, 69.

*Quere*, whether if it had been quite clear that the defendant was personally unacquainted with the defect, the proper remedy would not have been against the partnership, rather than the individual partner who in this latter transaction was acting for a third person?

—

COSTS.

Where one party insists upon that to which he is not entitled, and the other is willing to perform the agreement really entered into, the defendant is entitled to costs, although a decree for specific performance is pronounced for the plaintiff. It is a frequent practice to give costs against a plaintiff who has a decree—the real question being, by whose fault were the costs incurred. 1 *Tamlyn*, 83.

—

AD VALOREM STAMP.

Letters of administration had been taken under £20. It was doubtful whether property of a considerable amount belonged to the administrator of a bankrupt's wife, or to the bankrupt's assignees. It was urged that the ecclesiastical court did not put a stamp when the property was in litigation. But the *Master of the Rolls* said, "I think differently, for I must protect the revenue." The cause stood over, with leave to correct the letters of administration. 1 *Tamlyn*, 144.

—

LIABILITY OF TRUSTEES.

The members of the profession are so frequently appointed trustees and executors in important matters, that it may be useful to notice the following case, which is a liberal construction of their responsibility.

A bill was filed to make executors liable for a sum produced by the sale of £3000 Navy 5 per cents. which had been deposited with country bankers, who had failed.

It appeared the testator had kept large sums in the hands of the same bankers till the time of his death, and had employed one of the bankers' clerks as his confidental agent. The executors employed the same person. In the execution of their trust they contracted for the purchase of an estate, and believing it would be immediately completed, they

sold stock, and deposited the money with the bankers. Delays occurred in the investigation of the title, and before it was perfected, the bankers failed.

It was urged that the stock was sold out before it was wanted, and that the executor's agent, the banker's clerk, must have known the insolvency of the house. However, the executors were wholly unacquainted with it. A reference had taken place to the master, and he had reported in favor of the executors. Exceptions were taken to his report.

The *Master of the Rolls* said that nothing would be more injurious to the interests of society than the allowance of these exceptions. The notice to the agent must be in the character of agent, in order to render the principal liable. The trustees having received satisfactory answers to most of the inquiries, and in order that no time might be lost, sold the stock in August. From circumstances, the conveyance was not completed till February, and before that time the bankers had failed. It would prevent persons from becoming trustees were he to allow the exceptions. He therefore overruled them. 1 *Tamlyn*, 172.

—

MEDICAL CERTIFICATE OF LUNACY.

*Rex v. Jones.*

THIS was an indictment founded on the 9th Geo. IV. c. 41, s. 30, for signing the certificate of the insanity of one Elizabeth Wood, without having visited, and personally examined her, contrary to the provisions of the above statute.

The words of the section are, "that every certificate, upon which any order shall be given, for the confinement of any person, (not a parish patient,) in a house kept for the reception of two or more insane persons, shall be signed by two medical practitioners, each of them being a physician, surgeon, or apothecary, who shall have separately visited, and personally examined the patient to whom it relates, and such certificate shall state that such insane person is a proper person to be confined, and the day on which he or she shall have been so examined, and also the christian and sur-name, and place of abode of the person by whose authority such patient is examined, and the degree of relationship, or other circumstances of connexion between such person, and the insane person; and the name, age, place of residence, former occupation, and the asylum, if any, in which such patient shall have been confined, and whether such person shall have been found lunatic, or of unsound mind, under a commission issued for that purpose, by the Lord Chancellor, or Lord Keeper, or Commissioner of the Great Seal, intrusted as aforesaid, and every such certificate for the confinement of any person in a house licensed under this Act, within the jurisdiction of the said visitors, shall, if the same be not signed by two medical practitioners, state the special circumstances, if any, which shall have prevented the patient being separately visited by two medical practitioners; and any patient may be admitted into any such licensed house upon the certificate of one medical practitioner only, under the special circumstances aforesaid, provided such certificate shall be further signed by some other medical practitioner, within seven days next after the admission of such patient into such licensed house as aforesaid; and any person who shall, *knowingly, and with intention to deceive*, sign any such certificate, untruly setting forth any such particulars required by this Act, shall be deemed guilty of a misdemeanour; nevertheless, if any special circumstance shall exist, which may prevent the insertion of any of the particulars aforesaid, the same shall be specially stated in any certificate, provided always that no physician, surgeon, or apothecary, shall sign any certificate of the admission to any house of reception for two or more insane persons, of which he is wholly, or partly the proprietor, or the regular professional attendant; and any physician, surgeon, or apothecary, who shall sign, or give any such certificate, without having visited, and personally examined the individual to whom it relates, shall be deemed to be guilty of a misdemeanour.

Every count of the indictment charged the offence in the words of the first branch of the prohibitory part of the section to have been committed "knowingly, and with intention to deceive."

The evidence was, that the certificate had been signed by the defendant on the representation of his partner, not having seen the patient for a considerable time before the signing.

Mr. BROUGHAM, for the defendant, objected, that there was a fatal variance here, between the allegations of the indictment and the evidence. No proof whatever that the certificate had been signed "with intention to deceive."

Lord TENTERDEN, C. J. thought there was no evidence of the certificate having been signed, by the defendant, with any intention to deceive. There were two branches of this section: the first prohibited the signing the certificate, with intention to deceive; the second, the signing the certificate without having seen the patient on or about the day of signing. Here all the counts of the indictment were founded on the first branch. Now he thought it might be taken on the evidence for the prosecution, that there was no intention on the part of the defendant to deceive. He should therefore direct the jury to find a verdict of guilty, subject to a special case for the opinion of the court whether the evidence would sustain the indictment in its present form. Verdict, guilty, subject to a case. M. S.

—

BAIL.

Some decisions on the subject of bail, which it is believed have not yet been reported, will not be considered as improperly introduced here.

As to the competency of bail, not housekeepers or freeholders, to justify in respect of *long leases*, a difference of practice existed among the judges of the King's Bench.

Thus, bail have been ruled sufficient by *Bayley, J.*, and insufficient by *Littledale, J.*, *Colson's* bail were rejected by *Parke, J.*, on the ground of their not being housekeepers or freeholders, although they had long leases. However, on hearing that a difference existed in the practice of the judges, he promised to consult them on the subject. On a subsequent day in the next term, his lordship informed the bar, that it had never been the practice of the other courts to let persons, not freeholders or householders, justify in respect of long leases: that it was expedient that the practice of all the courts should conform, and that the judges on conference had determined, that for the future, persons not householders or freeholders should not justify in respect of leases. *Parke, J.*, M. T. 1829.

In an action against four defendants for a bailable amount, two were arrested. They put in bail, but the notice of justification stated, that they would justify for three of the defendants. Holden, that the notice was good. When the bail came into court, they might decline justifying for the third defendant. Per *Parke, J.*, K. B. Michaelmas T. 1830. Denton and others, bail.

## MISCELLANEA.

### ANCIENT NUMBER OF JUDGES.

Formerly the number of judges in each court appears to have been uncertain. From the special commission granted by Henry III. in the forty-second year of his reign, to the justices of the King's Bench, to hold that court at Westminster till he should otherwise determine, it would appear that the number of judges of that court was then three; namely, *Roger de Thurkelby, Gilbert de Preston, and Nicholas Handlo. Dugdale's Orig. Jurid.* c. 17.

The number of judges in the Common Pleas varied considerably. Previous to the reign of Edward II. the number was three. At the commencement of his reign the number was increased to six, on account of the increase of business. They sat in two seperate places, but for how long this practice continued is uncertain. Three years after, 6 Edward II. there were seven; but no more than six in any subsequent year of that reign, nor until 7 Edward III.; then the number of seven was resumed. In 11 and 12 Edward III. they were increased to eight, and by 14 Edward III. Trinity term, they amounted to nine. This appears by the fines levied before them. Afterwards, during the remainder of Edward III. Richard II. Henry IV. and Henry V. there were only five. Henry VI. increased them to seven. After that, the number was reduced, and there were seldom more than five, until 27 Henry VI.; then they were increased to six, and that number remained till 29 Henry VI. In that year, and till 32, they were seven, and then eight. In 33, six; then, and until the latter end of the reign of Edward IV., seven. Then they were reduced to four; and so they remained till the end of Henry VII. It is to be observed, that some of these justices were, at the same time, chief barons of the Exchequer. *Dug. Orig. Jur.* c. 18.

In the Exchequer, under Henry III. three spiritual and three temporal barons sat with *Ranulph de Glanville*, at that time justice of England. *Dug. Orig. Jur.* c. 19.

The power to increase the number of judges is new, as a legislative enactment. It, however, appears to have been exerted as a matter of prerogative by James I. during the greater part of his reign, for the benefit of a casting voice, in case of a difference of opinion, and that the circuits might at all times be supplied with judges of the superior courts. (*a*) In subsequent reigns, upon the permanent indisposition of a judge, a fifth has been sometimes appointed. (*Bl. Com.* vol. 3, p. 41, note *n.*) Sir Thomas *Raymond* mentions the death of Sir Thomas *Twisden*, one of the justices of the King's Bench, in the first week in January, 1682, *grandævus senectute.* He continued judge till his death, but was dispensed with from sitting in court by reason of his age and infirmity. *T. Ray. Rep.* p. 475.

(*a*) The provision intended by this Act, as to the number of the puisne judges who are to sit at a time in the different courts, will have just the opposite effect to that which James I. intended, by his alterations in the number of the judges in the King's Bench and Common Pleas.

—

### THE LATE LORD ELLENBOROUGH,

who was a ripe and a good scholar, was peculiarly happy in his Latin quotations, an instance of which occurred one day in the court of King's Bench. It is well known to the senior members of the profession, that *Erskine* was a great favorite with Lord Kenyon, who, though a rigid moralist himself, and accustomed to treat with severity the slightest deviations from rectitude in others, always looked upon *Erskine's* failings (for he, too, had some of the leaven of human nature in his composition,) with great tenderness and forbearance, apologizing for them whenever they were mentioned, by observing, in his rapid manner, "Spots in the sun! spots in the sun!" But that he had not the same kindly feeling towards *Law* is also well known. One day *Erskine* and *Law* were warmly opposed to each other in discussing some matter before the judges of the court of King's Bench, when Lord *Kenyon* appearing to lean in favor of *Erskine*, and the puisne judges seeming disposed to side with their chief, *Erskine*, in anticipation of victory, became more glowing and animated than usual, which so irritated *Law*, who thought that the justice of the case was with him, that, at the conclusion of his speech, turning towards his opponent, he indignantly poured forth, in his deep and manly tone, the following quotation from the 12th Æneid of Virgil:

* * * * non me tua fervida terrent,
Dicta, ferox, Dii me terrent et Jupiter hostis.

Those who remember *Erskine* in his best days will feel that the epithet "fervida" was as characteristic of his glowing eloquence, as "ferox" was foreign to his kind and amiable disposition, and that whilst "Dii" was a suitable appellation of the puisne judges (who may be considered as a sort of dii minores, or terrestrial deities), "Jupiter hostis" was powerfully descriptive of the omnipotence of their chief, and of his dislike of *Law*; in fact, a quotation so apt in all its points (except the one alluded to) to the occasion and the persons, very rarely occurs.

—

### THE FIRST LAW BOOK.

Macklin at first designed his son for the law, and for this purpose entered him in the Temple, where he procured him chambers, a library, &c. rather above what he could afford, considering the casualty of his income. "And what book, sir," said the veteran, in telling this circumstance, "do you think I made him begin with? Why, sir, I'll tell you,—the Bible—the Holy Bible." "The Bible, Mr. Macklin, for a lawyer!" "Yes, sir, the properest and most scientific book for an honest lawyer, as there you will find the foundation of all law, as well as all morality."

*Memoirs of Charles Macklin*, 1804, p. 308.

—

### LORD MANSFIELD.

Previous to his lordship's elevation to the bench, he had much practice at the bar of the House of Lords. This is alluded to by Pope:

"Grac'd as thou art with all the power of words,
So known, so honour'd, in the House of Lords."

This couplet does not manifest the poet's usual skill. The familiarity of the second line, contrasted with the dignity of the first, renders it worthy of a place in Scriblerus's Treatise on the Bathos. It was not unhappily parodied by Cibber:

"Persuasion tips his tongue whene'er he talks,
And he has chambers in the King's Bench walks."

The ridicule would, however, have been more striking, if the writer had preserved his gravity in the first line, and had substituted for the ludicrous verb "tips," the word "guides," or "rules."

From another of Pope's productions, his first ode in imitation of the fourth book of Horace, we may fix the exact locality of the "silver tongued" advocate's chambers:

"To *number five* direct your doves,
There spread round Murray all your blooming loves."

# The Legal Observer.

VOL. I. SATURDAY, NOVEMBER 20, 1830. No. III.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative an d reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## PRACTICAL DISSERTATIONS ON CONVEYANCING.

NO. I.

### DIRECTIONS FOR THE STUDY OF THE LAWS OF REAL PROPERTY.

BLACKSTONE commences his Commentaries by an Introductory Lecture, shewing the great importance of the study of the law, not merely to lawyers, but also to all other classes of the community; and it would be easy to prove, that if this be more correct in any particular branch than in the others, it is in the study of the laws of property, or that portion of legal learning which is comprised under the general term *conveyancing*. A man may never bring an action at law or file a bill in equity, during the course of his life, but he is always the possessor of some portion of property, large or small, which he or his relatives have acquired, and which he wishes to enjoy with comfort and security during his life, and to hand down to others on his death. He will probably, without passing through a very eventful or busy existence, become a party to most of the transactions common in conveyancing. He generally either becomes the purchaser of lands, or he rents a house; in the one case a *purchase deed*, in the other a *lease*, will be wanted; he is desirous of raising a sum of money, and a *mortgage* is the security demanded from him; he marries, and a *settlement* for the mutual benefit of himself, his wife, and his children, becomes expedient; he is anxious to transmit his property according to his own notions of the manner in which it should be enjoyed, and he finds it necessary to make a *will*.

The importance, therefore, of every one possessing some knowledge of all these commonplace transactions, will readily be seen and admitted; but if an acquaintance with the laws of property is an agreeable and useful accomplishment to the man of the world, to the legal practitioner, of whatever class, it is indispensable. The principles of the law of property are derived from well known and intelligible sources, and their application in practice is constantly demanded.

At least one half of all the causes which are tried in the courts of justice in England, whether in equity, at common law, or in the ecclesiastical courts, arise entirely from disputed questions on the laws of property; and two-thirds of the causes so tried involve indirectly some point relating to them. To the barrister, therefore, and to the student for the bar, whether practising, or intending to practise, in the upper or the lower end of Westminster Hall, a familiarity with these laws is absolutely necessary. To the solicitor and attorney, and to those who are qualifying themselves for that branch of the profession, it is at least as requisite. In the difficulties and intricacies of pleading, in the strife and turmoil of a court, the attorney can call in the assistance of others, and may rely almost devotedly on them. So also, on many embarrassing questions depending on the laws of real property, he may obtain the advice of counsel. The abstruse case, the voluminous abstract, the perplexing conveyance, may all be laid before the conveyancer, and the responsibility thrown upon him. But there are many duties, not less important than these, for the discharge of which the attorney must solely rely upon himself and his own sources of information. If employed for a vendor or mortgagor, he must prepare the abstract of the title-deeds, wills, and other documents; if employed for a purchaser or mortgagee, he must compare the abstract delivered, with the original deeds, and other documents abstracted. These duties alone, to be efficiently discharged, require no inconsiderable knowledge of the laws of property, and the formal language of legal instruments; and the solicitor must remember, that he is positively responsible to his client for fulfilling this portion of his labours faithfully and correctly, and that he can in no manner avoid the penalties to which his neglect or ignorance in these particulars will expose him. Thus, where an attorney acts for a client who advances money on the security of legacy given under a will to the borrower, the attorney is not justified in relying upon a partial extract from the will furnished by his client, but must consult the whole of the original will, unless the latter agrees to take the responsibility on himself. *Wilson* v. *Tucker*, 3 *Stark.* N. P. C. 154, S. C. 1 *Dow. and Ry.* N. P. C. So also, where an attorney was employed by a purchaser to inspect the title of an estate,

and an abstract was delivered to him on behalf of his client. The attorney laid an abstract before counsel for his opinion, containing only some of the deeds, and omitting others contained in the abstract delivered to him. The opinion of counsel (Mr. Preston,) on the abstract delivered to him, was, that the vendor had a good title; but that opinion would not have been given, if the deeds omitted had been stated to him in his abstract; and it was held, that the attorney was personally liable for the damage which the purchaser sustained from the invalidity of the title, Mr. Justice Bayley observing, that "It was the duty of an attorney to take care not to draw wrong conclusions from the deeds laid before him, but to state the deeds to the counsel whom he consults, or he must draw conclusions at his peril." 3 *Barn. and Cress.* 799.

Now, in these cases no fraud, no desire to deceive, was imputable to the attorney. He was merely held liable from his neglect of the duties of his profession, and they are cited for the purpose of shewing how easily a man who will not give himself the trouble of acquiring the proper knowledge, may not only injure the most important interests of his client, but may himself be forced to make good the damage arising from his neglect.

The importance of the knowledge of the laws of property to the professional man being admitted, the next inquiry is into the means of obtaining it. And let it not be supposed that these are very distressing or laborious. The principles of conveyancing, if the student will only enter heartily and earnestly into the enquiry, may now speedily be acquired. At a former period his difficulties were much greater; he had himself to explore, without any guide, the vast but undigested stores contained in Lord Coke's Commentary on Littleton, or Rolles' Abridgment. He had to dig his learning himself out of these mines. His task at the present day is much more easy. Elementary books have been written by some of the most eminent men; treatises on every subject abound; he has now nothing to disgust or frighten him in the study; the folio volume has been superseded by the octavo; the black letter has entirely disappeared; the important difficulties are done away; and all that is wanted for the pursuit, is a moderate portion of industry, ability, and perseverance. The blame if the student did not advance, might formerly have fairly been laid to the dryness of the study and its varied and numerous difficulties; at the present day the blame can only attach to himself.

In recommending a course of study upon the laws of property, we shall choose that which we have found answer best in practice; other courses recommended by several eminent men will be pointed out (*a*), but the one to which we shall call the reader's attention will be found to be more short and simple than any of these, and we know that it has been found very extensively serviceable, and has answered the end designed.

In the first place we should advise the student to devote at least six hours daily to reading; "seven hours to law," was Sir William Jones's translation of Lord Coke's "*sex horas*," and the student may so translate it if he will; but six hours, properly employed, are, we think, at first sufficient. They must, however, be given at the best time of the twenty-four, when the mind is most fresh, and most susceptible of acquiring information; they need not be six *consecutive* hours; they had better, in fact, *not* follow each other, but they must be actually devoted to study. It will not be sufficient that the student shall pass the time in company with his books; he must make himself certain that he has actually acquired some knowledge during the intercourse; before commencing his day's study, he must inquire whether he recollects any thing of his yesterday's. He should be satisfied that he is in the right course, and that he is daily obtaining information: he must reflect on his legal pursuits in his leisure hours, and in his walks; nay, it will not be amiss if he dream a little about them, for that will prove, that his mind is thoroughly engaged in the study.

We have been thus minute, because we know how useless and tiresome mere general rules are; and we shall, throughout this course of dissertations, continue to be as minute and particular in our directions and details as possible, because we know it will be of service to the student.

The first book which the student of the laws of real property should take up, is the second volume of Blackstone's Commentaries. Since this work was written, the principles of conveyancing have undergone some variation; the author, moreover, was not a practical conveyancer; and, in reducing the large mass of learning contained in the earlier writers into a system, he was occasionally led into error; but, notwithstanding these disadvantages, the second volume of Blackstone will still be the best first book for the student. He will find the principles of the laws of property clearly stated and arranged; he will get a general view of the information which he is to obtain, he will meet with definitions and explanations of all technical phraseology, and he will find the whole written in a language so beautiful and harmonious, that it will be singular if he be not delighted with the study. Besides, on many points, the information which he obtains from Blackstone will be all that he will need.

To the study of this volume, then, the student must devote himself. A modern edition will of course answer better than an old one, but the notes generally appended will not be found of much service,—the text must be the great object of his study. He will go through it chapter by chapter, and master every sentence: the slowness of his progress through

(*a*) The recommendations of different learned persons as to the study of the law, will be given in our next number.

the volume is immaterial—let him only fully understand and reflect upon every thing he reads; if he cannot fully comprehend it, let him look at the authorities referred to, if there be any, although they will not always help him much; if he is still in doubt, let him ask some competent person the meaning of the passage, but let him never leave it until he is satisfied he fully understands it.

Blackstone's second volume should always be read *twice*, and it depends upon the manner of the second reading, whether it should not be read a third time. If, on a second reading, the student finds he is perfectly familiar with its contents, he may then leave it; but, if he finds the subject still fresh to him, and that he does not remember much of it, he should read it again and again, until he almost knows it by heart. The great rule with Blackstone, and other *good* books, is, that you should never leave them without carrying away all they contain, and making it a portion of your own stock of knowledge.

If the student follows these directions, he will have gained this great advantage, that, if he takes up any other work on the laws of property, he will know, before reading it, some portion of its contents. He will be already the proprietor of a little stock of knowledge, and he will be continually adding to the heap. He will carry with him to the consideration of a fresh branch of the subject, some knowledge of the other branches, which will afford him the greatest assistance. His notions will be precise and accurate, and not mere floating generalities.

The next work to be taken up is Mr. Butler's Notes to Lord Coke's Commentary on Littleton, particularly the long and able note upon uses and trusts. Here he will find the most important practical information presented to him clearly and correctly. We think that Lord Coke's Commentary may safely be passed over except as a work of reference. We are thoroughly convinced that it is not the book to be put into a student's hands: the quaintness of the style, the mass of useless matter, the diffusiveness on unimportant points, the entire omission of others now rendered important; all these faults, of which this celebrated work is undoubtedly guilty, disqualify it in our opinion from being a student's book. All the useful information it contains may now be much more easily and readily obtained in other works. We therefore are happy to remove this heavy obstacle from the path of the conveyancing student.

Having fully mastered Mr. Butler's notes, we next recommend Mr. Sanders's Essay on Uses and Trusts, in which this important learning is ably and perspicuously treated. The following works should then be most attentively read in their order: Cruise's Digest; Sugden's Powers; Fearne on Contingent Remainders; Preston's Treatise on Conveyancing; Powell on Devises; Roberts on Wills; Powell on Mortgages, by Coventry; and the first edition of Preston on Estates. All these are excellent works, and cannot be too well known.

If the student is master of these volumes, he will be now well acquainted with the theory of conveyancing. He will have a competent knowledge of one great branch of property law, and he should then turn his attention to the other great branch, the practice. He must endeavour to get a competent knowledge of abstracts of title and of deeds. Here he will meet with more difficulty in obtaining his information merely from books. The chambers of a conveyancing counsel, or the office of a solicitor, will be the best places for acquiring this knowledge. These, however, may not be open to him; or, if they are, some preparatory information may still be useful, and he may derive benefit from the following observations.

Let him read with the greatest attention Sugden's Vendors, a work replete with the most useful practical information. He may also peruse more cursorily Preston on Abstracts, a book containing some valuable matter. The fourth vol. of Cruise's Digest should also be carefully perused a second time. The student may also consult with advantage the works containing Precedents in Conveyancing, and make himself master of the legal phraseology, and the usual forms employed in legal instruments. There are now several very valuable collections of these before the profession.

Having mastered all these works, the student will have attained a very tolerable knowledge of conveyancing. His progress will not depend on the number of books read, but on knowing a few good books well, and with the help of those already named, he will be prepared for all ordinary transactions. He may safely add many other modern treatises, which are considered of authority.

At his leisure he may take up the reports, but here he must exercise some discretion. He may, we think, safely leave the elder reporters, and keep them merely as works of reference, but he should read all the cases upon the law of property, in the more modern reporters, beginning with Atkins in the courts of equity, and Lord Raymond in the courts of common law. This of course will be a work of time, and must be necessarily much disturbed by business, but we should advise its steady pursuit.

We shall now bring our observations to a close. In the first part of his studies the greatest endeavours should be made to acquire clear and precise ideas on the nature and kinds of property, the estates for which it may be granted and held, and the usual manner of alienating property. We shall, in an early number, direct our attention to these subjects, and in the course of these dissertations we shall, from time to time, apply ourselves practically to the difficulties of conveyancing, and endeavour to remove them.

It will, we think, be no slight incentive to the earnest consideration of the subject, for the

student to reflect that it will make him master of a science which will be of practical importance in almost every great event of his life, the knowledge of which, to any extent, will be shared with him by a very limited class of persons; and that he will thus acquire a decided and well earned superiority over his fellow citizens.

## IMPROVEMENTS IN CHANCERY PRACTICE.

[CONTINUED.]

IN our second number we introduced part of the communication of a correspondent, with regard to answers sworn in the country, and their mode of transmission to the six clerks. We now conclude the article by suggestions as to affidavits and witnesses, and the other general business of the public office in chancery.

*Affidavits*

should be sworn before the clerk of the Affidavit office, where they are filed, and not before a master, and then taken to be filed at the Affidavit office, which may be at a great distance, for what is to prevent its being in the Temple, or Gray's Inn, or at a place still more remote.

*Affidavits in Bankruptcy*

should be sworn at the Bankrupt office where they are filed.

*Witnesses*

should be sworn before the examiner.

By this arrangement, the principal part of the business of the public office would be annihilated, and the remainder might be transferred to other offices, where it would be more appropriately transacted; for instance, the acknowledgment of deeds and recognizances should go to the Inrolment office, where they are inrolled and filed; and so of other business.

Thus the functions of the public office would be at an end, and the masters relieved from the troublesome and irksome duty of sitting from ten till two, and from six till eight, merely to hear the clerk administer an oath, or ask a question, and sign their names, and would be enabled to devote their valuable time to the more important duties of their chambers. According to the present mode, the services of one master during all the year round are consumed at the public office in transacting very unimportant matters.

I am not aware of any objection that can reasonably be made to this arrangement. The principal ones which an advocate for reform has to encounter, are, that fees are taken from some without compensation, and new duties cast upon others without remuneration. Now this account may easily be adjusted. If the masters object because it would diminish their fees, let an account thereof be kept at the different offices to which the business is transferred, and let the amount be paid to them. The clerks of those offices cannot with any reason object to the additional duties thereby thrown on them, for there is no more trouble in both swearing and filing an answer or affidavit, than in doing the latter only; but, if it should be thought just that those who will have to perform the duties should be paid for it, then let a part of the master's fee be paid to them; and, if the masters should object to give up part of their fees, and the officers to which the business is proposed to be transferred, refuse to transact it without being paid for it, why, then, let there be a small addition to the fees already paid, and even then the public will be benefited, for the journeying from one office to another to do different parts of the same business, all of which might be performed in one office, serves only as a pretext for making as many charges; whereas, if it were all transacted under the same roof, the pretext would be taken away.

I cannot for a moment suppose, that any objection will be made to it on the score of the solemn nature of an oath; and that, therefore, it ought to be taken before a person of weight and consideration, for any person may be named in a commission to take an answer, and an affidavit in chancery may be sworn, and a deed acknowledged, before any solicitor who will be at the expense of being made a master *extraordinary* in Chancery; and, if there was any weight in this objection, every person swearing to an answer or affidavit ought to come to town to do it before a master in chancery (*a*).

## LONDON UNIVERSITY.

*Report of the Law Class for the Session* 1829-30.

THE students of the law class, desirous that the system of legal education, pursued in this university, should be more generally known, requested and obtained the permission of Professor Amos to publish his Report. Our limited space restrains us from inserting this

(*a*) It may be a matter of curious history to add, that the public office was established by 13 Car. II. s. 1, by which, after reciting, "That it hath bin found inconvenient for suiters to put in answers, or returne commissions in the private studdyes of the masters, so that through the difficulty of finding such answeres and commissions (with what master they were left,) or through the master's absence at such time as they are called for, it frequently happens that persons conceived to be in contempt are exposed to much trouble and charge thereby. And it is more proper, safe, and satisfactory to the subject in generall, that affidavits, answeres, recognizances, and acknowledgments of deeds, should be dispatched in some publique, certaine, and open place, where the persons that doe the same may be publiquely seene and knowne, rather than in private studdies or houses, it is enacted, that from and after the three and twentieth day of October, 1661, there shall be one publique office kept, and noe more, as nere to the Rolls as conveniently may be, in which the said master's, some or one of them, shall constantly attend for the administering of oathes, caption of deeds, and recognizances, and the

document at length, but we present it in an abridged form.

The number of the law class has this session amounted to 111; of which number about a fourth part has been attending for a second year.

With respect to the diligence of this numerous class: there has never been a thin attendance, for a single evening, from the commencement to the conclusion of the course.

The legal conversations which have been held every week, have afforded convincing proof, that the gentlemen attending have not only comprehended, and fixed in their memories all the information that has been conveyed to them, but that they have also exercised much research and reflection upon subjects, with regard to which the professor could attempt no more than merely to excite their curiosity.

A society for the discussion of questions of law and jurisprudence has been instituted by the students themselves. The meetings have been held within the university, and they have been found productive of much benefit, in consequence of their affording an additional incentive to reading, besides encouraging the cultivation of those talents which are useful in transacting the public business of courts of justice.

The excellent law library which the university possesses, has held forth great inducements to study; especially as it has afforded an opportunity of examining, at the moment, the authorities referred to in the lectures.

The law class has been indebted to Dr. Turner for two lectures upon such species of chemical information as it is useful for lawyers to be acquainted with, especially with regard to the examination of medical evidence.

The professor feels anxious, in case there be found a desire among any considerable number of students for more minute and detailed information upon particular branches of law, than is consistent with the plan of his lectures to give, that this want should be supplied. He invites, therefore, gentlemen of the profession, whose qualifications may be approved of by the council, to give courses of lectures, within the university, upon subjects more particularly lying within the sphere of their practical experience.

There have been three examinations in the course of the session, and after each examination three prizes have been distributed.

A subscription has been entered into, by the students of the class, for the purchase of prizes, to be awarded upon an examination, to take place next October, in Lord Coke's Reports.

It is proposed, in the course of the next year, to establish a prize essay upon some subject connected with the history and the improvements of the English law.

The prizes which are about to be distributed have been awarded as the result of an examination in the lectures of the entire course. The first prize has been adjudged to Mr. Richard Davis Craig, the second to Mr. Joseph Watson, the third to No. 68.

Besides these prizes, certificates of honour have been awarded to three candidates of equal merit, Mr. Gale, Mr. Udall, Mr. Tatham.

It is due also to Mr. Thomas Abbott to mention, that he has shewn a very general and competent knowledge of the subjects of examination.

Many of the other candidates have displayed great industry and talent in the course of the examinations, and are deserving of great commendation.

dispatch of all matters incident to their office, (references upon accounts and insufficient answers only excepted,) from the houres of seaven of the clock in the morning, until twelve at noone, and from two in the afternoone until six at night."

## THE LAW INSTITUTION.

THE Inns of Court and Chancery, which constituted a species of law university, where the members possessed the advantage of extensive libraries, and the means of improving themselves, by legal and forensic exercises, were anciently not confined to the graduates of the bar, but included the attornies at law, who, like the rest of the members, assembled in commons at stated parts of each term.

Amongst the alterations which time has wrought in the legal profession, we may notice the disuse of the ancient regulations with regard to attornies, by which they were required "to come into commons, according to the custom and orders of those societies, *to their great ease in transacting causes one with another.*"(a)

The circumstances under which these rules were permitted to be disregarded. it is needless in this place to investigate; but it appears that the profession soon felt the importance of establishing a substitute for those venerable associations; and accordingly, in the year 1739, the *Law Society* was formed expressly "for the purpose of supporting the honour and independence of the profession, promoting fair and liberal practice, and preventing unnecessary expense and delay to suitors." About ten years ago, another association for similar objects was instituted, called the *Metropolitan Law Society*, and numerous *clubs* of solicitors, both in London and in different parts of the country, have also, from time to time, been established for the furtherance of the respectability of the profession. These at length have been followed by the *Law Institution*, which has been framed upon a larger scale of utility.

The following is an account of its *origin*, and in a future number we shall detail its various important *objects* and advantages:

The plan of the Institution originated with some individuals in the profession, who were desirous of increasing its respectability, and promoting the general convenience and advantage of its members.

It appeared to them singular, that whilst the various public bodies and commercial classes in the metropolis, and indeed in many of the principal towns in the kingdom, had long possessed places of general resort, for the more convenient transaction of their business; and while numerous Institutions for promoting Literature and Science amongst all ranks of society had been long established, and others were daily springing up, the attorneys and solicitors should still be without an establishment in London, calculated to afford them similar advantages.

To supply this desideratum, and afford other professional facilities, the present Institution was suggested. The outline of it having been in the first instance submitted to the consideration of the

(a) The last rule of court on this subject was in 1704.

more immediate friends of the parties with whom the plan originated, and from whom it received the most unequivocal proof of approbation, measures were adopted for submitting the plan to the profession at large. A meeting accordingly took place, at which the subject was discussed and referred to the consideration of a provisional committee, who having made their report, a general meeting was held, at which the measure was finally approved, and a Committee of Management appointed to carry it into execution.

For effecting the purposes of the Institution, it was considered necessary to raise a fund of £50,000, in shares of £25 each, payable by instalments, no one being permitted to take more than twenty shares. The plan having been generally announced to the profession, a large proportion of the shares were immediately subscribed for, so that no doubt remained of the success of the design, and the committee therefore directed inquiries to be made for a site for the intended building, and succeeded in obtaining an eligible one in *Chancery lane,* nearly opposite to the Rolls Court, and extending to Bell yard; thus having the advantage of two frontages, and, from its contiguity to the Law Offices and Inns of Court, being peculiarly adapted to the objects of the Institution.

## THE LAW SOCIETY.

PUBLIC observation having been directed to the recent proceedings of this Society, and three of the resolutions of its last general meeting having been quoted in one of the newspapers, we conceive it will be interesting to our readers to peruse the whole series.

At a general meeting of the Society of Practitioners in the courts of Law and Equity, resident in and near the metropolis, established in 1739, for the purpose of supporting the honour and independence of the profession, promoting fair and liberal practice, and preventing unnecessary expense and delay to suitors, held at Furnival's Inn Hall, on Wednesday the 11th day of August, 1830. Benjamin Brooks, esq. in the chair:

Resolved,

1st. That the unbounded confidence reposed in attornies and solicitors, by persons of every rank in society, for the protection of character, liberty, and property, renders it highly expedient that they should be men of education, honour, and integrity, and supported in public estimation.

2d. That the imputations cast upon attornies and solicitors, of causing delay in the administration of justice, increasing expense in legal proceedings, and claiming excessive remuneration for their services, are (as applied to them generally) unfounded and unjust, and calculated to injure and degrade them, and to weaken the confidence so essentially necessary to public security. Yet so long as those imputations were general, the Society did not attempt to counteract them; but having been lately brought forward and embodied in proposed legislative enactments, (thus to obtain the sanction of the highest tribunal of the country,) it has become necessary to protest against such aspersions.

3d. That the duties of attornies and solicitors involve great responsibility, labour, and anxiety, and require talent, experience, attention, and perseverance, not only in the arrangement of property under family settlements and wills, but in collecting and scrutinising facts and circumstances, and arranging evidence for judicial investigation and decision; and without their assistance in these important legal preparations, no benefit could be derived from counsel, however eminent, and the greatest confusion, embarrassment, and delay, would necessarily ensue; rendering it impossible for judges or jurors to perform their respective duties satisfactorily to themselves, or beneficially to the country.

4th. That delay in legal proceedings is disadvantageous to the attorney and solicitor; because it increases his risk of loss, diminishes the benefit of an early return of capital, and postpones the remuneration for his services; consequently every attorney and solicitor is interested in the despatch of business; and delay generally arises out of circumstances over which he has no control.

5th. That the greater part of the expenses attendant on legal proceedings is composed of fees to counsel, and officers of the several courts, payments to witnesses, and other disbursements, which attornies and solicitors are obliged to advance, and from which they derive no emolument, consequently they are interested in keeping down such expenses; since, if they do not obtain payment of their bills, (the amount of which is materially increased by such outlay,) the loss of the whole falls upon them; no part of such fees or payments being returned.

6th. That the remuneration allowed to attornies and solicitors, in actions and suits, is not commensurate with their skill and exertions, taking into consideration their responsibility, the expense of their professional education, the heavy stamp-duties on their articles, admission, and annual certificate, the pecuniary risks they run, the capital they employ, the salaries of clerks, and other expenses incident to all respectable establishments.

7th. That the modern practice of appointing barristers to fill those situations at the government boards, which were formerly held by attornies and solicitors, tends not only to deprive them of their fair rights and honourable inducements to practice, but to raise an inference of their incapacity, which the Society consider the less called for, as they reflect with pride and satisfaction, that many most eminent chancellors, chief justices, judges, and counsel, have risen from, or been educated in, their branch of the profession.

8th. That nothing can be more dangerous to the property and interests of the community than the hasty adoption of entire untried systems, under the delusive appellation of necessary practical reform; and many of the changes in the administration of the law, which have been contemplated, and particularly of those included in a Bill recently brought into parliament, are, in the opinion of this Society, calculated to foster petty dissentions, encourage a spirit of litigation, and prevent men of liberal education, character, and respectability, from entering the profession, or practising as attornies and solicitors, and thus to deprive the public of the security hitherto felt in their confidential advisers.

BENJAMIN BROOKS, *chairman.*

## NEW BILLS IN PARLIAMENT.

WE present an analysis of two bills lately introduced by the Chief Justice of the court of King's Bench. There are three other bills, a summary of which we are unable to insert in the present number.

The first of these bills is one of extensive utility. Its object is to settle, by *arbitration,* all controversies relating to matters of *account,*

giving the judge power to direct a reference; and enabling the referees to discharge their duty with due effect.

It is well known that actions of this kind, after they are brought into court at great expense, are necessarily referred to the decision of arbitrators, it being impracticable, consistently with the interests of public justice, to devote sufficient time to the investigation of the various items of a debtor and creditor account, each of which might form a separate issue, to be tried by the jury.

The difficulties in regard to the examination of *witnesses*, when out of the jurisdiction of the court, or unable from distance and infirmity to attend in person, have been long felt to be great hindrances in the administration of justice. They are now proposed to be removed by the provisions of the present bill, in which, however, due precautions are taken to secure the important object of the personal examination of witnesses, wherever it can be obtained.

These are improvements which we consider honourable to the distinguished personage by whom they are recommended, and we trust, that, by similar means, all other defects in our judicial system will be gradually corrected; thus, facilitating the dispensation of justice, and lessening its expense.

---

*An Analysis of a Bill, intituled, "An Act for settling Controversies by Arbitration."*

This bill, which was ordered on the 8th instant to be printed, recites that the determination of controversies by arbitration is often conducive to justice, and advantageous to the parties; but controversies cannot now be referred to arbitration without the consent of the several parties thereto, and such parties are sometimes deterred from submitting their differences to arbitration by reason of the want of sufficient means to enforce the attendance of witnesses and performance of the award. It is therefore proposed to be enacted that, in all actions wherein the matters in dispute might be made an action of account, or consist of pecuniary demands, the court or any judge thereof may order such matters to be referred to an arbitrator. That in actions involving any question of law or matter of fact, the court may order a special case or a trial of such matters to be had, and refer the other matters in dispute. But without preventing a special verdict. That, unless by special direction of the court or judge, the costs shall follow the event; but if other matters are referred by consent, the additional costs to be in the discretion of the arbitrator. That the arbitrator be empowered to direct a judgment to be entered. That the court may interfere to relieve parties affected by references made without consent—application for such relief to be made within a limited time. That the entry of records of submissions to arbitration may be made at any time, either in term or vacation, and that the court may compel the attendance of witnesses, and the production of documents. Witnesses entitled to expenses. That arbitrators be empowered to administer oaths. That the power of the arbitrator shall not be revoked without leave of the court. That an enlargement of time may take place without rule of court. That if payment of money or delivery of possession of lands ordered by an award is not made, the award may, at any time, be entered of record, and be of the same force as a judgment, except as to becoming a charge upon lands, &c. That the court as well before as after award may proceed by attachment, according to 9 and 10 William III. Matter that may require the adjustment or settlement of the account of any personal estate of any testator or intestate, shall not be referred without the consent of the person or persons having the administration of such estate; and the adjustment or settlement of the account of any real estate not to be referred without the consent of the persons chargeable in respect thereof as heirs or devisees.

---

*An Analysis of a Bill, intituled, "An Act to enable Courts of Law to order the Examination of Witnesses upon Interrogatories and otherwise."*

This Bill, ordered to be printed on the 8th inst. recites, that great difficulties and delays are often experienced, and sometimes a failure of justice takes place, in actions depending in courts of law, by reason of the want of a competent power and authority in the said courts to order and enforce the examination of witnesses, when the same may be required, before the trial of a cause: and it also recites, that by an Act passed in the thirteenth year of the reign of his late Majesty King George the Third, intituled, An Act for the establishing certain Regulations for the better Management of the Affairs of the East India Company, as well in India as in Europe, certain powers are given and provisions made for the examination of witnesses in India in the cases therein mentioned; and that it is expedient to extend such powers and provisions: it is therefore proposed to be enacted, that the powers of the recited Act be extended to all the colonies, and to all actions in his majesty's courts at Westminster, Lancaster, and Durham, when examination by a commission shall appear necessary. That the courts may order the examination of witneses within their jurisdiction by an officer of the court; or may order a commission for the examination of witnesses out of their jurisdiction. That the courts shall have power to compel the attendance of witnesses, and the production of documents. Witnesses entitled to expenses. That the examinations of witnesses shall be upon oath. Persons appointed for taking examinations to report to the court upon the conduct or absence of witnesses, if necessary. That the costs of the order for examination may be made costs in the cause, except otherwise directed by the court or judge. That no examination or deposition to be taken by virtue of this Act shall be read in evidence without the consent of the party against whom the same may be offered, unless it shall appear that the examinant or deponent is beyond the jurisdiction of the court, or dead, or unable from permanent sickness or other permanent infirmity, to attend the trial, in all which cases the examinations and depositions shall be received and read in evidence, saving all just exceptions.

---

## REVIEW.

*A Practical Treatise on the Law of Patents for Inventions, by* EDWARD HOLROYD, ESQ. *Barrister at Law, Commissioner of Bankrupts.* Richards, 1830; Pp. 236.

THE power of conferring on the inventor or first importer of any useful manufacture or art, the right of using or vending the same for a

reasonable time, appears to have resided in the crown at common law; and it was to correct the abuse of that power, and the mischiefs arising from the monopolies which its undue exercise had engendered, that the statute of 21 Jac. 1. c. 3, was enacted. That statute has always been considered as *declaratory* of the common-law prerogative; it did not render any patents lawful after, which were not so before. The principal section of this Act is the sixth, which provides that no declaration before mentioned in it, shall extend to letters patent for the term of fourteen years or under, for the sole working of any new manufactures to the true and first inventor; but that the same shall be of such force as they would be, if this Act had never been made.

Lord Coke was chairman to the committee on the passing of the bill, and being thus especially conversant with the measure, his opinion upon the sixth section is valuable. Mr. Holroyd has quoted it from the 3 Inst. 183, 184: it is at page 6 of the work now before us:

"Letters patent to come within the proviso in the sixth section of 21 Jac. I. must have seven properties.

"1. They must be for the term of fourteen years or under.

"2. They must be granted to the first and true inventor.

"3. They must be of such manufactures which any other, at the making of such letters patents, did not use; for albeit it were newly invented; yet if any other did use it at the making of the letters patents, or grant of the privilege, it is declared and enacted to be void by this Act.

"4. The privilege must not be contrary to law; such a privilege as is consonant to law must be substantially and essentially newly invented; but, if the substance was in *esse* before, and a new addition thereunto, though that addition make the former more profitable, yet it is not a new manufacture in law; and so was it resolved in the Exchequer Chamber, Pasch. 15 Elizabeth, in Biroot's case, for a privilege concerning the preparing and melting, &c. of lead ore: for there it was said that that was to put but a new button to an old coat; and it is much easier to add than to invent. And it was there also resolved that if the new manufacture be substantially invented according to law, yet no old manufacture in use before can be prohibited(*a*).

"5. Nor mischievous to the state, by raising of prices of commodities at home. In every such new manufacture that deserves a privilege, there must be *urgens necessitas* and *evidens utilitas*.

"6. Nor to the hurt of trade. This is very material and evident.

"7. Nor generally inconvenient."

Lord Coke's notions of inconvenience are at variance with those of our political economists; for, as an instance of inconvenience, he states that "There was a new invention found out heretofore, that bonnets and caps might be thickened in a fulling-mill; by which means more might be thickened and fulled in one day, than by the labours of fourscore men who got their livings by it. It was ordained (by statutes 22 Edward IV. c. 5 and 7, Edward VI. c. 8; which were repealed by 1. Jac. I, c. 25,) that bonnets and caps should be thickened and fulled by the strength of men, and not in a fulling-mill; for it was holden inconvenient to turn so many labouring men to idleness."

Mr. Holroyd arranges his subject under the following heads:

"1. Of the nature of the invention for which a patent may be granted.

"2. Of the person to whom and for what time a patent may be granted.

"3. Of the manner of passing a patent; of the caveat; and of the inrolment of the specification.

"4. Of the patent, its form and provisions, and herein more particularly of the denomination of the invention in the patent, of the specification, its form, and requisites; and of the rule of construction applicable to the patent and specification.

"5. Of the title of the patentee; assignment of a patent; and licences to use the invention.

"6. Of enlarging the term of letters patent, and enabling the benefit of an invention to be assigned to more than five persons.

"7. Of the remedies for an infringement of a patent; and what is an infringement.

"8. Of the repeal and surrender of a patent."

This division appears to be the natural and proper one, and it does not materially vary from that made by Mr. Godson in his Practical Treatise on the Law of Patents for Inventions, and of Copyright (*a*).

With regard to the first head,—the nature of the invention; the sixth section of the 21 Jac. I. c. 3, contains the phrase "new manufactures," and no further definition of the inventions upon which letters patent may be granted. But according to the liberal construction which this Act has received, it has been made to comprehend an immense variety of inventions in things made, and in the mode or practice of making them.

The true and first inventor is, 1. A person who discovers an invention, or who, under the protection of a patent, first publishes it to the world, 2. A person who brings from abroad, or has had communicated to him by a foreigner, an invention, which he first publishes in England under a patent. Thus the inventor may be a discoverer of a new thing; a publisher of an invention; or an introducer of a foreign invention.

It is sometimes difficult to substantiate the pretension of being the first inventor. It was objected to Dollond's patent for making object glasses, that Dr. Hall had made the same discovery before him; but it was decided that as the doctor had not com-

(*a*) "It has long been established that a patent may be granted for an addition or an improvement, provided it be so claimed. It would seem from the last resolution in Bircott's case, as stated by Lord Coke, as if the patent in that case had been claimed for the whole, and not for the improvement only."

(*a*) Published by Joseph Butterworth and Son; 1823.

municated it to the public, Dollond was to be considered as the inventor. (*a*) In "Barker and Harris *v.* Shaw," which was tried before Mr. Justice Holroyd, at the Lancaster summer assizes, 1823, and which was an action for the infringement of a patent for an improved manner of making hats, one of the plaintiffs' men, whom they called as a witness, proved that he himself invented the improvement which was the subject of the patent, whilst employed in their workshop. The plaintiffs were therefore held not to be the inventors, and were nonsuited. (P. 60.)

In the case of the King *v.* Arkwright, a patent had been granted for an improved air-pump, in which the patentee urged that he had embodied a principle, and reduced it to practice by means of his own discovery. The machine consisted of ten distinct parts, and it was proved that every part which was not *old* or had not been *used* for the same purpose to which it was then applied, was either not *material*, or not *useful*. A verdict was given for the crown, to repeal the patent.

With regard to the manner of passing a patent; the first thing is to present a petition to the king, reciting that the inventor has discovered something (which is named) likely to be of general benefit, of which he is the true and first inventor, and that it has never before been used; and praying for letters patent to secure to himself the sole use of his invention for fourteen years. An affidavit, sworn before a master in Chancery, must support the allegations of the petition: the proceedings which then ensue are thus succinctly detailed by Mr. Holroyd, page 66:

"The petition and affidavit must be taken and left at the office of the secretary of state for the home department, through whom the petition is to be presented to the king.

"A few days after the answer to the petition may be had, containing a reference of it to the attorney or solicitor general, to report as to the propriety of granting its prayer.

"The report of the attorney or solicitor general may be had in a few days.

"The report, if in favor of the prayer of the petition, must be taken to the office of the secretary of state, for the king's warrant. This warrant is directed to the attorney or solicitor general, it is the authority for preparing a bill for the king's signature, and is to be taken to the patent office of the attorney or solicitor general for that purpose.

"The bill which contains the grant, must be taken to the secretary of state's office for the king's sign manual thereto.

"It must be then taken to be passed, at the office of the signet.

"One of the clerks of the signet will make, in the king's name, letters of warrant under the hand of such clerk, and sealed with the king's signet, to the lord keeper of the privy seal for further process to be had therein.

"And the clerk of the privy seal will make other letters of warrant, subscribed by him, to the lord chancellor, for writing and sealing with the seal in his custody letters patent. (*b*)

"This last warrant must be taken to the patent office of the lord chancellor; the patent will be there prepared, and sealed with the great seal, and is thus passed."

Caveats may be lodged at the offices of the lord chancellor, the attorney and solicitor general. A patent for England may be made to extend to the colonies; but does not extend to Scotland or Ireland. After the patent is passed, a specification, or particular description of the nature of the invention, and the mode of its operation, should be prepared within the time allowed for that purpose—usually two months for an English patent—acknowledged, and lodged at the inrolment office. A certificate of the inrolment, which is indorsed on the back of the specification, may be had at the same time. The specifications are intended for the public use, and copies of them may be obtained. If the time for the inrolment has been suffered to elapse, or any other essential error has occurred in suing for the patent, it has been thought advisable to keep the invention secret, and begin proceedings *de novo* for a fresh patent.

Our limits will not permit us to enter particularly into the remaining chapters of Mr. Holroyd's treatise. Originality in a legal treatise on a subject which has been handled by a previous writer, as this has been by Mr. Godson, is out of the question. Mr. Holroyd has, however, furnished a work solely on patents, while Mr. Godson's also embraces the law of copyright; the *desideratum*, therefore, of a small practical manual on the former subject, is supplied by the treatise before us. The decisions on cases relating to the subject have been brought down to the present time; there is a good index and an appendix of forms; and every thing appears to have been done that can render the book generally useful.

(*a*) Per Buller, J. in Boulton *v.* Bull; 2 H. B. C. 470.

(*b*) There is some obscurity in this sentence: the practice is that the clerk of the lord keeper of the privy seal gives another warrant, directed to the lord chancellor, to whose patent office it is carried, and there the patent is taken out and sealed. *Rev.*

## INDIAN LAW (*c*).

For a long period the Hindoos were regarded as distinguished by every virtue, and exempt from every crime. Their patience, prudence, temperance, and gentleness, were taken for granted. Their lawgivers were affirmed to be giants, compared with the pigmies of the western world, and their sacred books were supposed to contain inestimable trea-

(*c*) *A code of Gentoo Laws, or Ordinations of the Pundits, from a Persian translation made from the original written in the Shanscrit language.* [By Nathaniel Brassey Halhed,] 4to. London, 1776.

*Institutes of Hindu Law, or the Ordinances of Menu, according to the gloss of Cullúca, comprising the Indian system of Duties, Religious and Civil. Verbally translated from the original Sanscrit, with a preface by* Sir William Jones. Calcutta printed, London reprinted, 1796.

sures of wisdom and knowledge. Time and research have dispelled these delusions. In proportion as we have become better acquainted with the character and literature of the Hindoos, our admiration has subsided. We have found that their patience was but insensibility, their prudence but cunning of the lowest kind, their temperance the result of superstition, or of idleness, and their tenderness to the brute creation, compatible with a high degree of cruelty to the human species. Their legislators turn out to be drivelling fanatics, or juggling impostors: their men of learning proud, lazy, tyrannical mendicants, innocent of all knowledge, either useful or ornamental; and their sacred writings are discovered to be made up of the most extravagant and tasteless fables, combined with the most ridiculous trifling, and the grossest impurity. No man of healthy intellect would now refer to the attainments of the Hindoos in jurisprudence and moral science, but as a matter of curiosity, or as illustrating a chapter of the human mind. It is with this view that we advert to the subject, and cull from the sources acknowledged at the foot of our last page, some curious specimens of Indian legislation.

One of the most remarkable features in the laws, as in the character of this people, is the prevalence of trickery and cunning. If a man cannot get his money by fair means, what is he to do? Why, he must still get his money. He must have recourse to that which in our cold climate would be considered a "vigour beyond the law." So says the Gentoo code. Let it speak for itself.

"If a man hath lent money to *one of the same family*, or to a man of bad principles, he shall by *evasive pretences* get hold of some of the debtor's goods, and by that means procure payment." *Halhed.*

This, at any rate, is "sharp practice," and its being sanctioned and recommended by law, is a circumstance perhaps peculiar to the codes of the East.

It has been urged as a reproach against some countries, that there is 'one law for the high, and another for the low.' The Gentoo code does not affect to conceal this; and it is worthy of remark, that the advantages of rank are extended also to learning—at least, to that which, in Hindostan, is reputed learning. The combined claims of "privilege of peerage," and "benefit of clergy," are singularly beneficial to him who can urge them.

"If a very rich man of *weak understanding*, and of a *very mean tribe*, from a principle of fraud and obstinacy, refuses to pay his debts, the magistrate shall oblige him to discharge the money claimed, and fine him DOUBLE THE SUM.—If a very rich man *of an excellent education*, and *of a superior cast*, from a principle of fraud and obstinacy refuses to pay his debts, and the creditor commences a suit against him, the magistrate shall cause the money in dispute to be paid, and shall fine the debtor ONE TWENTIETH OF THE SUM recovered." *Halhed.*

The law of inheritance is "confusion worse confounded." The brain turns giddy with such a rule as the following:

"If there be no grandfather's grandfather's father's brother's grandson, it goes to the grandfather's grandfather's grandfather's daughter's son. If there be but one grandfather's grandfather's grandfather's daughter's son, he shall obtain the whole; if there are several grandfather's grandfather's grandfather's daughter's sons, they shall all receive equal shares." *Halhed.*

In India, as elsewhere, "Possession is nine points of the law."

"Suppose two persons should quarrel about the right of property in certain glebe lands, or houses, or orchards, and one of them should produce a written deed, the other, after the property in dispute has been occupied for the space of sixty years by three following possessors who are now dead, is the fourth person now in possession of such property; in that case, the possession of three persons in succession is of more validity than the writing. The person who is in present possession shall obtain the property of such glebe land, or houses, or orchards, and the claim of him who produces the written deed shall not be heard." *Halhed.*

It is a remarkable coincidence with a part of our own law, that *sixty years* should be the length of possession requisite to constitute a legal title.

There is no vice to which the natives of Hindostan are more addicted than that of lying. It is universal among them, and they seem to think, that speech was given to men, not to inform, but to deceive. A very intelligent Indian judge, Mr. Tytler, gives the following picture of Hindoo morality in this respect.

"In nothing is the general want of principle more evident, than in the *total disregard to truth* which the Bengalee shews. And here no order or rank among them is to be excepted. Their religious teachers set the example, and it is most scrupulously followed by all ranks. As the Shasters declare that lying is allowable in some cases, and the Bramins have shewn that these cases may be extended, as besides it is a practice esteemed highly serviceable by all the natives, it has therefore become universal, and is no longer considered discreditable. With nothing is the European more struck in the country than with this horrid vice." *Tytler's Considerations on the Present Political State of India*, vol. i. p. 268-9.

"The want of truth is a failing very generally allowed to be prevalent among the natives; but few, except the judicial servants of the company, are acquainted with the length to which it is carried. It is said to proceed from their religion, from their education, and from their situation as inhabitants of a country ruled from time immemorial by despots. These have all their effects, and the Hindoo character is their joint product. Their religion permits of occasional falsehood: their education does not restrain them in the use of it; *for, among young people, it is very generally esteemed a mark of cleverness!*" *Ib.* vol. ii. p. 107.

In every other country, as Mr. Tytler elsewhere observes, a regard for truth is the first lesson inculcated upon the opening mind of childhood. It is not only the first, but that which is most frequently and most earnestly enforced. It is repeated again and again, "line upon line, and precept upon precept:" but, in Hindostan, youth are trained up in falsehood, and an aptitude for lying is regarded as a gratifying proof of juvenile talent. No wonder, where such a horrible education is general, that arbitrators should receive such instructions as these. Their necessity is but too evident.

"When two persons upon a quarrel refer to arbitrators, those arbitrators, at the time of examination, shall observe both plaintiff and defendant narrowly, and take notice if either, and which of them, when he is speaking, hath his voice faulter in his throat, or his colour change, or his forehead sweat, or the hair of his body stand erect, or a trembling come over his limbs, or his eyes water; or if, during the trial, he cannot stand still in his place, or frequently licks and moistens his tongue, or hath his face grow dry, or in speaking to one point, wavers and shuffles

off to another, or if any person puts a question to him he is unable to return an answer; from the circumstances of such commotions they shall distinguish the guilty party."

The law, of course, condemns false witness. It does more; it furnishes us with a scale of the guilt of perjury, graduated with mathematical accuracy.

"In an affair concerning kine, if any person gives false evidence, whatever guilt is incurred by the murder of ten persons, he becomes obnoxious to the punishment due to such a crime.

"In an affair concerning a horse, if any person give false evidence, his guilt is as great as the guilt of murdering one hundred persons.

"Besides kine and horses, in an affair concerning any other animal that hath hair on his tail, if any person give false evidence, whatever guilt is incurred by the murder of five persons, that guilt shall be imputed to him."

"In an affair concerning a man, if any person give false evidence, whatever guilt is incurred by the murder of one thousand persons, he becomes amenable to the punishment of such guilt.

"In an affair concerning gold, if any person give false evidence, whatever guilt would be incurred by murdering all the men who have been born, or who shall be born in the world, shall be imputed to him.

"In an affair concerning land, if any person give false evidence, whatever guilt would be incurred by the murder of all living creatures in the world, he shall be liable to the punishment of such guilt." *Halhed.*

But to all general rules there are exceptions. Perjury is, on the whole, a bad thing; but it seems to be thought that a portion of it, like a small dose of a poisonous drug, may occasionally be administered with the best effects.

"Wherever a true evidence would deprive a man of his life, in that case, if a false testimony would be the preservation of his life, it is allowable to give such false testimony: and for ablution of the guilt of false witness he shall perform the *Poojeeh Sereshtee*; but for him who has murdered a Bramin, *or slain a cow*, or who being of the Bramin tribe has drunken wine, or has committed any of these particularly flagrant offences, it is not allowed to give false witness in preservation of *his* life.

"If a marriage for any person may be obtained by false witness, such falsehood may be told; as on the day of celebrating the marriage, if on that day the marriage is liable to be incomplete for want of giving certain articles, at that time if *three or four falsehoods be told, it does not signify*; or if on the day of marriage a man promises to give his daughter many ornaments, and is not able to give them, such falsehoods as these, if told to promote a marriage, are allowable. If a man, by the impulse of lust tells lies to a woman, or if his own life would be otherwise lost, or all the goods of his house spoiled, or *if it is for the benefit of a Bramin*, in all such affairs falsehood is allowable." *Halhed.*

"In some cases a giver of false evidence from a pious motive, even though he knows the truth shall not lose a seat in heaven; *such evidence wise men call the speech of the gods.*" *Jones.*

It is notorious that the natives avail themselves to the full of the privilege of perjury thus conceded. The effects of these doctrines in their courts of law is pointed out by Mr. Tytler.

"But no where is this venality more conspicuous than in our civil courts of justice, where, in almost every cause that is tried, the witnesses (perhaps all from the villages) will range themselves on different sides, and give a plausible and consistent story, the one in direct opposition to the other. Members of one and the same family will contradict each other; and though contrary to their own belief, they will, with the greatest obstinacy, persevere in maintaining any assertion which they may be paid to make; on this subject more will be found when I come to the treatment of the subject of witnesses. It is sufficient here to have mentioned their disregard of truth, and their extreme venality, as features in their characters distinguishing them from any other nation. In many nations these vices have a *partial* influence, but here they are *universally* prevalent." *Tytler's Considerations*, vol. I, p. 288-9.

"When on a trial all the witnesses tell lies, what are you to do? Is the criminal to escape, and are you to employ your time in the trial of the witnesses? In England, you would acquit the prisoner, and try the witnesses. In India, you must convict or acquit the prisoner, on the strength of that portion of truth which you can pick out of the compound mass of truth and falsehood. *There is not such a thing known in Bengal as a deposition that does not blend them together.*" Vol. II. p. 106-7.

"Our law says to a witness, 'You shall tell the truth, the whole truth, and nothing but the truth.' But a native witness seldom tells you the truth at all,—often tells a part only,—and often, indeed, in ten cases out of every twelve, a great deal more than the truth." P. 108-9.

"Witnesses in India cannot possibly be considered on the same footing with witnesses in England. There, (I mean in England,) there is an inherent love of truth, and detestation of falsehood; there we seldom meet with instances of perjury; but here, strange as it may appear, I do not hesitate to say that there exists an almost inherent love of, or inclination to, falsehood." "In England," (says Colonel Wilks, in his report on the Mysore,) "it is customary to believe a witness till he is proved to have perjured himself; but here the reverse is the case, and a testimony is doubted until proved to be true." P. 161-2.

The statement of Mr. Tytler is confirmed by the Abbe Dubois; who says, "There is no country on earth, in which the sanction of an oath is less respected, and especially among the Brahmans." *Description of the Character, Manners, and Customs, of the People of India.* P. 497.

As Indian witnesses are for the most part equally worthy, or rather equally unworthy, of belief, it becomes a matter of no small delicacy to decide upon their testimony. A very worthy judge was once in the habit of deciding causes by casting the dice, and it is said that fewer of his decisions were reversed than of those of his brethren. The Indians ascertain the value of testimony by numbering the witnesses, and if that will not do, they weigh them according to rules laid down in the code; and even when this fails, like Lampedo, when soul and body were divorced, "they have a remedy."

"In a case where there are many witnesses, if at the time of examination most of them give their evidence for one person, and one or two of them depose in favour of the other party, the evidence of the majority is approved. If, of the whole number, half depose for one side, and half for the other, then the evidence of any one of the witnesses who is a man of science, shall be credited. If they are all men of science, the evidence of him among them who is the farthest advanced in knowledge, shall be approved: if the knowledge of all of them is equal,

the testimony of him among them who regulates his conduct by the *Beids*, (Gentoo scriptures,) is approved: if they all regulate their conduct by the *Beids*, and the evidence of such men is contradictory, then such a suit cannot be decided by the testimony of witnesses; but the *Purrikeh* (ordeal) must be performed."

The following is in every way worthy of a code which tolerates perjury:

"The witness who has given evidence, and to whom, within seven days after, a misfortune happens from disease, fire, or the death of a kinsman, shall be condemned to pay the debt and a fine." *Jones.*

There are many more curious things in these storehouses of eastern wisdom, but we have not room at present to pursue the subject farther.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

### PRIVILEGE OF ATTORNEY.

On a motion for a rule to show cause why a bail bond should not be delivered up to be cancelled, the following were the facts. The defendant, who is an attorney of the King's Bench, had been arrested on process issuing out of the Common Pleas, and had given a bail bond. It was admitted that great difficulty existed in making the application, as the defendant was not the officer of the Court, but of the Common Pleas. Yet it would be extremely hard upon the attorney, to be thus forced to lie in prison until the suit was ended, or give bail, who would not be discharged until that time. In the case of Snee *v.* Humphreys, 1 Wils. 306, an application was made to the King's Bench, on behalf of an attorney of the Common Pleas, who had been arrested on a *latitat*, to set aside the proceedings against him, on the ground that he ought to have been sued in the Common Pleas by bill. The court there said, "You must sue out your writ of privilege, for if you are an attorney of the Common Pleas, and are *rectus in curia* there, you will have it of course, and may plead it here. That case, it was conceived, might be distinguished from the present, as the application was here to cancel the bail bond, which was taken by the sheriff. Now the sheriff was an officer of all the courts, and therefore this court would have power to exercise its jurisdiction over him, and consequently might compel him to give up the bail bond to be cancelled.

Littledale, J. This case may be considered with reference to the attorney, and with reference to the sheriff. An attorney of this court ought certainly to be relieved, if he is arrested on process issuing out of this court. But here he is arrested on process issuing out of the Common Pleas; we, therefore, have no jurisdiction to interfere. There is a mode by which he may obtain relief from the Common Pleas. It is true that remedy is more dilatory than the one now sought to be applied, but I think he must be left to his remedy there. Then, as the application concerns the sheriff, it is true he is the officer of all the courts; that is to say, any one of the courts may employ him to execute its process; but when a court has employed him to execute its process, he is the officer of that court only, so far as he is employed to execute its process; therefore, having here been employed to execute the process of the Common Pleas, he is, so far as that is concerned, the officer of the Common Pleas only. The Common Pleas only, therefore, has a right to exercise any jurisdiction over him.

Rule refused. K. B. Mich. T. 1830.

If this application had been granted, and the sheriff had been ruled by the Common Pleas to bring in the body, *quere*, what return could he have made?

—

### CAUSE RESTORED—ILLNESS OF SOLICITOR.

In the case of "Collins *v.* Price," the Lord Chancellor granted an order to restore a cause for hearing in the paper of the Master of the Rolls, which his honour had directed to be struck out, in consequence of the absence of the plaintiff's solicitor at the time for the hearing. The absence of the solicitor was occasioned by severe indisposition; and as he attended to his Chancery practice himself, he had not a clerk competent to transact the business without his superintendence. A day or two before the cause was in the list, several other causes were struck out on various grounds, so that the situation of this cause in the paper was unexpectedly accelerated. A subsequent application was made to the Master of the Rolls, in which the cause of the non-attendance was stated; but his honour ordered the bill to be dismissed with costs. The Lord Chancellor, on ordering the restoration of the cause, required that all costs arising from the absence of the solicitor, should be borne by him. *Sittings before the Lord Chancellor, Mich. Term*, 1830.

—

### LIABILITY OF ATTORNIES.

In an action against the defendants, as attornies, for negligence in negociating a mortgage, in which the plaintiff was mortgagee, the following facts appeared. The plaintiff wishing to lay out £2000. on mortgage, applied to a friend named Jay, a barrister, to assist him. He applied to the defendants, and through their medium a mortgage on certain leasehold premises was effected, and the £2000 was advanced by the plaintiff. It was soon discovered that the premises mortgaged were only worth between three and four hundred pounds, and the mortgagor became bankrupt. This was the ground of the action. For the defence, evidence was produced to show that the defendant had acted for the mortgagor only, and that Mr. Jay had acted for the plaintiff. The evidence was thus contradictory. The jury found a verdict for the plaintiff.

On a motion for a new trial the court were of opinion, that as all the facts of the case had been submitted to the jury, whose province it was to consider the effect of the evidence on both sides, the verdict ought not to be disturbed. Rule refused.—Taylor *v.* Street, and others. Mich. Term, 1830.

—

### LORD LANSDOWN'S ACT.

Kelly moved for a rule to show cause, why a certiorari should not be granted for the removal of a conviction by certain magistrates, under the 9 Geo. IV. c. 31, s. 27, for a common assault. The 27th section empowered two magistrates, in cases of common assault, to fine the offender £5, or inflict certain other punishments. By s. 29, however, it was provided, that if the assault were found to have been accompanied by any attempt to commit felony, they should abstain from adjudication. Here the defendant had been charged with an assault with intent to commit a particular felony. The magistrates, however, convicted him of a common assault, and fined him £5. Now the offence with which he was charged was, in fact, no assault unless accompanied with those circumstances, which evidenced the intent. But if it would have been an assault without the accompanying circumstances, the assault and

the intent could not be separated from each other; and therefore, as in such cases they ought not to adjudicate, they had here exceeded their jurisdiction. That it was not the intention of the legislature to allow the magistrates to act in such cases was clear, from the provision contained in s. 25 of the same Act, which was, that any assault with intent to commit felony should be punishable *by the court*, with imprisonment, fine, and the obligation to find sureties for keeping the peace. Now it was not to be conceived that there would be two different punishments provided for the same offence in the same Act, to be inflicted by two different tribunals. By s. 36, the certiorari was taken away in cases of conviction under the Act But that must mean conviction where the magistrates had jurisdiction. Therefore, as in this instance, they had none; the certiorari was not taken away.

Lord Tenterden, C. J.—By section 36, it is provided, that no conviction under this Act shall be removed by certiorari. The conviction here purports to be a conviction for a common assault. There they have jurisdiction, and *primâ facie* they have jurisdiction here. Even if they had not jurisdiction, I do not think we should grant the certiorari, but here I am clearly of opinion that we ought not. When a common assault has been committed, the magistrates are, by the 27th section, empowered to punish it in a particular manner. When it is accompanied with an attempt to commit felony, they are, by the 29th section, prohibited from adjudicating. But that section leaves it to the discretion of the magistrates to determine, whether the assault was accompanied with an attempt to commit felony or not. Now they have, by their conviction for a common assault, negatived that they thought there was any attempt to commit felony. I am, therefore, of opinion, that we ought not to grant the rule.

Bayley, J. and Littledale, J. concurred. Parke, J.—I doubt whether we could grant the certiorari, if the magistrates had not jurisdiction. For if they had not, the conviction goes for nothing. Rule refused. Mich. T. 1830.

—

BAIL.

An action for an illegal distress pending against bail, is no ground for rejection. *Bayley, J.*, T. 1828.

A bail having paid 5s. in the pound, and his creditors having by deed expressed themselves satisfied, may justify. *Littledale, J.*, M. T. 1828.

A bail not having justified pursuant to notice, a consent by the plaintiff's attorney to oppose on a subsequent day, endorsed on the back of the notice, is sufficient, if the plaintiff's attorney appear to consent, to permit justification without affidavit of service of notice. *Littledale, J.*, M. T. 1828.

A native of Berlin, swearing to the requisite amount of property, but not stating it to be within the jurisdiction, was permitted to justify. *Littledale, J.*, M. T. 1828.

Jurat of affidavit of sufficiency of country bail stated "read over and signed, in my presence," Held bad, as it should, in accordance with the rule of court, of E. T. 31 Geo. III. state, "read over *in my presence*, and signed in my presence." *Bayley, J.*, M. T. 1828.

Bail appeared to justify in 280*l.* and swore to leases to the amount of 250*l.*, and 250*l.* Greek bonds, permitted to justify. *Parke, J.*, M. T. 1828.

Bail being rejected for insufficiency, time to justify others was refused, without an affidavit that defendant thought the rejected bail were substantial, and also an affidavit of merits, to be produced before the judge at chambers. *Parke, James, J.*, T. 1829.

—

BAIL—ATTORNEY.

Where a notice of justification of bail in error *coram nobis* had been served too late, the court gave further time to serve fresh notice, and they were allowed to justify, per *Bayley, J.* M. T. 1830.

It has been decided, that it is a rule never to allow time to justify bail in error (1 Chit. Rep. 76, (*a*), sed vide 1 D. and R. 9, 1 Tid. p. 273, ed. 9.) But the statutes requiring bail in error, (3 Jac. I. c. 8, perpetual by 3 Car. I. c. 4, s. 4, 13 Car. II. c. st. 2, c. 2, s. 9, 16 and 17 Car. II. c. 8, s. 3, 22 and 23 Car. II. c. 4, 6 Geo. IV. c. 96, s. 1,) have been determined not to extend to writs of error, *coram nobis* and *coram vobis* (2 Cromp. 3 Ed. 377, 1 Lil. Pr. Reg. 710, 2 Tid. Pr. p. 1154, 1 Archb. K. B. Pr. p. 277.)

On examining the bail, one admitted, that he became bail at the request of the attorney to the plaintiff in error, not knowing his client. He had received no undertaking to bear him harmless, but he thought that in point of honour, in case of his being fined, the attorney would indemnify him. Holden, that he could not justify, (see 1 Bing. 423, 8 Moore, 516, S. C. 1 Tid. 268, 2 Tid. 1155, ed. 9.) M. S.

—

PRACTICE.

Where the writ and notice of declaration being filed, were served within two hours of each other, and before the declaration was actually filed, and the defendant moved to set aside the service of both,

The court discharged the rule as to the writ and made it absolute as to the copy of the declaration. The service of the writ was clearly regular, and therefore the defendant had asked too much.

Where a bill of Middlesex, and a *latitat* had issued against two defendants, each writ containing the name of one defendant only, and the plaintiff afterwards declared against them jointly and severally, there being joint and several causes of action, but it was uncertain whether the joint declaration had been served before the several declarations,

The court referred the matter to the master, to inquire as to the priority of the declarations, intimating, that if the plaintiff had declared jointly, before he declared severally, he had been guilty of an irregularity. For that would be declaring by the bye, before he declared in chief, which he had no right to do.

Vid. *Evans* v. *Whitehead*, 2 Man. and Ry. 366. Rule, Easter Term, 8 Geo. IV. 1827.

—

EJECTMENT.

By the 1 Will. IV. c. 70, s. 36, landlords, when their title accrues in or after Hilary or Trinity Terms, are allowed to serve a declaration in ejectment on their tenants, to which is to be subscribed a notice to appear and plead in ten days. (Vide *Dowling's Statutes*, p. 388.)

On a motion for judgment against the casual ejector in the King's Bench, it appeared that an attorney in the country, supposing that the section in question applied to all actions of ejectment, had subscribed his declaration in a common ejectment in this special manner.—It was served before the essoign day. Holden to be no irregularity per *Littledale, J.*, M. T. 1830.

On a motion for an attachment for non-payment of costs pursuant to the master's *allocatur*, in an action of ejectment, it appeared that the master had by mistake indorsed his *allocatur* on a rule for judgment, as in case of a nonsuit, instead of the consent rule. All the other proceedings were regular.

LITTLEDALE, J., refused the attachment, and directed a fresh *allocatur* to be made out. M. T. 1830.

On a motion for judgment against the casual ejector, the declaration was intitled of Trinity Term, in the first year of the reign of William IV. the death of George IV. having taken place in that term. Holden, that it was properly entitled. M. T. 1830.

## NOTES OF THE WEEK.

WE are constantly receiving short hints and suggestions—some epistolatory, others verbal, —which, though within the scope of our plan, are not capable of being arranged in the form of separate articles. We are willing to open as many channels of useful communication as possible. Several of our well-wishers have not leisure to write a formal letter, adapted for publication, but can contribute short *notes*. Their brevity will not bar their reception, and we shall either introduce them, if complete, or enlarge upon them, if defective.

It may also be convenient in the same department to include occasional reflections, the results of reading, or the gleanings of conversation upon subjects of professional importance.

### *Local Courts.*

In our first number we presented an analysis of the Bill for the *establishment* of two Local Courts: the one for the county of Kent, and the other jointly for the counties of Durham and Northumberland. We observe that Mr. Brougham has given notice in Parliament of his intention immediately to bring forward again this important measure. It is remarkable that the *abolition* of the Local Courts in the principality of Wales and the county palatine of Chester should take place during the same session in which this Bill was introduced.

We have not been inattentive to the subject, but deem it necessary to wait for the examination of the new bill. We have received numerous communications, and are "much enforced" to deliver our sentiments. We shall not be found wanting. We shall take an early opportunity to correct the misstatements which have been made, and to expose the erroneous conclusions which have been drawn.

We are not splenetive and rash. We do not think the matter so vital, that we should quit the even tenor of our way, nor, whatever may be the provocation, lose our vantage ground of usefulness and good temper.

We believe it to be the general wish of the members of the profession, that there should be some improvement in the law regarding the recovery of small debts, either by the revival or extension of the ancient local courts, or the creation of new ones. Nor is it doubted that improvements may be made in other respects, in our judicial system, and its practical application to the affairs of an altered state of society. The only difficulty has been as to the degree of the modification, and the best means of effecting the improvement. It is said by Lord Bacon "that the entire body and substance of the law shall remain, only discharged of idle and unprofitable, or hurtful matter," and we desire to follow in the footsteps of this sage of the law.

We believe it to be perfectly true that the increase of the petty courts will not decrease the profits of the profession. We have no doubt the amount of law expenses will be enormously increased, and that the attornies, as a body, will receive double, nay treble, the amount of their present bills, so far as they relate to actions at law. But it is another, and a different question, whether they will gain in reputation, as well as in purse, and more especially whether any real advantage will result to the public from the facilities offered to petty litigation. In due time we shall discuss the subject in all its bearings. *Registry of Deeds.*

The review in our last number of the Commissioners' Report on the proposed *General Registry of Deeds* will put our readers in possession of the principal grounds on which the Commissioners are induced to recommend the Registry. We have abstained from giving any opinion on the subject. We invite the fullest discussion of the measure, and for the present we shall confine ourselves to the office of moderator between the parties; and we are more especially desirous that the controversy should be conducted on both sides by a constant reference to instances and illustrations, rather than by a mere appeal to abstract principles. Let the alterations be founded on practical experience, and not on theoretical views, however ingenious or plausible.

Our limits did not permit the insertion of the following extract, in which the commissioners give their opinion regarding the alteration which a general registry will make in the professional remuneration of solicitors.

"The emoluments (says the report) of the solicitors who conduct the business of conveyancing, depend, in a great measure, on the number and length of deeds and abstracts, and the multiplication of copies; for all which they are very liberally paid. All these it is one of the objects, and of the probable results, of a Register to abridge. There is, however, a considerable part of the duty of solicitors, requiring much skill and care, and imposing great responsibility, for which they are at present very inadequately remunerated.

We think it for the public good that solicitors should be liberally remunerated for their services. Considering the confidence reposed in them, and the intelligence and skill required from them, it is desirable that they should be men of education and of honourable feelings; and should occupy a respectable station. In our opinion it would be

highly inexpedient that the rank which they hold in this country should be lowered.

It will therefore be necessary to provide for the remuneration of solicitors in a different manner. Their fees for actual services should be higher than they are at present, and perhaps some mode of regulating them, which now exists only with respect to costs of actions and suits, might be beneficially introduced.

This subject requires great consideration, and due attention to the suggestions which may be obtained from the leading members of that part of the profession.

We would, however, observe, that the diminution of the profits of solicitors from the present sources, will not be felt for a considerable time, and that afterwards it will be gradual," pp. 101-102.

We may hereafter advert to the evidence taken under the Commission on this subject.

—

### *Clerks to the Committees of Vestry not to be employed as Solicitors.*

In a Bill brought in by Mr. Hobhouse, bearing the date of July 1, 1830, "for the regulating of parish rates and vestries, and for lighting and watching, cleansing, paving, and watering, towns in England and Wales," there is the following clause at page 14:

"And be it further enacted, that any *committee of vestry*, appointed under this Act, be empowered to appoint a committee clerk or clerks, with such salary or salaries as may be determined by the said committee, and to be paid out of some one of the rates levied for parochial purposes; and that the said committee clerk, or one of such committee clerks, or, in case of sudden and serious illness, some one appointed by the committee to act as clerk, do sign the minutes of the proceedings of all vestry meetings, and also all notices, orders, or other documents, prepared or published by the said committee of vestry: provided always, that *in no instance whatever the person holding the office of committee clerk* shall be clerk to the magistrates having jurisdiction in the parish so adopting this Act, *nor shall be employed as solicitor or law agent in the prosecution or defence of any suit, or in carrying into effect any of the provisions of this Act.*

—

### *Private Bills in Parliament.*

The House of Commons has determined not to receive any petition for private bills after Friday, the 25th day of February next, nor to permit any private bill to be read the first time after Monday, the 21st day of March, nor any report to be received of such private bill, after Monday, the 9th May next.

—

### *Administration of Justice.*

A bill is to be brought in to amend the 1st Will. IV. c. 70, so far as relates to the Essoign and general return days of each term, and to substitute other provisions in lieu, and to declare the law with regard to the duration of the terms in certain cases.

—

### *Chancery Reform.*

Mr. Spence has given notice of his intention to move to simplify the practice of the Court of Chancery, and to reduce it to a known and certain system; to alter the form, and simplify the mode of issuing process in the Court of Chancery; to facilitate the taking of answers and pleas, particularly in country causes, and the swearing of affidavits; to provide for the more effectual taking of evidence in the Court of Chancery; to abolish unnecessary recitals in decrees and orders, and to provide for the due and expeditious drawing up of decrees and orders. To provide for the despatch of business in the master's office; to establish distinct officers for taking accounts; to provide for abolishing the public office; to provide for the master's sitting in public in certain cases, and to enable them to determine various interlocutory matters; to abolish proceedings by hourly warrants; to abolish copy money; to abolish unnecessary recitals in reports; to diminish the expense of proceedings in the master's offices, and to increase the despatch of business there. To enable the Lord Chancellor to appoint a broker of the court of Chancery, and to regulate the salary of the Accountant-general. To abolise the equity jurisdiction of the court of Exchequer, and to constitute the Chief Baron a judge of the court of Chancery, and to provide for the removal of the offices of the court of Exchequer to the court of Chancery. To assimilate the duties of all the judges of the court of Chancery, and to provide for the despatch of business in their different courts. To constitute from the judges of the court of Chancery a court of Appeal for the court of Chancery; to provide for the keeping of the records of all proceedings in the court of Chancery in one certain place.

—

### *Writs to the County Palatine of Chester.*

All writs should be now directed immediately to the sheriff, as in other counties, and not to the chamberlain. If the writ be addressed to the latter, the under sheriff will be obliged to return it for alteration and re-sealing.

The Act, however, does not affect the counties palatine of Lancaster or Durham in this respect, and therefore the direction of writs to those counties will remain the same.

—

### *Proctor's Fees.*

By the 11th Geo IV. c. 20, laws relating to the pay of the Royal Navy, are amended and consolidated. By some error in arranging the table of fees on granting administration, the higher class of fees are made payable when the deceased person is a common seaman or mariner, and the lower class, where he is a warrant or petty officer in the navy, or a non-commissioned officer of marines. Vide Dowling's Statutes, pp. 117, 119.

## MISCELLANEA.

### THE FAMILY OF MILTON.

It is the privilege of genius to confer an interest upon all who can claim kindred with its possessors. In this view the relatives of Milton become objects of literary curiosity, and as two of them followed the profession of the law, they have thus an especial right to a brief notice in our pages.

John Milton, the father of the great poet, was the son of the deputy ranger of the forest of Shotover, near Halton, in Oxfordshire. He was intended for a scholar, and placed by his father at Christ church, in the university of Oxford; but religious differences frustrated this design. The elder Milton was a rigid catholic, the younger was warmly attached to the doctrines of the reformation. In consequence of this attachment, he was disinherited by his father, and compelled to quit the university. The disinherited student exchanged literature for law, and adopted the profession of a scrivener, which he exercised at the sign of the Spread Eagle (the family crest) in Bread street. He was distinguished, it is said, by prudence and integrity, and his labours were rewarded with success. He acquired a competent fortune, and retired to Horton, near Colnbrook in Buckinghamshire. His favourite recreation was music, in which he was eminently skilled, and some of the airs to which the psalms are still sung in our churches were composed by him.

Christopher Milton, his second son, and the poet's younger brother, was a member of the Inner Temple, of which society he became a Bencher. His political principles were completely opposite to those of his brother, and, during the civil wars, he became obnoxious to the Parliament, by opposing their interests in the town of Reading, where he resided. On that town being taken by the Parliamentary forces, he quitted his house, and followed the royal army. At the conclusion of the war, he succeeded, through the interest of his brother, in making his peace with the ruling powers, and resumed the exercise of his profession. He obtained no preferment during the reign of Charles II. but, soon after the accession of James, being specially recommended to that sovereign "for his known integrity, and ability in the law," he was knighted, and made one of the barons of the Exchequer. He was in a short time removed to the Common Pleas, but ill health compelled him to resign, and he retired (says Edward Phillips) to a life of study and devotion. He passed his latter years at Ipswich. Toland represents him as of "a superstitious nature, and a man of no parts or ability;" but Phillips, who was likely both to know him better, and to judge of him more fairly, not only gives him credit for ability and learning, but declares him to have been "a person of a modest quiet temper, preferring justice and virtue before all worldly pleasure or grandeur." Sir Christopher Milton was married, and left several children, one of whom, Thomas Milton, was Secondary of the crown office in chancery. —*Edward Phillips — Toland—Birch—Newton —Hayley.*

### GOOD FRIDAY.

Lord Mansfield having expressed his intention of proceeding with certain business on the Friday following, was reminded by Sergeant Davy, that it would be *Good Friday*. "Never mind," said the judge, "the better day, the better deed." "Your lordship will do as you please," said Davy, "but, if you *do* sit on that day, I believe you'll be the first judge who did business on Good Friday since Pontius Pilate.—*European Mag. May*, 1793, and *May*, 1798.

—

### CAUTION TO INFORMERS.

By 52 Geo. III. c. 146, s. 14, the punishment of transportation for the term of fourteen years was substituted instead of a pecuniary penalty for making false entries in parish register books; but the clause directing the division of the pecuniary penalty was re-inserted by mistake, so that, as the Act *now* stands, one half of the penalty is to go to the informer, and the other half to the poor of the parish, that is, *seven year's transportation each!* We caution Mr. Johnson, and others, against informing under this Act.

—

### SOLILOQUY ON LAW REFORM.

A code, or not a code—that is the question!
Whether 'tis better in the law to suffer
The flaws and defects of numerous practiques,
Or to take arms against a sea of troubles,
And by revising, end them! To prune, to change,
No more—and by a code to say we end
Abuses, and the thousand natural pests
That law is heir to; 'tis a consummation
Devoutly to be wished.—To prune, to change,
To change, perhaps DESTROY! ay, there's the rub,
For in that sleep of law what ills may come,
When we have shuffled off the dreadful plague
Must give us pause. There's the respect
That makes precedents of so long life,
For who would bear the whips and smarts of law,
The high judge's frown, the lawyer's charges,
The pangs of satisfying debts, the law's delay,
The insolence of sheriffs, and the spurns
That patient merit of the policeman takes,
When he himself might his *quietus* make
With a *bare reform?* Who would judges pay,
To groan and sweat under a weary life,
But that the dread of something after change,
(Those undiscovered evils from whose ruin
No government returns) puzzles the will,
And makes us rather bear those ills we have,
Than fly to others we know not of.
Thus *wisdom* does make cowards of us all,
And thus the native hue of resolution
Is sicklied o'er with the pale cast of thought,
And enterprizes of great pith and moment,
With this regard their currents turn away,
And lose the name of action.

*Angell's United States Law Intelligencer and Review, for July*, 1830.

---

LONDON:

PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, NOVEMBER 27, 1830. No. IV.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## RECENT STATUTES.

THE NEW TRUSTEES ACT, 1 Gul. IV. c. 60. [Royal assent 23d July, 1830.]

THE law concerning trustees is of such general interest, as well to unprofessional as to professional persons, that we are anxious to lay before our readers a statement of the Act passed last session, (1 Will. IV. c. 60,) by which the whole statute law on this subject is consolidated and amended. Few persons pass through their lives without being concerned either as trustees or as *cestuis que trust*; as having either the management of trust property, or being interested in its management. We shall, therefore, shortly mention the principal changes affected by this Act, and we refer the reader for further particulars to its analysis, which will follow our observations.

Trustees may become lunatic, may go out of the kingdom, may be unwilling to act, or may become otherwise disqualified, and in all these cases it will be necessary to appoint other trustees. Now, as our professional readers well know, powers to appoint new trustees under these circumstances, are generally inserted in the deed or will by which the property is limited or settled. But where there are no such powers, an application, under the present Act, may be made to the court of Chancery by petition, to appoint new trustees or a new trustee. A mortgage may have been made, the mortgagor may have paid back the mortgage money, but the mortgagee may have died, and the estate may be vested in his heir, an infant or lunatic, who is incapable of making a conveyance; but under this Act, the court of Chancery may order the committee of the lunatic or the infant, to convey the estate to the mortgagor; or, if the trustee has not been regularly found a lunatic, the court may direct a proper person to convey the estate.

It frequently happens that a person contracts to sell an estate to another, but dies before he has executed a conveyance of it; in this case, equity considers the estate as the property of the person to whom it was contracted to be sold; but it has been held, that the former Trustee Acts did not extend to this species of trusts, which are called *constructive trusts*, *Ex-parte Vernon*, 2 P. Wms. 549, *ex-parte Janaway*, 7 Pri. 679, Sug. Vend. 182; but, by the present Act, the heir of the vendor of the estate in such cases is declared to be a trustee within the Act, and a petition therefore may be presented to enforce a conveyance of the estate from him to the purchaser.

We now present our readers with an analysis of the Act. Where the clauses are mere re-enactments of former sections, we have pointed it out, distinguishing the new portions by printing them in italics.

The Act is entituled, "*An Act for amending the Laws respecting Conveyances, and Transfer of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give effect to their Decrees and Orders in certain Cases*"

By the first section, all the former Acts on the subject are repealed, "except so far as the same relate to stock belonging beneficially to infants or lunatics, and also except as to such proceedings of any description, under the same Acts respectively, as shall have been commenced before the passing of this Act, (23d July, 1830,) and which may be proceeded in according to the provisions of the said recited Acts respectively, or according to the provisions of this Act, as shall be thought expedient."

By the second section, rules are laid down for the interpretation of the Act, which tend greatly to shorten its provisions: certain general words are used throughout the Act, which are to be understood to apply to all matters and things of the same class, "that is to say, those relating to land, to any manor, messuage, tenement, hereditament, or real property, of whatever tenure, *and to property of every description transferrable otherwise than in books kept by any company or society, or any share thereof or interest therein*; those relating to stock, to any fund, annuity, or security, transferable in books kept by any company or society established or to be established, or to any money payable for the discharge or redemption thereof, or any share or interest therein; those relating to dividends, to interest or other annual produce; those relating to a conveyance, to any fine, recovery, release, surrender, assignment, or other assurance, including all acts, deeds, and things, necessary for making and perfecting the same; those relating to a transfer, to any assignment, payment, or other disposition; those relating to a lunatic, to any idiot or person of unsound mind or incapable of managing his affairs; those relating to an heir, to any devisee or other real representative by the common law or by custom or otherwise, and those relating to an executor, to any administrator or other personal representative;

unless there be something in the subject or context repugnant to such construction; and whenever this Act, in describing or referring to any trustee or other person, or any trust, land, conveyance, matter, or thing, uses the word importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females, as well as males, and bodies corporate as well as individuals, and several trust lands, stock, conveyance, matters, or things respectively, as well as one trust, land, stock, conveyance, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction." (A doubt has already arisen in this section on the words in italics, whether the Act is applicable to a sum of money charged on lands; the better opinion seems to be, that it is within the Act.)

Sec. 3 enacts, that where any person seised or possessed of any land upon any trust or by way of mortgage shall be lunatic, it shall be lawful for the committee of his estate, by the direction of the lord chancellor, to convey such land, to such person, and in such manner, as the said lord chancellor shall think proper. (Corresponds with 6 Geo. IV. c. 74, s. 3.)

Sec. 4 enacts, that where any stock shall be standing in the name of any person who shall be a lunatic, as a trustee or executor, alone or jointly with any other person, *or shall continue to be standing in the name of a deceased person whose executor shall be lunatic*, or shall be otherwise vested in, or *transferrable by* any person who shall be lunatic, *for the benefit of some other person*, it shall be lawful for the lord chancellor, intrusted as aforesaid, to direct *the committee* to transfer such stock into the name of such person and in such manner as the said lord chancellor shall think proper, and also to order such person to receive and pay over *or join in receiving and paying over* the dividends of such stock in such manner as the said lord chancellor shall direct. (Corresponds with 6 Geo. IV. c. 74, s. 4, with the exception of the words in italic.)

Sec. 5 enacts, that where any such person as aforesaid being lunatic shall not have been found such by inquisition, it shall be lawful for the lord chancellor to direct any person to convey *or join in conveying* such land, *or to transfer or join in transferring such stock and receive and pay over the dividends thereof, as herein-before is mentioned; but where any sum of money shall be payable to such lunatic, no such last-mentioned order shall be made if such sum of money shall exceed seven hundred pounds.* (Corresponds with the 6 Geo. IV. c. 74, s. 6, with the exception of the words in italic.)

Sec. 6 enacts, that where any person seised or possessed of any land upon any trust or by way of mortgage shall be under the age of twenty-one years, it shall be lawful for such infant, by the direction of the court of Chancery, to convey the same to such person and in such manner as the said court shall think proper. (Same as 6 Geo. IV. c. 74, s. 2.)

Sec. 7 extends the provisions of the Act to infant trustees and mortgagees of the duchy of *Lancaster*, or the counties palatine of *Chester*, *Lancaster*, and *Durham* respectively, or the principality of *Wales*. (See 6 Geo. IV. c. 74, s. 2.)

Sec. 8 enacts, that where any person seised of any land upon any trust shall be out of the jurisdiction of or not amenable to the process of the court of Chancery, *or it shall be uncertain, where there were several trustees, which of them was the survivor*, or it shall be uncertain whether the trustee *last known to have been seised as aforesaid* be living or dead, *or, if known to be dead, it shall not be known who is heir of his heir;* or if any trustee seised as aforesaid, *or the heir of any such trustee*, shall neglect or refuse to *convey* or if any trustee seised as aforesaid, *or the heir of any such trustee*, shall neglect or refuse to *assign or surrender* such land *for the space of twenty-eight days after* such land *for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same;* then it shall be lawful for the said court of Chancery to direct a person in the place of the trustee *or heir*, to convey such land to such person and in such manner as the said court shall think proper. (Corresponds with 6 Geo. IV. c. 74, s. 5.)

Sec. 9 enacts, that where any person possessed of any land for any term of years upon any trust shall be out of the jurisdiction of or not amenable to the process of the court of Chancery, *or it shall be uncertain whether the trustee last known to have been possessed as aforesaid be living or dead*; or if any trustee possessed as aforesaid, *or the executor of any such trustee*, shall neglect or refuse to assign or surrender such land *for the space of twenty-eight days next after a proper deed for making such assignment or surrender shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same;* then it shall be lawful for the said court of Chancery to direct any person whom such court may think proper to appoint for that purpose, in the place of the trustee *or executor*, to assign or surrender such land to such person and in such manner as the court shall think proper. (Corresponds with 6 Geo. IV. c. 74, s. 5.)

Sec. 10 enacts, that where any person in whose name, as a trustee *or executor, (either alone or together with the name of any other person,) or in the name of whose testator, (whether as a trustee or beneficially,)* any stock shall be standing, *or any other person who shall otherwise have power to transfer or join with any other person in transferring any stock to which some other person shall be beneficially entitled*, shall be out of the jurisdiction of or not amenable to the process of the court of Chancery, or it shall be uncertain whether such person be living or dead; or if any such trustee or executor or other person shall neglect or refuse to transfer such stock, or receive and pay over the dividends thereof, to the person entitled thereto or to any part thereof respectively, or as he shall direct, *for the space of thirty-one days next after a request in writing*, then it shall be lawful for the court of Chancery to direct such person as the said court shall think proper to appoint for that purpose, in the place of such trustee or executor or other person, to transfer such stock to or into the name of such person and in such manner as such court shall direct, and also to order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said court shall direct. (Corresponds with 6 Geo. IV. c. 74, s. 7.)

Sec. 9 enacts, that every direction to be made in pursuance of this Act by the lord chancellor, shall be signified by an order upon petition in the lunacy or matter, of the person or some or one of the persons beneficially entitled to the land, or stock, to be conveyed, transferred, or paid; and if the same shall relate to a conveyance in order to vest any land or stock in a new trustee, then upon the petition either of the trustee in whom the same shall be proposed to be vested, or of any person having an interest therein; and if the same shall relate to the conveyance of an estate in mortgage, then upon the petition of the person entitled to the equity of redemption thereof, or of the person entitled to the monies thereby secured, or the guardian or committee of the person entitled to such monies, if an infant

or lunatic. (Corresponds with the 6 Geo. IV. c. 74, s. 8.)

By sec. 12, the lord chancellor in cases of doubt may order a bill to be filed to establish the rights of the parties.

Sec. 13 enacts that any committee, infant, or other person, directed, by virtue of this act, to make any conveyance or transfer, shall be compelled to make the same in like manner as trustees of full age, and of sane mind. (6 Geo. IV. c. 74, 8, 9.)

Sec. 14 enacts that, where the person to whom any money shall be payable, towards the redemption of any mortgage, of which a release shall be obtained under this act, shall be an infant, it shall be lawful for the person by whom such money shall be payable, to pay the same into the bank of England, to the credit of such infant, to be invested in the public funds. (See 6 Geo. IV. c. 74, 8, 16.)

Sec. 15 enacts that every person shall be a trustee within the meaning of this act, notwithstanding he may have some beneficial estate or interest in the same subject, or may have some duty as trustee to perform, but the court shall have power to order a bill to be filed to establish the rights of the parties. (See 6 Geo. IV. c. 74, s. 10.)

Sec. 16 enacts, that where any land shall have been contracted to be sold, and the vendor shall have departed this life, either having received the purchase money for the same, or some part thereof, or not having received any part thereof, and a specific performance of such contract shall have been decreed by the court of Chancery in the lifetime of such vendor, or after his decease, and where one person shall have purchased an estate in the name of another, but the nominal purchaser shall, on the face of conveyance, appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the said court, either before or after the death of such nominal purchaser, shall have declared such nominal purchaser to be a trustee for the real purchaser, then the heir of such vendor, or such nominated purchaser, or his heir, in whom the premises shall be vested, shall be, and be deemed to be a trustee for the purchaser within the meaning of this Act. (By this and the four next sections, the principal novelty in the Act is effected; that of extending it to constructive trusts, to which it was determined, the former acts did not apply. See Sug. Vend. 182, 8th ed.)

Sec. 17 enacts, that where any land shall have been contracted to be sold, and the vendor shall have departed this life, having devised the same in settlement so as to be vested in any person for life, or other limited interest, with any remainder which may not be vested, or may be vested in some person from whom a conveyance of the same cannot be obtained, or by way of executory devise, and a specific performance of such contract, shall have been decreed by the court of Chancery, it shall be lawful for the court to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey the fee-simple to the purchaser.

Sec. 18 enacts, that the several provisions hereinbefore contained shall extend to every other case of a constructive trust, or trust arising or resulting by implication of law; but in every such case where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee, until after it has been declared by the court of Chancery, in a suit regularly instituted in such court, that such person is a trustee for the person so seeking a conveyance or transfer; but this act shall not extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor, except in any case hereinbefore expressly provided for.

Sec. 19 enacts, that where any femme covert would be a trustee, mortgagee, heir, or executor, within the provision of this act, if she were an infant or lunatic, or out of the jurisdiction or not amenable to the process of the court of Chancery or Exchequer, or had refused or neglected as aforesaid to execute or make such conveyance, transfer, receipt, or payment, as hereinbefore is mentioned, and the concurrence of her husband shall be necessary in any conveyance, transfer, or payment, which ought to be made or executed by her as such trustee, mortgagee, heir, or executor, then and in any such case such husband, whether under any disability or not, shall be and be deemed to be a trustee within the meaning of this Act.

Sec. 20 enacts, that the provisions hereinbefore contained for obtaining conveyances from any person being lunatic shall extend to and include all persons being lunatic who, by force of any law for payment of debts out of real estate, would or hereafter may be compellable to convey any land if of sound mind.

Sec. 21 enacts, that the provisions hereinbefore contained shall extend to all cases of petitions in which the lord chancellor is by law authorized and empowered to grant relief and make summary orders without suit, either in matters of charity, or relative to or for the better security, or for the application of the funds thereof, or in matters relative to any benefit or friendly societies, or for the better security, or for the application of the funds thereof. (See 6 G. IV. c. 74, s. 11.) (This and the two next sections are new. They are very useful provisions, and will be of much practical importance.)

Sec. 22, reciting that cases may occur, upon applications by petition under this act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and expedient for the lord chancellor to direct, by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointments to file a bill for that purpose, although there is no power in any deed or instrument creating or declaring the trusts of such lands or stock to appoint new trustees; it is enacted, that in any such case it shall be lawful for the lord chancellor to appoint any person to be a new trustee, by an order to be made on a petition to be presented for a conveyance or transfer under this act, after hearing all such parties as the said court shall think necessary; and thereupon a conveyance or transfer shall and may be made and executed, according to the provisions hereinbefore contained, so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually, and in the same manner as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted.

Sec. 23 enacts, that where all the persons in whom any lands may have been vested in trust for any charity shall be dead, it shall be lawful for the court of Chancery, on the petition of the persons or body administering such charity, to direct any master or other officer of the said court to cause two successive advertisements to be inserted in the *London Gazette*, and in one or more of the newspapers circulated in the county, city, or place where such land shall be situated, giving notice that the representative of the

last surviving trustee do within twenty-eight days appear or give notice of his title to such master or other officer, and prove his pedigree or other title as trustee; and if no person shall appear to give such notice within such twenty-eight days, or the person who may appear or give such notice, shall not, within thirty-one days after such appearance or notice, prove his title to the satisfaction of such master or other officer, then and in such case it shall be lawful for the said court to appoint any new trustees for such charity or charitable public purpose; and such land may be conveyed to such new trustees by any person whom the said court respectively may direct for that purpose, by virtue of the provisions in this act, without the necessity of any decree.

Sec. 24 enacts, that where in any suit commenced or to be commenced in the court of Chancery, it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and clerk at the hearing of such cause: provided always, that no such decree shall bind any person against whom the same shall be made without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right, or interest which such person shall have at the time of making such decree, for his own use or benefit, or otherwise than as a trustee as aforesaid.

Sec. 25 enacts, that the lord chancellor may order the costs relating to the petitions, conveyances, and transfers, to be made in pursuance of this Act, to be paid from the land or stock, or the rents or dividends, in respect of which the same respectively shall be made. (Corresponds with the 6 Geo. IV. c. 74, s. 17.)

Sec. 26 enacts, that the powers given by this Act to the lord chancellor of *Great Britain*, shall extend to all land and stock within any of the colonies belonging to his majesty, except *Scotland* and *Ireland*.

Sec. 27 enacts, that the powers given by this Act to the lord chancellor of *Great Britain*, shall be exercised by the lord chancellor of *Ireland*, with respect to all land and stock in *Ireland*.

Sec. 28, gives the powers of the lord chancellor to the lord keeper and commissioners.

Sec. 29 enacts, that the powers given by this Act to the court of Chancery in *England*, shall extend to all land and stock within any of the colonies belonging to his majesty (except *Scotland*;) and, (sec. 30,) may be exercised by the court of Exchequer.

Sec. 31 enacts that powers given to courts in England may be exercised by the same courts in Ireland.

Sec. 32 enacts that in all cases in which orders shall be made, in pursuance of this Act, for the transfer of stock, the person to be named in such order for making such transfer, shall *either be the committee of the estate of the* person being lunatic in whose place such transfer shall be made, *or a co-trustee or co-executor of the person in whose place such person shall be directed to transfer, or some officer* of the company or society in whose books the same respectively shall be directed to be made. (See 6, Geo. IV. c. 74, s. 15.)

Sec. 33 enacts, that this Act shall be declared to be a full and complete indemnity and discharge to the governor and company of the Bank of *England*, and all other companies and societies, for all acts done pursuant thereto. (Corresponds with the 6 Geo. IV. c. 74, s. 16.)

## NEW BILLS IN PARLIAMENT.

We continue the analysis of Lord Tenterden's bills, the remaining three of which are as follow:

1. To expedite the *judgment* and *execution* in actions in the superior courts of law. The power to complete the judgment consequent upon a verdict, and immediately to enforce execution, appears essential to the purposes of justice, where the case is free from doubt. The practice of waiting till the ensuing Term, often a period of several months, is therefore proposed to be abolished.

2. To enable the superior courts of law to adjudicate adverse claims on persons holding property in which they have no interest themselves, but require the sanction of a competent court to authorize their delivering it to either party. These questions, hitherto, could only be settled by a bill of interpleader in a court of Equity, and in many cases a collateral issue in a court of law.

3. The next measure is designed to improve the proceedings in *prohibition* and writs of *mandamus*.

---

*An Analysis of a Bill, intituled, "An Act for the more speedy Judgment and Execution in Actions brought in his Majesty's Courts of Law at Westminster."*

This bill, ordered to be printed the 8th inst., recites that the judgment and execution in actions brought in his majesty's courts of law at Westminster, are often delayed by reason of the interval between the terms. It is therefore proposed to be enacted that writs may be made returnable on any day in term or vacation to be named therein, and the usual proceedings to be had at the return thereof. That the judge before whom any action shall be tried, may certify before the end of the sittings or assize that execution ought to issue forthwith; or at some day to be named in such certificate, and subject, or not, to any condition or qualification, and in case of a verdict for the plaintiff, then either for the whole or for any part of the sum found by such verdict; in which case judgment may be signed, and execution issued according to the terms of the certificate. That judgment may be vacated, execution stayed, and new trial granted by the court. That no judgment signed or execution issued on a cognovit signed after declaration filed, shall be deemed within the provision of 6 G. IV. c. 16.

---

*An Analysis of a Bill, intituled, "An Act to enable Courts of Law to give Relief against adverse Claims made upon Persons having no Interest in the subject of such Claims."*

This bill, also ordered to be printed the 8th inst., recites that it often happens that a person sued at law for the recovery of money or goods wherein he has no interest, and which are also claimed of him by some third party, has no means of relieving himself from such adverse claims but by a suit in Equity

against the plaintiff and such third party, usually called a bill of interpleader, which is attended with expence and delay. It is therefore proposed to be enacted that, upon application by a defendant in an action of assumpsit, debt, detinue, or trover, stating that the right in the subject matter is in a third party, the court may order such third party to appear and maintain or relinquish his claim, and in the mean time stay proceedings in such action, and may order such third party to make himself defendant in the same or some other action, direct feigned issues, order a special case to be stated, or, with the consent of the plaintiff and such third party, dispose of the merits of their claims in a summary manner, and make such orders therein as to costs and all other matters as may appear to be just and reasonable. Plaintiff or third party dissatisfied may bring writ of error. That such judgment and decision be final. That if such third party shall not appear, or shall neglect or refuse to comply with any rule or order to be made after appearance, the court may bar his claim against the original defendant. Costs to be in the discretion of the court. That when any claim shall be made to any goods or chattels taken in execution, the court may, upon application of the sheriff or other officer, call before them as well the party issuing process as the party making such claim, and thereupon exercise all the powers given by the bill. Rules, orders, &c. made in pursuance of this Act, may be entered of record, and made evidence; and every such rule or order so entered shall have the force and effect of a judgment, except only as to becoming a charge on any lands, &c. Costs, to be paid within fifteen days after notice of the taxation and amount. Disobedience to be deemed a contempt of court.

---

*An Analysis of a Bill, intituled, "An Act to improve the Proceedings in Prohibition and on Writs of Mandamus."*

This bill, which was also ordered to be printed the 8th inst., recites that the filing a suggestion of record on application for a writ of prohibition is productive of unnecessary expense, and the allegation of contempt in a declaration in prohibition filed before writ issued is an unnecessary form; and it is expedient to make some better provision for payment of costs in cases of prohibition. It is therefore proposed to be enacted, that applications for writs of prohibitions may be made on affidavit only; and, in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not, as heretofore, on the behalf of the party and of his majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to shew the ground of the application, without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the defendant may demur or plead by way of traverse, and conclude by praying a writ of consultation. That so much of 2 and 3 Ed. VI. c. 13, as relates to prohibition, may be repealed.

That the enactments of 9 Ann. c. 20, relating to returns of writs of *mandamus* therein mentioned, and the proceedings thereon, be extended to all other writs of mandamus. That for the protection of certain officers to whom writs of mandamus are directed, the court may call not only upon the person to whom such writ may be required to issue, but also upon every other person interested, to show cause against it, and upon the appearance of such person, or in default of appearance, may exercise all such powers, and make all such rules and orders, applicable to the case, as are or may be given by any Act passed or to be passed during this present session of parliament for giving relief against adverse claims made upon persons having no interest in the subject of such claims. Return to be made and issues joined in the name of the person to whom such writ shall be directed, unless the court shall think fit to direct that they be made and joined on the behalf of other person mentioned in the rules; and in that case such other person shall be permitted to frame the return, and to conduct the subsequent proceedings, at his own expence; and if any judgment shall be given for or against the party suing such writ, such judgment shall be given against or for the person on whose behalf the return shall be expressed to be made. Proceedings not to abate by removal of officer. Costs to be in the discretion of the court.

---

## ON THE STUDY OF THE LAWS OF REAL PROPERTY.

In our last number (*a*) we made some observations on the importance of the study of the law, more particularly that part of it termed conveyancing. We showed that a minute acquaintance with this branch of the law is essential to the practitioner, and that some knowledge of it is advantageous to every man who inherits, purchases, or alienates property. That the student might not be deterred by the appearance of insuperable difficulty, we displayed the means which modern science has provided for facilitating his progress; and to enable him to use those means beneficially, we pointed out a course of study founded on practical experience. In bringing forward our own plan we adverted to others which have been laid down at different times by persons eminent for legal learning. These we now present to our readers, and we trust that they will be perused with interest. They exhibit the various opinions which have prevailed at different periods of our history, of the steps to be taken to insure a knowledge of the subject; and we give them the more readily, as we differ from most of them, and wish, at the same time, to afford the student the fullest information.

Lord Hale's advice is as follows. See Pref. Roll. Abr. It is of a more general description than the remarks we have given.

"Touching the method of the study of the common law I shall say thus much. It is necessary for the student to observe method in his reading and study; for, though his memory be ever so good, he will never be able to retain all, or even the greatest part, of what he reads to the end of seven years, or even a much shorter time, without the assistance of use or method. Yea, what he has read seven years since, will without that help appear new to him as if he had never read it: this method may be varied

(*a*) Practical Dissertation on Conveyancing, No. 1, p. 33.

according to fancy. I shall therefore propound that which, by some experience, has been found useful; and it is this. 1st. It is proper for a student to spend about two or three years in the diligent reading of *Littleton, Perkins, Doctor and Student, Fitzherbert,* and especially my *Lord Coke's Commentary,* and possibly his reports; this will fit him for exercise, and enable him to improve himself by conversation and discourse with others, and to attend the courts of Westminster. After two or three years thus spent, let him get a large commonplace book, and divide it into alphabetical titles, which he will easily gather by observing the titles of Brooks' Abridgment: or of this book (Roll. Abridg.) Afterwards (among the year books) he may read Edward III., the second part of Henry VI. Edward IV. Henry VII. and so down to Plowden, Dyer, and Coke's Reports, the second time.

"What he gathers in his course of reading, let him enter (in the abstract) under the proper titles, in his commonplace book."

The advice of Chief Justice Reeve is as follows:

"First read *Wood's Institutes* in a cursory manner, to understand the general divisions of the law, and obtain precise ideas of the terms used in it, for such terms as Wood does not explain, 'Les Termes de la Ley' should be consulted, and for the more full and modern explanation, Jacob's Dictionary; but the authority of this last must not be too implicitly relied on. To understand Wood's Chapter of Conveyancing, call in some practitioners, or consult Bohun's Institut. Legalis, or Jacob's Attorney's Companion.

"This done, read Littleton's Tenures, without notes, consider it well, and abridge such parts as the books inform you are now law. Thus armed, venture upon Coke's Comment on Littleton, which, being well understood, the whole is conquered, and without it a sound common lawyer can never be made; to this all the faculties of the mind must be applied with the heartiest attention; it will not be found very difficult, with the preparation already prescribed; abridge it throughout, and see Hawkins' Abridgment, which will afford much light to my Lord Coke.

"This finished, I would recommend a second careful review of Wood's Institutes, in order to digest the several heads of the law for the help of memory, and consult the references, &c.

"During the second stage of study, many books may be brought in for variety, which will be very useful, and not interrupt the main scheme, as Doctor and Student, Noy's Maxims, Office of Executors, Hale's History of the Common Law, and Rolle's Abridgment. It will about this time, and not much sooner, be proper to give diligent attendance on the courts of Westminster, and to begin reading in order the several reports, which must be read and commonplaced as you will find best by considering the nature of the study.

"My whole scheme, without naming the books, is this:

"1st. Obtain precise ideas of the terms or general meaning of the law.

"2d. Learn the general ideas of the terms, and general meanings of the law.

"3d. From some authentic system, collect the great leading points of the law in their natural order, as the first heads and divisions of your future inquiry.

"4th. Collect the several particular points as they occur, and range them under their generals, and as you find you can best digest them.

"And, whereas law must be considered in a twofold light:

"1st. As a rule of action.

"2d. As the art of procuring redress.

"When this rule is violated, the study in each of them may be easily regulated by the foregoing method, and the books so recommended will so carry on the joint work, that with this course, so finished, the student may pursue each branch of either to its utmost extent, or return to the centre of his general knowledge without confusion, which is the only way of rendering things easy to the memory."

The course of reading recommended by the celebrated Mr. Dunning was as follows:

Hume's History of England, particularly observing the rise, progress, and declension of the feudal system; minutely attend to the Saxon government that preceded it, and dwell on the reigns of Edward I. Henry VI. Henry VII., Henry VIII., James I., Charles I., Charles II., and James II. Blackstone's Commentaries,—on the second reading turn to the references; Wright's Treatise on Tenures; Coke on Littleton, especially every word of Fee Simple, Fee Tail, and Tenant in Tail; Coke's Institutes, more particularly the 2d of Sergeant Hawkins' Compendium; Coke's Reports; Plowden's Commentaries; Bacon's Abridgment, and First Principles of Equity; Piggott on Recoveries; Reports of Croke, Burrows, Raymond, Saunders, Strange, and P. Williams; Paley's Maxims, and Lord Bacon's Elements of the Common Law.

Mr. Chitty's advice in a lecture, delivered December 14, 1813, in Lincoln's Inn Hall, is as follows:

"The student must labour to acquire a regular established system of legal knowledge, and not depend on accidental fragments and scraps. The study of the law is much less complex and difficult than has been represented. It will be proper to employ as much as ten hours daily in study, but of these, six hours are sufficient for law; the remaining four must be usefully employed in general study, as it will promote habits of regular application. But the student must not flag, or become irregular in this course of study. The vacation, in particular, must be devoted to study, reserving the *Terms* for acquiring *practical* knowledge."

Mr. Chitty recommends common placing, and refers to a method in North's Life of Lord Keeper Guilbert, p. 20. The following are the books he recommends:

I. Preparatory Reading; 1st, Blackstone's Commentaries; 2. Woodeson's Vinerian Lectures; 3. Sullivan's Lectures; 4. Eunomus; 5. Brown's Civil Law; 6. Hale's History of the Common Law. II. Reading with a view to Practise; 1. Butler's Nisi Prius; 2. Espinasse's Nisi Prius; 3. Selwyn's ditto; N. B. read Butler's Nisi Prius, and the same heads in Espinasse and Selwyn's concurrently, and after reading all the heads in Butler, with those in Espinasse and Selwyn, read the remaining heads in the latter work. III. Then proceed to particular branches of the law, as Rights of Persons, Holt, Starkie, and George, on Slander: information on other heads, by retracing Blackstone's Commentaries, 119 to 143; Buller's Nisi Prius, 3 to 24, and Selwyn's Nisi Prius, titles, Assault, Imprisonment, and Adultery; and read the appropriate titles in Bacon's Abridgment and Comyn's Digest.

II. Personal Property and Commercial Law; 1. Blackstone's Commentaries, from chap. 23 to the end; 2. Powell's Law of Contracts; 2. Newland on Contracts; 4. Roberts on Statute of Frauds, 104 to 240; 5. Jones's Law of Bailments; 6. Bayley on Bills of Exchequer; 7. Chitty on ditto; 8. Abbot's Law on Shipping; 9. Park on Insurances; 10. Marshall on ditto; 11. Chitty on Apprentices; 12. Watson on Partnership; 13. Paley's Law of Principal and Agent; 14. Whittaker on Stoppage in Transitu and Liens; 15. Cullen's Bankrupt Laws examined, with Cooke's and Montague's Bankrupt Laws; 16. Kyd on Awards; 17. Kyd on Corporations; 18. Toller's Laws of Executors; 19. Roper on Legacies.

III. Real Property, and Landlord and Tenant Law. 1. Blackstone's Commentaries, 2d vol. to the end of chap. 23; 2. Cruise's Digest; 3. Coke on Littleton, parts not obsolete; 4. Watkins on Copyholds; 5. Woodfall's Law of Landlord and Tenant; 6. Roberts on Statute of Frauds, 241 to 287; 7. Gilbert's Distresses, by Hunt; 8. Bradby on Distresses; 9. Sugden's Law of Vendors and Purchasers; 10. Sanders on Uses and Trusts; 11. Preston on Estates, &c.; 12. Adams on Ejectment; 13. Runnington on ditto.

IV. Pleading. 1. Blackstone's Commentaries, vol. 3, ch. 8 to 21; 2. Summary of Pleading; 3. Lawes on ditto; Chitty on ditto; 5. Saunders' Reports and Notes.

V. Evidence. 1. Peake's Law of Evidence; 2. Gilbert's ditto, old edit.; Philipps's ditto.

VI. Practice of Common Law Courts. 1. Crompton's Introduction; 2. Tidd's Practice with the Forms; 3. Sellon and Impey, together with the Rules; 4. Gilbert's History of the Court of Exchequer.

VII. Criminal and Poor Laws. 1. Retrace 4 Blackstone's Commentaries; 2. Hale's Pleas of the Crown; 3. Hawkins, ditto; 4. East's ditto; 5. Forster's Crown Law; 6. Hand's Practice; 7. Introduction to Crown Circuit Companion; 8. Nolan's Poor Laws, examined with Bott.

VIII. Equity Law, Pleadings, and Practice. 1. Retrace 3 Blackstone's Commentaries, chap. 27; 2. Fonblanque's Treatise on Equity; 3. Mitford's Pleadings; 4. Newland's Chancery Practice.

Mr. Butler's advice is as follows: (see Reminiscences, p. 60.)

"The student should begin by reading Littleton's Tenures with extreme attention, abstaining from commentary, but perusing Gilbert's Tenures. After this, Wright's Tenures, and Watkins' Treatise on Descents; and then Littleton a second time, then a third time, with Coke's Commentary; afterwards read Sheppard's Touchstone, Preston's edition. Then the notes on feuds, uses, and trusts, in the last edition of Coke upon Lyttleton; and then, once more, Coke upon Lyttleton, and the notes of the last edition. Then, with profound attention, Sander's Treatise on Uses and Trusts, and Preston on Fines and Recoveries. Fearne's Essay on Contingent Remainders, and Sugden on Powers. Then Plowden's Commentaries for Equity; the article 'Chancery' in Comyn, comparing it with P. Williams' Reports.

## BIOGRAPHICAL SKETCH OF MR. DUNNING.

The Right Honourable John Dunning, Lord Ashburton, was the second son of an attorney at Ashburton, where he was born, on the 18th of October, 1731. When seven years old, he was sent to the free grammar school of his native place, where he made an astonishing progress in the classics and mathematics. His memory was prodigious: it is said he would get by heart, in the course of two hours, a book in Homer, or in Virgil's Æneid. It was a favorite amusement with him, to draw the diagrams of Euclid's elements on the walls and ceiling of the school room; and, at an advanced period of his life, he declared that he owed his fortune to Euclid, and Sir Isaac Newton. On leaving school he went into his father's office, and remained there till the age of nineteen. It was his father's intention that he should settle in his own neighbourhood, and succeed to his practice; but the son appears to have had a consciousness of possessing powers which would enable him to play a distinguished part in a much greater theatre than a country town. According to some accounts he had great difficulty in prevailing upon his father to alter the plan which he had formed for his son's future life; but, at length, he obtained his consent to go to London, on an allowance of £100 a year, to prosecute his studies, and set himself forward in the great world. Others state that his father was for many years steward to Sir Thomas Clarke, master of the Rolls, who, having occasionally met young Dunning, was satisfied of his superior abilities and attainments, and recommended him to be sent to the Temple. It is said that he was admitted as an attorney, but not finding much success in that branch of the profession, which mainly depends on private connexions, of which he, as a stranger in the metropolis, had but very few, he directed his attention to the bar.

He had chambers up two pair of stairs, in Pump court, where he lived almost wholly se-

cluded from the society of other young men, partly from a natural shyness, which he with difficulty threw off, and partly from his desire to pursue his studies without the possibility of interruption. It was his practice to rise early, and apply himself to his books without intermission till late in the evening, seldom going out to vary the scene, and never encouraging visitors to call upon him. In the evening he dined and supped in one meal at the Grecian, he would then relax a little into conversation, and prove by his wit, and his fund of intelligence, that he was capable of being a most social and agreeable companion. There can, however, be little doubt that his mode of life was hurtful to his constitution, which was always delicate, and that the want of suitable relaxation was one of the causes of the indisposition under which he frequently laboured during his short life, which terminated in his fifty-second year.

His disinclination for society rendered him rather negligent of his person, which was not formed in nature's most elegant mould, and his great modesty made him shrink from the courts, so that he was three years at the bar before he received 100 guineas. Fortunately an opportunity was presented to him for gaining distinction by his pen.

In the year 1759 the authority of the French in the East Indies, was overthrown by the English, who thereby acquired an accession of power and influence, which excited the jealousy of the Dutch. Some insults were offered by them to the British flag, and many of our vessels were seized and detained, contrary to the treaties which then existed between the two nations. Nevertheless, the Dutch transmitted complaints to their mother country against the English, and especially against the servants of the East India Company, as violators of neutrality, and interrupters of Dutch commerce. These complaints were formally delivered in writing to Sir Joseph Yorke, the British ambassador at the Hague, and were communicated to the public in a pamphlet.

The English East-India Company required some able writer to vindicate them from charges which so deeply concerned their credit and their interests; their chairman, Lawrence Sullivan, was induced to intrust the important task to Mr. Dunning. According to some statements, this selection might be ascribed to a private acquaintance that subsisted between them; but, according to others, Mr. Sullivan requested Mr. Hussey, a king's counsel, to recommend to him some able man equal to the occasion, and that gentleman pointed out Mr. Dunning as a person eminently qualified. Mr. Dunning produced a most ingenious and powerful vindication, entitled, "a Defence of the United Company of Merchants trading to the East Indies, and their Servants, (particularly those at Bengal,) against Complaints of the Dutch East-India Company," 4to. 1762. It was a master-piece of eloquent reasoning, too searching and too nervous for their high mightinesses to resist; it drew from them a conciliatory answer, and led to the redress of grievances, of which the English had, in reality, most cause to complain. Both His Majesty's government, and the East India Company were highly delighted with this performance, and the latter evinced their satisfaction in the substantial form of a bank note for £500. This was but an earnest of the profits which resulted to him from the reputation he acquired by this composition. The public at once gave him credit for talents of a very high order, and his professional assistance became in great request.

It required, however, some such unequivocal encouragement to enable Mr. Dunning to overcome the extraordinary diffidence which beset him when a young man, but which he eventually overcame, and almost fell into the opposite extreme. This diffidence arose like Tully's, from the high standard of excellence by which he tried himself; from a full apprehension of the various knowledge and matured faculties which he who aspires to the glorious character of an orator ought to possess, and from "the secret dread, and inward horror," of being unable, in the moment of exertion, to give full effect to his own conceptions. Mr. Dunning had to contend against the disadvantages of an awkward figure, an inexpressive countenance, a constant shaking of the head, and a hectic cough, which caused him frequent interruptions in his speeches. He held a brief in some important cause, which was to come on before the House of Commons; he studied it night and day, and made himself complete master of every point. When the day arrived, he was attended to the bar by several barristers, who had formed high expectations of his abilities: he began in a low tremulous voice, and had scarcely ended his first sentence, when he turned to his brief to refresh his memory; but, such was his state of nervous excitement, that the paper in his hand appeared a perfect blank, and he hastily concluded, in his own mind, that he had by mistake, brought a bundle of writing paper from his chambers, instead of his brief: his confusion increased, he looked in vain on the brief; all appeared blank, and he was obliged to retire from the bar, overcome with trepidation.* When he had leisure cooly to reflect on the causes of his failure, he must have seen the unreasonableness of his excessive timidity, which alone had rendered his laborious preparations abortive; and, knowing as he must, that he had, in his close application for many years, amassed a fund of knowledge which might safely be drawn upon, for the exigencies of almost any cause, he took courage, and resolved to overcome a weakness which tended to paralize his best energies. When Wilkes's papers were seized under a general warrant, that busy politician commenced actions against the secretaries of state: he gladly availed himself of Mr. Dunning's assistance on trials and arguments arising out of his numerous political conflicts, and his counsel was highly distinguished for his knowledge of constitutional law, and his zeal in maintaining it.

* European Magazine, vol. xxxiv. p. 83.

By his exertions for the idol of the crowd, he acquired a large share of popularity, and the name of Dunning was often shouted with "Wilkes and liberty!" His reputation being once established, practice flowed in upon him like the waves of the rising tide: not only augmenting, but becoming more elevated. He was highly esteemed in the House of Lords, which frequently resounded with his eloquence. One of his most celebrated speeches was delivered at the bar of that house in a cause relating to some lead mines of Lord Pomfret. His lordship was considered one of the proudest members of the peerage; but he was so delighted with his counsel, that he bowed to him repeatedly during his speech, which occupied three hours and a half; and, at the conclusion he hastily passed through the bar, and shaking him by the hand, poured forth such a torrent of compliments, that the orator, to escape from them, pleaded the necessity of going home to recruit his spirits.

He was appointed solicitor general in 1767, and he would doubtless have risen to the highest stations in his profession, if his firm adherence to his political connexions had not induced him to relinquish the pursuit of those objects of ambition, rather than compromise his principles. He resigned office about two years afterwards, with his friend and patron, the then Marquis of Lansdowne; and, as he had never been a king's counsel, he resumed his place without the bar, according to his standing, having refused a patent of precedency, which was offered to prevent him from the supposed humiliation; but which he rather gloried in, as a triumph of independence and consistency. The recordership of Bristol, an office which has been held by some of the most celebrated lawyers, he thought an honour worthy of aspiring to, and he was elected to succeed Sir Michael Foster.

On the change of ministry, in 1782, Mr. Dunning was appointed, through the interest of the Marquis of Lansdowne, chancellor of the duchy of Lancaster, and was created a peer by the title of Baron Ashburton. Here he closed his labours at the bar, which were as honourable to his integrity, as to his transcendent talents; for if, after having stated a case from his brief, he found from the evidence, that his client had been guilty of any gross misconduct, he made no scruple to throw his brief over the bar, and take up the papers in the next cause in which he might be concerned.

He did not enjoy his retirement long: his constitution, always weak, undermined by the intense application of his youth, and the incessant exertions of his riper years, yielded to a decline, which brought him to his end the year after his last promotion, and in the fifty-second of his age. His death was probably accelerated by a severe shock which his parental affection sustained in the loss of one son, and the dangerous illness of another. In his hours of relaxation, the nursery was the scene of his chief delight; but the death of one of its inmates, and his apprehensions for the safety of another, were more than his enfeebled spirits could endure. His intimate friend, Sir William Jones, has mentioned in affecting terms, a visit he paid him at this period of affliction; when they parted in tears, Sir William, "little hoping," as he expresses himself, "to see him again in a perishable state."

As his malady increased, he was advised to try his native air of Devonshire, and on his journey thither he accidentally stopped at the same inn where Mr. Wallace, who was once attorney general, had put up, on his way to London, for the purpose of procuring the best medical advice for his own shattered constitution. They had been throughout their professional lives, both legal and political antagonists: but now they met as friends, and passed the evening together with as much cheerfulness as the indisposition of both would permit; and they parted in the morning, promising to visit each other in the winter. These promises, alas! were never fulfilled, as Dunning died on the 18th of August, 1783, and Wallace survived only till the 11th of November following.

The fortune acquired by Lord Ashburton through his professional labours, has been stated as not less than 130,000l. a sum which appears the more considerable, when we reflect on the increase which has taken place in the amount of counsel's fees during the last half century. No meanness in acquiring, no parsimony in amassing, his riches, could be imputed to him: they were showered upon him as the spontaneous tribute to his unrivalled genius; he enjoyed them liberally, and made others participate in his enjoyments. But his immense practice left him no time to indulge in the pleasures of a domestic establishment; he was often unable to take a regular dinner at home. This made it convenient for him to resort to George's Coffee-house, Temple Bar, two or three days in the week: he took an early supper there with a few select friends, one of whom was Arthur Murphy the dramatic author: here he relaxed after the fatigues of the day, and on Saturday he sometimes took his companions to a seat he had at Fulham, where they stayed till Monday morning. He looked upon this coffee house as his own house; he never asked for his bill, but the landlord every two or three months, or whenever he stood in need of money, sent in his account, which Mr. Dunning used to discharge at sight, merely looking at the sum total, and never taking the trouble to examine the items, or the casting. Being asked one day, how he contrived to get through so much business? he answered, "Why I don't know how it is: I do some myself, to be sure; a good deal does of itself, and the rest is left undone." In court, he was tenacious of the rights of the bar, and could not brook any slight from the judges. Lord Mansfield happening to take up a newspaper while Mr. Dunning was addressing him, the sensitive counsel made a sudden stop. "Pray go on, Mr. Dunning," said his lordship, "No, my lord, not till your lordship has finished." While he was one of the most intrepid advocates, and on some few occasions at the bar,

allowed his wit, which was always fruitful, to transgress the limits of propriety, he was in private remarkably unassuming; studious not to talk more than his share, and an attentive and patient hearer of what others had to offer. When Lord Thurlow gave his first dinner as lord chancellor, he called Mr. Dunning to his right hand, in preference to all the great law officers present; and when he hesitated to take the place, Lord Thurlow called out, in his blunt manner, "Why will you keep the dinner cooling in this manner." His father lived to witness his prodigious success: he went to the Steward's office in the Middle Temple to sign the bond of some student, and when the clerk saw the signature of "John Dunning," he asked with some surprise, whether he were any relation to *the great Dunning*. The old gentleman was sensibly affected, and modestly replied, "I am John Dunning's father, sir." Mr. Dunning always evinced great veneration for his father, and treated him with the most amiable tenderness.

His character, as a speaker and a lawyer, has been so ably portrayed by his eminent contemporary and intimate friend, Sir William Jones, that it would be presumptuous and vain at this time to attempt an original description, which could not prove half so satisfactory to the reader as the testimony of one whose kindred genius enabled him to form a due estimate of those wonderful talents, the display of which he delighted to witness.*

## MEMOIR OF MR. HODDING.

A MELANCHOLY accident has been the means of depriving the profession of a highly respectable member, Mr. John March Hodding, town clerk of Salisbury. He had been staying with his family on the sea coast, at Hordle, near Lymington, and was proceeding from thence to his client, Sir William Heathcote, of Hursley park: on the road his horse took fright, and in endeavouring to get out of his gig, he fell on his head; a concussion of the brain took place, and he was taken up apparently lifeless. He was conveyed to a farm-house near the spot, where he was immediately, and constantly, attended by Mr. Adams, a surgeon of Lymington, whose efforts were seconded by those of Mr. Hodding's friend, Mr. Coates, of Salisbury. Some faint hopes were at one time entertained of his recovery, but after lingering five days, he expired, on the 6th instant, in the thirty-second year of his age.

Mr. Hodding was in partnership with his brother, Mr. Matthias Thomas Hodding, and they possessed the confidence of many of the most respectable gentry in the county of Wilts., whom they numbered among their clients. The family of Hodding has been many years settled in Salisbury: the father of the deceased was his predecessor in the office of town clerk. Mr. John Hodding was a man well calculated to support the character of the profession: active and indefatigable in his exertions to promote the interests intrusted to him; faithful in his advice; upright and honourable in his actions. He stood high in the opinion of the corporation of the ancient city where he resided; and his loss will be severely felt by its inhabitants of all classes. He took a lively interest in the welfare and general reputation of solicitors and attornies as a body; and conceiving that their interest and welfare would be greatly promoted by the Law Institution, he became one of its members. While the Institution will have to deplore the loss of some valuable friends before they could have the satisfaction of witnessing the maturity and operation of their design, it must still be gratifying to its surviving members, to recollect that it was, in its infancy, fostered by such men as our lamented friend; and the benefit of their early support will be held in grateful remembrance.

* We must postpone Sir Wm. Jones's character of Mr. Dunning, and the remainder of this article, to our next number.

## IMPROVEMENTS IN CHANCERY PRACTICE.

### *Writs of Subpœna.*

[FROM A CORRESPONDENT.]

ACCORDING to the present practice, the præcipe for the subpœna having been left by the solicitor at the office, the subpœna (which is a blank form,) is filled up, by the clerk or deputy of the patentee, with the names of the plaintiff and defendant, the teste and return. If there be only one defendant, there is, of course, only one subpœna, for which two shillings and sixpence are paid; but if more than one, there is a subpœna for each, for which an additional shilling is paid. It was formerly the practice to insert three defendants in a subpœna, and to have two labels to it, for each of which sixpence was paid, so that two of the defendants were served with the labels, and the subpœna shewn to them, and the body of the subpœna was served on the third, or left at his dwelling-house.*

The subpœna having been made out at the Subpœna office, is taken by the bag bearer to be sealed with the great seal on the seal days, which are on the first days of term; Tuesdays, Thursdays, and Saturdays, during term; the last day of term; and certain days appointed by the lord chancellor after each term, at the interval of about a week from each other, viz. two before and four after Hilary term, two before Easter term, two between Easter and Trinity terms, four after Trinity term, two before and four after Michaelmas term. Sixpence is paid for sealing a subpœna, if sealed on any of those days, but if it be necessary to seal it on any other day, three guineas must be paid for opening the seal, unless it should happen to be opened by any other person, which is frequently the case for sealing commissions of bankrupt, in order to defeat extents for crown debts, or

* The present practice is more convenient, for, in case a defendant cannot be met with to be served personally, the subpœna may be left at his dwelling-house, which could not be done with a label.

other reasons; in that case, three shillings and sixpence only is paid for a private seal.

Now all this machinery is attended with great delay, trouble, and expence, particularly during the long vacation, when there is no public seal from about the middle of August until the beginning of November.

There were sixty-four *public* seal days between the seal days before Michaelmas term 1829, and Michaelmas term 1830, including those days before, in, and after each term; and deducting those days, and fifty-two for Sundays, there remained 249 days during the year on which a subpœna could not be sealed, without paying for a *private* seal.

In lieu, therefore, of the present practice, I would propose, that solicitors shall be permitted to make out the subpœnas themselves, and get them signed and sealed at the Subpœna Office with an official seal, in like manner as is done with writs in the courts of law. I am not aware of any objection that can be made to this mode by any one, except by the person receiving the profits of opening the seal and of private seals; and he may be easily compensated for that loss, by taking the average number of subpœnas sealed at the opening of a seal and at private seals for any given number of years past, and adding something, in respect thereof, to the sixpence which is paid on each subpœna at a public seal, and for which the patentee of the Subpœna office shall be accountable to him.

I cannot, for a moment, suppose that any objection can be made to the substitution of an official seal for the great seal, as every practitioner knows there is no impression of it upon the subpœna (which must have been the reason originally for sealing it), but that after having been rolled up, and a piece of wax put round it, it undergoes the form of being put under the shadow of the great seal; but there is not, and cannot possibly be, the slightest impression of the seal, and it might as well be put under the chancellor's hat, nor do I anticipate any objection on the part of the patentee, as he will be relieved from employing a clerk to fill up the subpœnas, and will only have to stamp them with the official seal, as they are brought to him for that purpose by the solicitors, and to receive a fixed fee for his trouble.

This plan will not occasion any additional expences to the suitor, as the solicitor will be satisfied with the six shillings and eight pence which he now receives for the prœcipe and attending to bespeak the subpœna, for making out the subpœna, and attending to get it signed and sealed. I recommend a memorial to be presented to the lord chancellor on the subject, and the same opportunity may be taken of applying to his lordship to make an order for altering the present form of the subpœna to one which would better explain its meaning, as suggested to the chancery commissioners.

---

## LAW REFORMS.—*Court of Chancery.*

[FROM A CORRESPONDENT.]

AMONGST the various plans which have been suggested for expediting and facilitating the administration of justice, there is a very obvious one, which I do not remember to have seen noticed any where, and therefore I beg leave to state it. The court of Chancery, which is the court most complained of, sits for the despatch of business only two thirds, or at most three fourths, of the year. Independent of the other holidays and vacations, that court was shut from the middle of August, until the 1st of November. Why should it not be open all the year round? Is there so little demand for justice, that the tribunals at which it is to be had are to be shut for so long a period? But it will be asked, are the chancellor and other judges of that court to have no relaxation? To which I answer, let them, by all means, have their full share of it; and, in order thereto, let us have three additional equity judges; and when the lord chancellor, master of the rolls, or vice chancellor, is not sitting, let the *pro* chancellor, *pro* master of the rolls, or *pro* vice chancellor, take his place. But how, you will say, are they to be paid? Why, if the country cannot afford to pay the salaries of three additional judges, which would not amount to more than £15,000 or £20,000 a year, in return for expeditious justice, let them be paid out of the unclaimed funds of the court of Chancery. Again, it will be asked, are the counsel to have no holidays? Oh, yes; let them, too, take as many as they please; but if they want pleasure or relaxation, they must, like other classes of society, be content to sacrifice part of their gains to obtain it, and there will always remain a sufficient number of able men to transact the business in their absence. The present system creates a monopoly in favor of a few leading men, while the rest are starving.

In like manner, the sittings in London and Middlesex, after term, for the trial of causes, might be going on before the three chiefs, who should remain in town for that purpose, (there being three new judges appointed, who will do the circuit business,) whilst the other judges are going their circuits; or if the chiefs should prefer it, let them go the circuit, and leave three of the puisne judges at home to supply their places.

And here again it will be asked, how are they to try causes in the absence of counsel on the circuit? Never fear, there will always be a sufficient number of counsel, who will find it their interest to remain in town, and avoid the expense of the circuit. It might as well be said, that the assizes all over the kingdom should be held in succession, to enable the whole Bar to attend at every assize town. In effect, London and Middlesex would, according to my plan, become another circuit, which would have its separate Bar, like the rest.

Lastly, it will be asked, what is to become of the attorneys? Are they to work all the year round? To which I answer, as I have already done in the case of barristers, that if they take pleasure, they must be content to sacrifice part of their gains; the justice of the country is not to be delayed for the convenience and advantage of barristers, or attorneys, or any other class of men.

## LIMITATION OF THE NUMBER OF ATTORNIES AND THEIR EDUCATION.

[FROM A CORRESPONDENT.]

I THINK it desirable that no clerk should be articled until the age of seventeen, nor admitted as an attorney until twenty-four; and that no attorney should be allowed to take an articled clerk until he has been five years in practice. I think nothing would promote the education and respectability of the members of the profession so much as limiting the admission to the age of twenty-four; for, with the privilege of three years' clerkship only, many young men, prior to their being placed under articles, would then go to college, and I know this would also prevent many men from being articled till they had gone entirely through our public schools, instead of leaving them, as is now the usual course, when on the 4th form. If this rule were adopted, I, for one, should send my son to college, and let him take his batchelor's degree prior to his being articled.

I question also whether any attorney ought to have more than one clerk, and certainly none of less than fifteen years' standing ought to have more than one. Some limit must be put to the increase of the profession, and I know of no plan so unobjectionable as the deferring the time of being articled, and of admission, according to the above limitations. No increase of stamp duties, would, in my judgment, in the slightest degree abate the evil. At the same time, no person who has not been called to the Bar ought to act as a conveyancer, and all persons carrying on trade, in addition to their profession of conveyancers, ought at once to be deprived of their certificates, and restrained from practising. It is absurd to suppose that the profession can be altogether respectable with such members in it, and I think that every attorney levying fines, and acting as agent, for such conveyancers, ought to be removed from the rolls.

## ADMINISTRATION OF JUSTICE IN THE SUPERIOR COMMON LAW COURTS.

ALTERATIONS IN THE PRACTICE, *(continued.)*

WE adverted in our Second Number (*a*), to the alterations made by the 1 Will. IV. c. 70, so far as regards the admission of attornies in the court of Exchequer, the abolition of the Welsh and Cheshire courts, the terms and returns, the sittings at Nisi Prius, and the proceedings regarding bail. We have now to notice, as next in order of importance, the following subjects and matters of practice.

### *Appeal Court—Writs of Error.*

The Exchequer Chamber will now be established as the Court of Appeal, by writ of error, from the judgment of all the common law courts.

Thus the principal effects of section 8, as to writs of error, will be to remove the doubts which previously existed with respect to the proper Court of Appeal from a judgment of the King's Bench; to deprive the King's Bench of its jurisdiction as a court of error from the Common Pleas; to place its judgments on the same footing as the judgments of the other superior courts, as to the Court of Appeal from them; and to remove the necessity for the attendance of the lord chancellor and lord treasurer, in case of writs of error from the Plea side of the Exchequer.

### *Ejectment.*

Landlords are greatly benefited by the provisions contained in sections 36, 37, 38; by which they are enabled to obtain a more speedy possession of their premises when their right accrues, during or immediately after Hilary or Trinity Terms.

Before this Act, the law stood thus:

The 1 Geo. IV. c. 87, s. 1, provides, that when the interest of the tenant shall have expired, and the landlord shall proceed by ejectment, the notice attached to the declaration shall require the person to whom it is addressed to appear in the court in which the action shall have been commenced, on the first day of the term next following. Consequently, if the right of entry accrued during, or immediately after, Hilary or Trinity terms respectively, the landlord was delayed in the prosecution of his claim throughout the remainder of the term and the following vacation. *Tid. Prac.* p. 1209, edit. 9; *Archb. K. B. P.* vol. ii, p. 63.

The declaration used to be entitled of the term in which it was delivered; or, if delivered in vacation, of the term preceding. *Ad. Ejec.* 181; *Tid. P.* 1204, edit. 9; *Archb. K. B. Prac.* vol. ii, p. 64.

If the landlord obtained a verdict, or was nonsuited from the defendant's not confessing lease, entry, or ouster, the writ of possession could not issue before the judgment was signed. In the King's Bench, if a verdict was found for the plaintiff, the judgment could not be signed before the expiration of the rule for judgment in the King's Bench, or in the Common Pleas till after the appearance day of the return of the *habeas corpora juratorum*. *Tid. Prac.* p. 1241, edit. 9; *Archb. K. B. Prac.* vol. ii, p. 66-7. When the plaintiff was nonsuited at the assizes or sittings after term, on account of the tenant or landlord not appearing at the trial, and confessing lease, entry, and ouster, he was allowed, in the Common Pleas, to sign judgment, and take out execution immediately after the trial. *Throcmorton d. Fairfax v. Bently*, 2 *Durn. and East*, 780. But, in the King's Bench, he was not entitled to sign judgment against the casual ejector, till the day

(*a*) Page 19.

in banc, or first day in the ensuing term. 2 *Durn. and East*, 779.

*Quarter Sessions.*

The alteration of the time of holding the quarter sessions, appears to be necessary after altering the terms, in order to enable counsel to attend them.

The general quarter sessions were directed to be holden by the 2 Hen. V. stat. 1, c. 4, s. 2, four times a year: that is to say, in the first week after the feast of St. Michael (now, by the 54 Geo. III. c. 84, s. 1, directed to be the first week after the 11th of October, except in London and Middlesex;) in the first week after the Epiphany; in the first week after the clause of Easter; and in the first week after the translation of St. Thomas the Martyr; and more often, if need be. The quarter sessions, however, were variously holden in several counties, some on one day, and some on another; yet it was holden that they were good quarter sessions within the several Acts relating to quarter sessions, for they were only directory. 2 *Hale*, 50; 5 *Burn's Jus.* p. 192, *Mar.* edit. No alteration is made by this Act as to the time of holding the October sessions.

*Oaths and Declarations.*

The 1 Geo. IV. c. 55, s. 4, granted to a judge of the King's Bench the power of taking oaths and declarations, which is now extended to the judges of all the courts.

*Judgments on Felonies and Misdemeanours.*

The 9th section enacts that the judge, before whom persons are tried on any record of the King's Bench, for felonies or misdemeanours, *may* pass judgment on them at the assizes or sittings at which the trial takes place, instead of referring the case to the King's Bench for its judgment in the next term. The object of this provision, it is conceived, was to diminish the term-business of the court of King's Bench. But it is observable, that the pronouncing judgment is left as a matter of discretion to the judge.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

DUTY OF BANKERS.

THE plaintiff kept cash with the defendants, who are bankers. On a particular day the former drew bills upon the latter to a considerable amount. At the time of drawing he had not sufficient assets in their hands to meet his bills. Before, however, the bills were presented, he had paid in sufficient for that purpose. The time of paying in the money was so near that of the drafts being presented, that the books on the day of paying in had not been made up, so that on reference to the general book of the firm, it appeared that his, the plaintiff's, account was short. If the day-book of that day had been examined, it would have appeared that he had assets. This not being done, the defendants appeared to have no assets in hand, and the bills were returned unpaid. The effect of this was, as the plaintiff alleged, to injure his credit, and on that ground the present action was brought. A verdict was found for the plaintiff, with nominal damages, the jury expressly negativing malice on the part of the defendants, and the allegation of special damages accruing to the plaintiff. On showing cause against a rule *nisi*, for a new trial, the question submitted to the court was, whether the action was maintainable or not.

LORD TENTERDEN, and the other judges sitting with him, were of opinion that the action was maintainable. It was the duty of the bankers to take care, at the time bills were presented to them on account of their customers, that they were certain whether the customer had assets in their hands or not. Here they had not made themselves acquainted with the fact, and therefore they had been guilty of a breach of their duty, sufficient to entitle the plaintiff to maintain the action. Rule discharged. — *Mazetti* v. *Williams.* Mich. Term, 1830.

—

LEGACY DUTY.

*Brougham* and *Lynch* showed cause against the common rule for paying a legacy duty. The *Attorney General* and *Amos* were heard in support of the rule. The question was, whether property consisting of funds, in foreign stock, bequeathed by a testator resident in England, was liable to the payment of the legacy duty.

The CHIEF BARON said, that the question in this case was, whether the circumstances were such as to bring the legatee, the executor, and the estate, within the description of the Act of Parliament. In the first place, the property on which the duty was to attach, must be personal estate. The circumstances stated in the affidavit in this case proved it to be personal, for Mr. Stoner had taken the property as executor, and had authorised the delivery of it to the legatee. The general words of the sections "every person," showed that the Act intended to make no personal exemption. The duty, according to the Act, was payable upon property obtained in respect of the probate granted to the executor. Though the executor was not bound to take out a probate in this country, yet he got at the effects by force of the will, which was made in this country. Under these circumstances his lordship was of opinion, that by the words of the Act, the legacy duty was payable.

Mr. BARON BAYLEY, in this case, felt no doubt whatever. This was the case of a will, made by a British subject, domiciled in England, the will administered by an English executor, and operating on that which throughout, in his opinion, must be taken to be English personal property. It had been much pressed on the court that the property must be considered in the country in which it was situated as real property, but there was nothing in the affidavits that shewed it to possess that character. The circumstance that the name of the executor had been introduced into the books, and that he had dealt with the property, was satisfactory to show that it was considered as personal property. If it was personal property, then the question was, whether it was to be considered in every respect as personal property, to be administered in this country. There was no doubt that the amount of this property, as part of the testator's estate, would be found in the first place to be situated in foreign funds, but the court must not look to the circumstance of place alone, but having ascertained that it was personal estate, they must see what rules of law applied to personal estate not existing in this kingdom, but existing locally abroad. In the case of Bruce *v.* Bruce, 2 Bos. and Pul. 229 (*n.*) it was

held that personal property followed the person of the owner, and must be distributed according to the law of the country in which he was domiciled at the time of his death, without regard to the actual situation of the property. In the late case of Somerville *v.* Somerville, the question was, whether the succession to the property should be regulated by the Scotch or English rule of descent, and the rule of domicile of the owner was applied, for he, having resided in Scotland at the time of his death, his property in the English funds was regulated by the rules of Scotch descent. That was the rule of personal property. It was always liable to transfer wherever the owner might be by the Act of the party to whom it belonged, and there were authorities that went the length of showing, that, if a trader in England became bankrupt, having at the time of his bankruptcy that which was considered by the law as personal property, belonging to him abroad, the assignment of his estate and effects should operate on that property, at least as against all those persons who owed obedience to those bankrupt laws. If this was personal property, and the executor might have it in full value in this country, why was not the legacy duty to be payable upon it. The rule of the *situs* of property did not apply here. It only existed with reference to the limits of the diocese within which the probate was taken out. It did not attach upon personal property where the proprietor was in India, as the case of Bruce *v.* Bruce had clearly decided, and on the whole his lordship was of opinion that the case must be governed by the rule relating to the domicile of the owner at the time of his death, and as in this instance the owner was domiciled in England, it must be taken as English personal property, and he legacy duty must be paid upon it.

Mr. Baron Garrow concurred. The legatees would probably be somewhat reconciled to this decision, when they recollected that if they took this property, it must be as personal property, for the will was not sufficiently attested to pass real property. (*a*)

Mr. Baron Vaughan concurred. Rule absolute.

*In re Stoner.* M. T. 1830.

—

EJECTMENT.

On showing cause against a rule, calling on the tenant in possession in an action of ejectment, to shew cause why he should not give the undertaking and enter into the recognisance required by the 1 Geo. IV. c. 87, s. 1, in actions of ejectment by landlords against their tenants, on the former complying with the provisions of that statute, it appeared that the tenant was in possession as assignee of the remainder of a lease of the premises. The application in question was therefore made. On the part of the tenant it was sworn, that it was true he had taken an assignment of the residue of the term, and had taken possession of the premises by virtue of that assignment, but that he had done so merely to prevent the premises from going to decay. He was heir at law, and would be entitled to the premises at the expiration of the lease, and therefore was now possessed of them in his own right.

Holden, that this was not a case within the statute, as that only applied to those cases where the tenant merely held under a title derived from his landlord. *Littledale*, J. M. T. 1830.

VOLUNTARY PREFERENCE—ATTORNEY.

This was an action by the assignee of an insolvent named Charles Porter, to recover a sum of £21. alleged to have been paid by him to the defendant by a voluntary preference, contrary to the provisions of the 7 Geo. IV. c. 57, s. 32. The defendant is an attorney, and had been employed by the insolvent to defend an action brought against him. The money in question became due for defending this action, and it was accordingly paid. At the time the money was paid the defendant was clearly aware of his client's insolvency.

Littledale, J. who tried the cause, told the jury that if they believed the money to have been paid for defending the insolvent from an action brought against him, he was of opinion the plaintiff was not entitled to recover, for it was not a case contemplated by the legislature in the statute on which this action was founded.

The jury found a verdict for the defendant. *Troup* v. *Brook.*

—

NONSUIT—ATTORNEY.

When a cause came on for trial, no person appeared for the plaintiffs; and on the application of *Wilde*, sergeant, for the defendant, a nonsuit was entered. It was stated at the time, that if it should be found a brief had been delivered to any one, the defendant's counsel would consent to the nonsuit being set aside on payment of the costs of the day. A rule for that purpose had since been obtained, on the ground that the plaintiff's attorney had been suddenly taken ill, and had given the management of the cause into the hands of his son on the day before it was expected to be tried. The son had been prevented by accident from delivering a brief that evening; but, on the following morning, he went to the chambers of a sergeant for that purpose, when he found that the sergeant had already left chambers for court. He proceeded thither instantly, but found that before his arrival the cause had been called on, and a nonsuit entered.

The court were of opinion, that enough had not been shewn to justify them in interfering, and they accordingly discharged the rule. *Eldridge* v. *Turnham.* M. T. 1830. C. P.

—

AGREEMENT—SET-OFF.

The plaintiffs came into possession of an order from a person named Wrentmore to the defendants, to pay a sum therein mentioned, when certain moneys from a house in New South Wales should come into their hands. The agreement for payment of the order was made, that the plaintiffs might withdraw an attachment issued out of the Mayor's Court. It was withdrawn. The defendants, who were creditors of Wrentmore, contended that they were not bound to discharge the order till the whole of the money had been received from New South Wales, and that they were entitled to apply the first proceeds in extinguishment of their own demand.

The chief justice thought the terms of the undertaking absolute. Verdict for the plaintiff. *Hare* v. *Richards.* Com. Pl. N. P. M. T. 1830.

—

PRACTICE ON INJUNCTIONS.

An injunction was granted to restrain the defendant from removing the standing crop from a certain farm in his occupation. The defendant committed a breach of the injunction, and an order was ob-

(*a*) *Quere.* If the real property was in America or France, Russia or Prussia, and the legatees were only to receive the produce after it had been disposed of?

tained for him to shew cause why he should not stand committed for contempt. The defendant's counsel contended that he should have had notice served upon him, of the plaintiff's intention to proceed for the contempt, and not an order *nisi*, and he cited the case of "Durant and Moore," as the only one reported that bore upon the point. The lord chancellor (Lyndhurst) having considered that case, together with a case in the registrar's book, *held* that the order to shew cause was a legitimate mode of proceeding; and that it was, in fact, better for the defendant than a notice. Court of Chancery, *sittings in Mich. Term.* 1830.

—

SECURITIES IN BANKRUPTCY.

A creditor held three promissory notes of the bankrupt, and a lease and title-deeds belonging to him and others, as security for the debt. The commission issued in 1797, and the creditor, who was a female, proved her debt, gave up her securities, and received a dividend in 1802: she died in 1824. A part of the bankrupt's estate to which some of the title-deeds related, remained unsold: and the representatives of the deceased creditor apply by petition to be permitted to recall the securities, and have the benefit of them, accounting for the dividend received. Held, that too long a time had elapsed; and there appearing no evidence of mistake in delivering up the securities, the petition was dismissed with costs. *Ex-parte* EGGINGTON. Court of Chancery, *sittings in Mich. Term*, 1830.

—

DECLARATION.

On shewing cause against a rule setting aside the notice of declaration, and taking the declaration off the file, the following objection appeared to have been the ground of the application. The declaration was in debt, and the notice was of a plea of trespass on the case. Common bail, too, had been filed by the plaintiff for the defendant, pursuant to the statute, before the declaration had been filed. The writ was returnable on the first return of Easter Term last, but the present application was not made until the sixth day of Michaelmas Term.

The court refused to interfere, as the defendant should have applied without delay. *Littledale, J.*, M. T. 1830.

—

BAIL-BOND.

Where an application to set aside all proceedings in an action on a bail-bond for irregularity, on the ground that proceedings were taken after notice of render of the principal, the writ having been sued out on the 12th of June, returnable on the 19th, and notice of render given on the 17th, and the writ therefore was right; it was holden, that the rule must be discharged as to the writ, and made absolute as to all subsequent proceedings, without costs. *Littledale, J.*, M. T. 1830.

—

JOINT ACTION.

In an action against three defendants, a rule was obtained by one of them to shew cause why the plaintiff should not reply in ten days, or why, in default of his replying, the name of the defendant applying should not be struck out of the declaration; or why all proceedings should not be stayed, on the ground that the plaintiff had been several times ruled to reply, but had never done so. It was moreover stated, that one of the defendants had suffered judgment by default, and therefore the defendant was unable to sign judgment of *non pros.* On shewing cause against the rule obtained on these grounds, the above facts were admitted. The court discharged the rule as to the two first parts of the defendants' application, but made it absolute for the stay of proceedings, unless within a month the plaintiff should reply. *Littledale, J.*, M. T. 1830.

—

DESPATCH OF BUSINESS AT THE ROLLS.

His *Honour* stated, that in consequence of the despatch of the business of the court, and the adjournment of several causes, only six *causes* remained for hearing after those in the day's paper; and, as the only mode in which the court could occupy itself was by advancing those under *further directions* and *costs*, he should hear such as the parties wished to have advanced.

Mr. *Bickersteth* suggested, that it would be very desirable could some effectual mode be adopted of giving due notice to all the parties concerned. Business had been despatched so much beyond expectation, that it had been found impossible to keep pace with the court.

His *Honour* considered it as indeed a very unfortunate state of things. To avoid the adjournment of the cases in which the parties were not prepared, would have been impossible.

Mr. *Bickersteth* stated the inconvenience had arisen from the long usage of the court. Solicitors had set down their causes before publication, relying that a considerable interval might elapse before they were heard. The evil, however, would cure itself.

—

PRACTICE AND BAIL COURT.

Lord TENTERDEN, after the appointment of *Patteson, J.*, and *Taunton, J.*, intimated to the bar that the single judge in the Bail Court would, for the future, take all motions, and hear cause shewn in matters of practice, and during the Term would take all bail.

## MISCELLANEA.

APPOINTMENT OF JUDGES.

THE increase which has taken place in the number of the judges, may render interesting the following account of the ancient mode of creating them:

The lord chancellor of England shall enter into the court where the justice is lacking, bringing with him the king's letters patents, and sitting in the midst of the justices, causeth the *serjeant* so elect to be brought in, to whom, in the open court, he notifieth the king's pleasure touching the office of the justice then void, and causeth the said letters to be openly read, which done, the master of the Roll shall read before the same elect person, the oaths that he shall take; which, when he hath sworn upon the Holy Gospel, the lord chancellor shall deliver unto him the king's letters aforesaid, and the lord chief justice of the court shall assign unto him a place in the same, where he shall then place him, and that place shall he afterwards keep (*a*).

"That he shall indifferently minister justice to all men, as well foes as friends, that shall have any sute or plea before him, and this he shall not forbear to do, though the king by his letters, or by express word of mouth, would command the contrary: and that from time to time, he shall not receive any fee or pension, or livery of any man, but of the king only, nor any gift, reward, or bribe of any man, having sute or plea before him, saving meat or drink, which shall be of no great value (*b*)."

A justice thus made, shall not be at the charges of

(*a*) *Fortescu* de Laud. Legum Angl. cap. 51 fo. 121, 6.

(*b*) Ib. fo. 122, 6.

any dinner, or solemnity, or any other cost at the time when he taketh upon him his office and dignity, forasmuch as this is no degree in the faculty of the law, but an office only, and a room of authority to continue during the king's pleasure (*c*).

As to the manner of their riding to Westminster Hall, after they are so made, take these instances from the authorities here cited.

Upon Wednesday, 29th Jan. A. D. 1605, this house, (id est, the *Inner Temple*,) with the students of the inns of Chancery belonging to the same, did accompany Mr. Justice Coventry, (sometime a boncher of this house, and newly chosen a judge of the Common Pleas,) from his chambers at Serjeant's inn, to Westminster, and that time the judge went formost, after him the bench, and then the barr, then the gentlemen of the house, and then the students of the innes of Chancery aforesaid, which was erroneous: for the innes of Chancery should first set forth, then the young gentlemen of this house, then the barr, then the bench, the antients coming last, and then the judge last of all. Which error was the next day (being Thursday) reformed, in accompanying *Mr. Justice Tanfeild*, newly chosen justice of the King's Bench, to Westminster, from his chambers at Serjeant's Inn (*d*).

And accordingly did Sir *Henry Montagu*, knight, one of the king's serjeants at law, and recorder of the city of London, proceed, in Michaelmas Term, 19th Novembris, A. D. 1616, (Regni Regis Jacobi, 14,) then succeeding Sir *Edward Coke*, in the chief justiceship of the King's Bench, viz. first went on foot the young gentlemen of the Inner Temple, after them the barristers according to their seniority, next the officers of the King's Bench, then the said chief justice himself on horseback in his robes, the Earl of Huntingdon on his right hand, and the Lord Willoughby of Tresby on his left, with above fifty knights and gentlemen of quality following.—*Dugdale's Origines Juridiciales*, p. 97.

—

THE MAN WITH THE DYING SPEECH.

When the vacancy occurred in the Exchequer Bench, which was afterwards filled by Mr. Adams, the ministry could not agree among themselves whom to appoint. It was debated in council, the King, George II. being present; and the dispute growing very warm, his majesty put an end to the contest by calling out, in his usual English, "I vill have none of dese, give me de man wid de dying speech," meaning Adams, who was then recorder of London, and whose business it therefore was to make the report of the convicts under sentence of death.—*Miss Hawkins's Memoirs*, vol. ii.

—

AN EQUESTRIAN PROCESSION TO WESTMINSTER HALL.

His lordship (Shaftsbury) had an early fancy, or rather freak, the first day of the term, (when all the officers of the law, king's counsel, and judges, used to wait upon the great seal to Westminster Hall,) to make this procession on horseback, as in old time the way was, when coaches were not so rife. And accordingly the judges, &c. were spoken to to get horses, as they and all the rest did by borrowing and hiring, and so equipped themselves with black foot cloths in the best manner they could; and diverse of the nobility, as usual, in compliment and honour to a new lord chancellor, attended also in their equipments. Upon notice in town of this cavalcade, all the shew company took their places at windows, and balconies, with the foot guard in the streets to partake of the fine sight; and being once settled for the march, it moved, as the design was, statelily along. But when they came to straits and interruptions, for want of gravity in the beasts, and too much in the riders, there happened some curvetting, which made no little disorder. Judge Twisden, to his great affright, and the consternation of his grave brethren, was laid along in the dirt: but all, at length, arrived safe without loss of life or limbs in the service. This accident was enough to divert the like frolic for the future, and the very next term after, they took to their coaches as before. *Roger North's Examen, p. 57.*

—

LORD KENYON.

I was pleased with an anecdote which Mr. ——— gave me of Lord Kenyon. A friend of his, some time since, had sold his lordship a cottage at Richmond; and going down there lately, wished to take a view of the premises: an old housekeeper admitted him; on the table he saw three books; the Bible, Epictetus, and the Whole Duty of Man. "Does my lord read this?" said the gentleman, taking up the Bible: "No," said the woman, "he is always poring upon this little book," pointing to Epictetus; "I don't know what it is; my lady reads the two others; they come down here of a Saturday evening, with a leg or shoulder of mutton; this serves them the Sunday, and they leave me the remains." A chief justice of England thus severely simple in his taste and habits, is at least a curiosity. —*Extracts from the Diary of a Lover of Literature.* [Mr. Green, barrister, of Ipswich.]

—

I SPY A BROTHER.

Sir Samuel Prime was a man of the highest honour and integrity in his private character, and of the first eminence in his profession. He might more than once have been on the bench; but owing to a certain quickness of feeling, which he conceived inconsistent with the character of a judge, he from conscientious motives declined it.

At the time when making a new sergeant was considered an important event, part of the ceremony was a procession, which set out, if I mistake not, from the Temple, and proceeding westward, turned up Surry street in the Strand, and then turning eastward, went up Chancery lane to Sergeant's inn, where those already of the rank of sergeants were assembled in their hall to receive the new sergeant; and, on his approach, the intimation was given in the following terms: "I spy a brother." When Sir Samuel Prime was called to the rank of sergeant, some one recollecting that his crest was an owl, placed at the first floor window of a house in the Strand, directly fronting Surry street, the figure of an owl, with a label, on which were the words, "I spy a brother." The application of the figure thus placed to the connexion of the owl in the armorial bearings of the new sergeant, might create a smile, but could not make the person himself ridiculous. At that time the degree of a sergeant was an honour; and perhaps we may venture to say, few deserved it better than the learned gentleman whose call is alluded to.—*Miss Hawkins's Anecdotes*, vol. i.

(*c*) *Fortescu* de Laud. Legum Angl. 123, a.
(*d*) *Ex Regist. Inter Templi*, fol. 58, a.

LONDON:

PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, DECEMBER 4, 1830. No. V.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## JUDICIAL CHARACTERS.—No. I.

### LORD LYNDHURST.

THE LORD CHANCELLOR has resigned the great seal. He has suffered a legal dissolution. His character and labours have already become matter for history—and, without attempting to detail the events of his life, we think we may properly advert to his character as a judge, and endeavour to furnish the means of forming a correct opinion on his qualifications in this capacity. It will be remembered that before taking the office of Lord Chancellor, he had for a short time held that of Master of the Rolls. Of his labours in this office it will be unnecessary to speak. The causes which he then heard were mostly decided after he became lord chancellor; his duties were of a minor kind; his sphere was contracted; and the materials there afforded for forming an opinion of his judicial character are scanty and unsatisfactory. We prefer, therefore, passing over the few months during which he held this office, and confining our attention to his labours as lord chancellor.

On the 20th of April, 1827, (Lord Eldon having previously resigned,) the great seal was intrusted to Lord Lyndhurst. His previous character at the bar well entitle him to so proud a distinction. His dignified and gentlemanly deportment, his extensive knowledge of law, his perspicacious and comprehensive insight into facts, his large practice and acknowledged reputation, and his clear and impressive eloquence, had all placed him in a situation in which he had hardly a rival, and certainly no superior. His elevation was almost universally hailed with pleasure and hope, and we shall now proceed to inquire how far these feelings have been justified by the result.

The judgments of Lord Chancellor Lyndhurst, in Chancery, at present before the public, are reported in the second, third, and fourth volumes of Mr. Russell's Reports, and in the first number of Messrs. Russell and Mylne's Reports; and those in the House of Lords, in two cotemporary reporters; the first and second volumes of the new series of Mr. Bligh's Reports, and the first and second volumes of the new series of Mr. Dow's Reports. As his lordship filled the office of Chancellor for more than three years and a half, we have ample materials for forming a fair estimate of his qualifications.

The first reported decision of Lord Lyndhurst occurs in the case of Honner *v.* Morton, 3 Russ. 65. The case was heard by him as Master of the Rolls, although he did not deliver his judgment until after he became Lord Chancellor. It involved the much agitated question whether a husband can alien his wife's reversionary interest in a *chose in action* for a valuable consideration. We very well remember the argument in this case, and the anxiety which was manifested as to his honour's expected decision upon it.

The point had been the subject of great discussion, and had been distinctly decided by Sir Thomas Plumer, in the prior case of Purdew *v.* Jackson, 1 Russ. 1. We have no hesitation in saying, that the clear and satisfactory judgment which Lord Lyndhurst delivered, has for ever set the question at rest. The cases are all discussed in the most masterly manner, the subject is perspicuously treated, and the point distinctly decided; and a practical man can have no difficulty in acting upon this decision.

We think we cannot give a better specimen of his lordship's judgments, than by extracting a part of his opinion in this case.

"This fund was a *chose in action* of the wife, it was her reversionary *chose in action*. Whether the husband has the power of assigning his wife's reversionary interest in a *chose in action*, is a question which has been repeatedly agitated, and has excited considerable interest, both at law and in equity. At law, the *choses in action* of the wife belong to the husband if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the *chose in action* of his wife, one would suppose, on the first impression, that the assignee would not be in a better situation than the assignor; and that he, too, must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement, that he will reduce the property into possession. It likewise considers what a party agrees to do, as actually done; and, therefore, where the husband has the power to reduce the property into possession, his assignment of the *chose in action* of the wife will be regarded as

a reduction of it into possession. On the other hand, I should also infer that, where the husband has not the power of reducing the *chose in action* into possession, his assignment does not transfer the property, till, by subsequent events, he comes into the situation of being able to reduce the property into possession, and then his previous assignment will act on his actual situation, and the property will be transferred."

The whole judgment on this case is very clear and satisfactory, and will always be referred to as the leading case on the point.

We shall next select his lordship's judgment in Vauser *v.* Jeffery, in order to show his mode of stating the facts of a case, and discussing the authorities.

"A person of the name of Guylot Cowherd, being seized of certain freehold and copyhold estates, and having, in 1794, surrendered the copyholds to the use of his will, made a will disposing of his freehold and copyhold estates, in different portions, to different individuals. Afterwards, in the year 1800, he executed a settlement in contemplation of his marriage, which subsequently took effect; and the settlement contained a covenant to surrender the copyhold estates to the uses of the settlement.

"When the case came on before Sir William Grant, the Master of the Rolls, he was of opinion, (and that point is not now contested,) that the settlement was a revocation of the will so far as related to the freehold property; but he thought that the question, as to the copyhold estate, was subject to a different conclusion. He said, upon the authority of several cases to which he referred—Ryder *v.* Wager, 2 P. Wms. 328; Cotter *v.* Sayer, 2 P. Wms. 622; and Knollys *v.* Alcock, 5 Ves. 648, that an agreement to convey would constitute, in a court of equity, a revocation, that here was a covenant to surrender; that, in his judgment, if a surrender had been actually made to the uses of the settlement, it would have amounted to a revocation of the will; and that, as a covenant to surrender was equivalent to a surrender itself, he was of opinion that the will was revoked as far as related to the copyhold property.

"Lord Eldon, when the case came before him, entertained doubts, whether the surrender, if made, would have amounted to a revocation of the will, so far as related to the copyhold property; and he directed a case for the opinion of the court of King's Bench. He said, the effect of a surrender was a purely legal question; if the present case can be distinguished from Cave *v.* Holford (2 Ves. jun. 605,) it is material that it should be so distinguished by the court of law, and to such a court the question must be addressed (the surrender being stated to have been made,) quite clear of all questions of equitable revocation.

"In consequence of this opinion, it was referred to the master to prepare a surrender conformably to the settlement; that surrender was prepared, and not questioned; and, as appears to me from the best consideration I can give to the instrument, it conformed substantially to the covenant, at least for the purposes of the present question.

"The case was argued before the court of King's Bench, and the four judges of that court certified, that, in their opinion, the surrender of the copyhold property to the uses of the settlement, did not amount to a revocation of the will, as far as related to the copyholds. That opinion of the court of King's Bench has been contested in the argument here; but it does not appear to me that it is contested upon any solid grounds. It seems to me impossible to impeach the grounds on which the decision of the court of King's Bench was founded."

We have hitherto considered only his lordship's judgments in the court of Chancery; we now turn to his decisions in the House of Lords. His first reported judgment appears to have been given in the case of *Lopdell* v. *Creagh*, 1 *Bligh, N.S.* 255, but it is otherwise uninteresting. A much more important case was that of *Hullett* v. *King of Spain*, 2 *Bligh, N.S.* 31. The circumstances were shortly as follow: By a treaty between the governments of France and Spain, it was agreed that France should pay the King of Spain a certain sum of money to be distributed by him among his subjects having claims against the government of France. This sum, by the terms of the treaty, was made payable to an agent to be appointed by the king of Spain. He accordingly appointed an agent, who received the sum stipulated, and afterwards deposited part of it in the hands of merchants of London, in the name of his secretary. A bill was filed in equity, in the name of the king of Spain, as plaintiff against the depositaries and depositor, stating these facts, and praying a discovery and account, and the payment of the money into court; the defendants demurred upon the grounds of a defect of parties, and that a foreign sovereign could not sue in a court of equity in England, and that the suit should have been brought by his ambassador. The lord chancellor thus addressed himself to the last topic. It is a happy specimen of the interrogative earnestness which he displayed on the bench.

"It has been argued, that political reasons might have rendered it necessary to recognize the right of some other sovereign; and a case has been supposed of a bill filed when the French were in possession of Spain, by the individual who exercised the authority over Spain at that time; the individual who here appears as the plaintiff, asserting his title as king of Spain, being no doubt deposed from his throne by power, not by right; his father then living, and claiming the throne against the person in possession, and his son against both: as to this, and the objection that the title of Ferdinand may be disputable, it is admitted upon the record, that he is the king and sovereign ruler of Spain.

"That a king is entitled to sue as a king cannot be disputed. As a suitor, he submits himself to the jurisdiction of the court, otherwise it might be an objection that you could not control him. But if he comes here as a suitor, he submits himself to the jurisdiction. Has not the sovereign power of another country the common privilege of mankind? Do you say that by the law of nations he is deprived of that privilege, being the king of Spain?

"The French government expressly stipulated that they will pay money into the hands of such person as shall be named by the king of Spain. The king of Spain appoints Machado as his agent, and by virtue of that agency and appointment, the French government allow him to subscribe the rentes in his name, and he is allowed to act as the agent of the king of Spain. Only consider it. An arrangement is entered into, not between the subjects of Spain, creditors of France, and the French government, but the king of Spain and the king of France, which ultimately the subjects of the king of Spain were to have the benefit of, but the acting

parties were the head of the respective governments.

"Why are we to assume on this record that the king of Spain is suing for the purpose of destroying the right: we are rather to assume that he is suing to establish the right. Machado takes possession of this money, and gets out of the reach of the king of Spain and the creditors. You will find, taking the whole of the record as it stands, the transaction is this; the government of France contracts with the government of Spain, to pay the king of Spain a sum of money, which is to be eventually distributed among certain persons who are subjects of Spain, who have sustained losses and injuries in consequence of the invasion by France of Spain. By that treaty between France and Spain, the king of Spain is the party to see the money properly applied; he is the party to see to its application. These very tribunals, which are established for the investigation and liquidation of these claims, are tribunals established by the will and arbitrary act of the king of Spain. He it is who establishes the tribunal of liquidation. He it is who establishes the court of appeal. They were not existing tribunals; they are tribunals established by him, and under his authority. He is to see, as the governing power of that country, to the application of these funds. In the mean time, these individuals under his authority get possession of these funds as agents. Then, is not the king of Spain, (provided he can sue in our municipal courts,) is he not entitled to come here, and sue for the money so obtained?

"It has been asserted, that no case has occurred in which a sovereign was permitted to sue in the municipal courts of England. Can no case be found in which the king of Spain has sued at law? What is that case in *Rolles* Reports, where he was directed to bring an action of trover, and he did so? In another case there was a bill filed by the ambassador of the King of Spain, but the bill was dismissed, on the ground that it ought to have been filed by the king of Spain.

"Suppose the king of Spain were to send jewels to be set, to Messrs. Rundell and Bridges, and the jewellers were not to deliver them up to the king, do you mean to say that the courts of the country could not interfere? that the king of Spain could not recover the jewels? do you think there would be no redress in a case of this kind?

"The action was not by the ambassador. How can an ambassador bring an action at law? the party was never in possession of the property. If you look at the reports in Rolle's, Bulstrode's, and Rolle's Abridgment, you will see in some places it is entitled the *King of Spain* v. *Pountes*. How could an ambassador bring an action of trover, the property never having been in his hands?

"Has the record been examined in the case cited from Rolle, to see whether the ambassador was the plaintiff on the record? It was brought by his direction very likely, but how could an ambassador bring an action for property belonging to the king? it is quite out of the question. I wish to point your attention to that case in Hobart, in which the bill was dismissed, on the ground that the bill should have been in the name of the king, and not in the name of the ambassador, as the ambassador was the agent of the king for political, but not for private, purposes. Have you observed what Lord Kenyon says in *Ogden* v. *Falliot*? (3 T. R. 731.) These are his words: 'If we were to consider the acts of the province of New York as binding, as has been contended, I am at a loss to know why all the property of those persons which was said to be confiscated, did not pass to the executive power of that state to whom it was said to be forfeited, and why an action might not have been brought in the name of such executive power to enforce the payment of this bond.' I think you will find in one of those cases, (I have not the books here,) that the King of Spain brought an action of trover against a party who had got possession of some property, and he recovered. It is quite clear it must be in his own name. There are several other cases besides that."

Many of his judgments are equally remarkable for the clear statement of the facts of the case, the able discussion of the difficulties which had arisen in the argument, and the satisfactory reasons given for their decision. Without noticing them more fully, we may mention, as instances of this, *Trant* v. *Dwyer*, 2 *Bligh, N S.* 11; *Collins* v. *Hare*, *ib.* 106; *Fitzroy* v. *Howard*, 3 *Russ.* 225; *Mortimer* v. *West*, 3 *Russ.* 370; *Phipps* v. *Lord Ennismore*, 4 *Russ.* 131; and *Ross* v. *Aglionby*, 4 *Russ.* 489.

As favourable specimens of his argumentative judgments, we would direct the reader's attention to the cases of *Free* v. *Montague*, 2 *Bligh, N.S.* 65; *the Mystery of Mercers* v. *the Attorney General*, *ib.* 165; *Burnand* v. *Nerot*, *ib.* 215; *Pattison* v. *Mills*, *ib.* 519; *Robinson* v. *Dickenson*, 3 *Russ.* 399; *Pemberton* v. *Oakes*, 4 *Russ.* 154; and *Nerot* v. *Burnand*, 4 *Russ.* 247, all of which display, in our opinion, great judicial talent.

It is proper also to observe, that the judgments of the late lord chancellor in Scotch appeals have always given the greatest satisfaction in that country (*a*).

## SUMMARY OF RECENT STATUTES.

### THE CARRIERS' ACT.

A VERY important statute, as it concerns mail contractors, stage-coach proprietors, and other common carriers by land, and persons sending parcels by them, was passed in the last session of Parliament, namely, the 1st W. IV., c. 68. We shall give an analysis of the Act, and at the conclusion, make some remarks on its principal provisions.

Sec. 1. After reciting that the liability of common carriers of various kinds had been greatly increased by persons sending property by them of great value in small compass, and neglecting to notify its value, thus preventing the carriers, by due diligence, from protecting themselves against losses arising from their legal responsibility; and that there was great difficulty in fixing parties with notices published by common carriers, with intent to limit such responsibility, whereby they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses; it is enacted, that, from the passing of the Act, no mail contractor, stage-coach proprietor, or other common carrier by land, shall be liable for the loss of, or injury to, any gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or time-pieces of any des-

(*a*) Our limits render it necessary to postpone the remainder of this article to the next number.

cription, trinkets, bills, notes of the governor and company of the Banks of *England*, *Scotland*, and *Ireland* respectively, or of any other bank in *Great Britain* or *Ireland*, orders, notes, or securities for payment of money, *English* or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles, or property aforesaid, contained in such parcel or package, shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving house, of such mail contractor, stage-coach proprietor, or other common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as herein-after mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.

Sec. 2. When any such parcel, of more value than ten pounds, shall be so delivered, an increased rate of charge to be notified by some notice affixed, in legible character, in some public and conspicuous part of the office, warehouse, or other receiving house, may be demanded and received; and all persons sending or delivering such parcel, shall be bound by such notice, without further proof of the same having come to their knowledge.

Sec. 3. A receipt, not stamped, for such increased charge, may be demanded; and if refused, or if notice is not put up, as required by this Act, the carrier shall not be entitled to the benefit of this Act, but shall be liable as at common law, and shall refund the increased rate of charge.

Sec. 4. Carriers' common law liability for property given into their care not to be limited by any notice, except where they are entitled to the benefit of this Act.

Sec. 5. Every office, &c. appointed by such common carriers for receiving parcels, shall be deemed a receiving house within the meaning of the Act: any one or more of such carriers shall be liable to be sued: and no suit shall abate for want of joining any co-proprietor or co-partner.

Sec. 6. Act not to affect special contract between the parties.

Sec. 7. When an increased charge has been paid for the carriage, and loss or damage takes place, such increased charges may be recovered in addition to the value of the parcel.

Sec. 8. No provision of the Statute to protect common carriers from liability for loss or injury arising from the felonious acts of any of their servants; or to protect such servants from the consequences of their neglect or misconduct.

Sec. 9. Common carriers to be liable only to such damages as shall be proved, on the trial, not exceeding the declared value, together with the increased charges, as before mentioned.

Sec. 10. Common carriers allowed to pay money into court in all actions for the loss of goods, in the same manner, and with the same effect, as money may be paid into court in any other action.

Sec. 11. Act declared a public Act.

By this statute the responsibility of mail contractors, stage-coach proprietors, and other common carriers by land, for hire, is limited to ten pounds, if any of the property mentioned in Sec. 1, be lost, unless its nature has been declared, and a proportionately increased rate of charge paid, or a satisfactory engagement for it given. Notice of those increased rates is to be "affixed, in legible character, in some public and conspicuous part of the office, warehouse," &c., "and all persons sending" "parcels containing such valuable article," "shall be bound by such notice, without further proof of the same having come to their knowledge." Previous to this Act being passed, if strong proof were not given that the limitation by the carrier of his common law liability had come to the knowledge of the party sending the parcel, or that sufficient efforts had been made to bring it to his knowledge, the carrier was liable for the loss or injury of the property sent. Difficulties, however, were frequently felt in fixing the plaintiff with knowledge of the limitation by the carrier. It was a question for the jury what were sufficient efforts to bring the limitation to the knowledge of the persons sending. *Vide—Kerr* v. *Willan*, 2 *Stark.* 53; *Davis* v. *Willan*, 2 *Stark.* 279; *Clayton* v. *Hunt*, 3 *Camp.* 27; *Butler* v. *Hearne*, 2 *Cam.* 415; *Leeson* v. *Holt*, 1 *Stark.* 186; *Rowley* v. *Home*, 3 *Bing.* 2; *Macklin* v. *Waterhouse*, 5 *Bing.* 212. Cited in *Dowling's Collection of Statutes*, p. 363.

Those difficulties will now be removed by observing the provisions of Section 2. There is, however, some degree of hardship in fixing a party with knowledge of a notice in "legible character" when the person by whom he sends his parcel or package may not be able to read.

Section 4 leaves the common law liability of carriers the same as before this Act, where any other articles than those mentioned in the 1st Section are sent. The effect, therefore, of this Act will be, it is conceived, that no common carrier by land can limit his common law liability to a less sum than ten pounds by any public notice he may give.

By Section 6 special contracts are not to be affected.

The provision contained in Section 5 is most valuable, namely, that actions against common carriers shall not abate on account of the non-joinder of any co-partner or co-proprietor. This removes one of the great difficulties attending the bringing of an action against common carriers before the passing of this Statute.

The provision contained in Section 10, permitting money in all cases to be paid into court by the carrier, is new. Before this enactment, when the damages were uncertain, money could not be paid into court. *Fail* v. *Pickford*, 2 *B and P.* 234. Where the amount of loss was specific, it was allowed. *Hutton* v. *Bolton*, 1 *Hen. Bl.* 299, *n.* (*b*). For the effect of such a payment, see *Yate* v. *Willan*, 2 *East*, 128; *Clark* v. *Gray*, 6 *East*, 570.

## ADMINISTRATION OF JUSTICE AMENDMENT BILL.

By the Act 1 Wm. IV. c. 70, passed in the last session of parliament, for the more effectual Administration of Justice, it was enacted, that the essoign and general return days of each Term should be as follows:

The *First* essoign or general return day for every Term shall be the fourth day before the day of the commencement of the Term, both days being included in the computation.

The *Second* essoign day shall be the fifth day of the Term.

The *Third* shall be the fifteenth day of the Term.

The *Fourth* and last shall be the nineteenth day of the Term.

This part of the Act is intended to be repealed, and the following provisions substituted:

That all writs now usually returnable in the King's Bench, Common Pleas, or Exchequer, on *general* return days, after the *first* of January next, may be made returnable on the third day exclusive before the commencement of each Term, or on *any day* not being Sunday between that day and the third day exclusive before the last day of the Term; and the day for appearance shall, as heretofore, be the third day after such return exclusive of the day of the return, or in case such third day shall fall on a Sunday, then on the fourth day after such return exclusive of such day of return.

That in case the day of the month on which any Term is to end shall fall on a Sunday, then the Monday next after such day shall be deemed the last day of the Term; and in case any of the days between the Thursday before and the Wednesday after Easter shall fall within Easter Term, such days shall be deemed a part of such Term, although there shall be no sittings in Banc on any of such intervening days.

## ON THE CONDUCT OF THE LEGAL OBSERVER.

*To the Editor.*

Sir, Congratulating the profession on the establishment of a work designed to collect and circulate information peculiarly beneficial to the practitioners of the law, and which appears well adapted to promote the interests of all branches of the profession, I beg to enclose a few hints relating to the practice and proceedings in bills in the *House* of *Commons*, which I hope may be useful and advantageous to the rising members of the profession who are inexperienced in business of that description, and especially to the assistants and clerks of solicitors in the country who may be intrusted to conduct and superintend a bill through parliament. In case you should think them worthy of insertion in the Legal Observer, I may be induced to trespass on its columns at a future day, by forwarding some practical hints relating to petitions against bills, and the proper course of opposing them. I may also probably forward you some similar suggestions regarding the mode of soliciting bills through the *House* of *Lords*.

I cannot omit this opportunity of alluding to two very singular reports which have reached me—the one, that the Legal Observer has been established to oppose *barristers*; and the other that its chief purpose is to write against the proposed *General Registry Act*; but I have looked in vain through the articles you have inserted for any evidence to authorise either of these reports. Indeed, I hope that you will never allow your pages to be made the vehicle of an improper or unfounded attack on any individual, or any body of men, whether connected or not with the profession; but more especially that forbearance will be observed in the absence of any act of injustice or injurious proceeding towards that department of the profession to which I presume you belong (*a*).

In times like the present, it becomes the duty of every man, so far as his power extends, to maintain the true interests of religion and good government, and, by consequence, the ancient legal institutions of the country. Whilst, therefore, moderate and prudent reform and amendment must be the wish of every honest man, especial care must be taken that the whole fabric be not endangered by too much impairing those great bulwarks by which it has for so many ages been upheld and supported.

I am, Sir,

Your most obedient servant,

An Old Solicitor.

## BILLS IN PARLIAMENT.

Practical Hints *relating to the Introduction and Passing of a* Bill *through the* House *of* Commons.

It is taken for granted that the parties are fully aware of the general nature of the bill required, and of the powers and provisions necessary to be included in it; but it too frequently happens that bills are introduced into parliament without that previous consideration of the object and details which is necessary to render them full and sufficient, as well as unobjectionable. Hence, then, the necessity of much previous attention.

1. A bill being determined upon, the first step to be taken is to examine very carefully all the printed standing orders of the Houses of Lords and Commons, and particularly those which are applicable to the bill, for it will be found that different rules are applicable to different bills. The rules laid down in the standing orders, must be scrupulously followed. Without a familiar knowledge of the standing orders, and a strict adherence to them, the solicitor will meet with perpetual difficulties, and probably lose his bill. It is therefore a duty imperative upon every one soliciting a bill, before he commences operations, to make himself master of the standing orders of both houses of parliament;

(*a*) We refer to the "Notes of the Term" in the present Number, for some remarks on the subject of this letter.

and having so mastered them, to be most cautious and careful in doing all that they require, and at the times required; especially as regards time, notices, advertisements, newspapers, surveys, plans, books of reference, estimates, applications to landowners, assents and dissents, exhibition of bill, subscribers, contracts, &c. And let it be recollected, that as bills are classed in the standing orders, care must be taken that the rules applicable to the particular bill to be solicited are duly observed.

2. The standing orders having been complied with, prepare and engross a petition for leave to bring in the bill. In the preparation of this petition, be cautious in the allegations and prayer, and the title to be given to the bill. This petition must be presented on or before the day fixed by the sessional order for the presentation of petitions.

3. After or before preparing the petition, apply to a member to present it, and to take charge of the bill; and, as such member is generally the chairman of the committee to whom the petition and bill will be referred, the member to be applied to should be well informed of the object of the bill, the grounds upon which it may be supported, the objections likely to be made, and of the answers to those objections, so that he will be armed with the fullest information, and be enabled to act as he shall see fit. Here it may be proper to add, that it is usual, and very essential to the success of a bill, to put every member who is likely to take an interest either for or against it, into early possession of sufficient information, by means of letters, printed statements, and personal intercourse, so that he may be the better able to comprehend the points likely to arise on the discussion of the bill in the committee, or in the House; and, consequently, to form his judgment of the propriety of supporting or rejecting the bill.

4. The petition, being presented to the house, is referred to a committee to examine into its allegations, and to report thereon, and also whether the standing orders of the House have been complied with.

5. Attend the committee on the petition with the witnesses and documents, to prove the allegations in the petition, and that the standing orders have been fully and completely complied with; and to avoid confusion in the committee, previously arrange and commit to writing the proofs, with the witnesses' names, and hand a fair copy to the clerk of the committee, so that he may quickly despatch the business, and prepare a proper report on the petition.

6. The report on the petition being made, lies on the table of the House one day, and then leave is given to bring in the bill.

7. Prepare the bill, and get it settled by counsel, and examined by the parliamentary agent. This ought to be done (if practicable) before the sessions commence, so that it may be well digested, and every proper clause introduced. There are a set of clauses called standing-order clauses, which must be in the bill. In preparing the bill, have especial regard to the recital or facts stated in the preamble, for it is upon the recital or facts that issue is most frequently joined, and upon which, therefore, the opposition to the bill is made.

8. When the bill has been prepared and settled, it is printed and engrossed, presented to the House, read a first time, and afterwards a second time, of which readings the standing orders point out the notice to be given, as well as the time which should elapse between them; and therefore, to prevent mistake, have recourse to the standing orders for information upon these points. In some bills there must be seven days between the first and second reading; but, in others, three days only, and three days' notice of the second reading is required.

9. Upon the second reading, if the bill be opposed, a stand is frequently made in the House, so that, should the bill be rejected, the expense of supporting and opposing it in the committee is avoided: but, in general, private bills are not opposed on the second reading, but referred to a committee. If an opposition to the bill on the second reading be apprehended, it is important that those members who take an interest in the bill should be apprised of the time fixed for the second reading, so that they may be present if they think fit, to support or oppose it.

10. After the bill is (upon the second reading) referred to a committee, seven days must elapse before the committee can proceed, and three days' notice is necessary to be given of the proceeding on the committee. Before going into the committee, it is usual to submit the bill to the chairman of the committee of the House of Lords for his perusal, by which means objections to the bill, when it has arrived in that house, are avoided.

11. To prepare for going into the committee when a bill is opposed, requires all the skill and prudence of the solicitor in getting up his case, and collecting evidence to support the bill, as well as evidence to repel objections. This case and evidence he will give to counsel accustomed to parliamentary business, and in the committee the merits or demerits of the bills are tried, and upon the recital or facts stated in the preamble the committee decide. Those members for or against the bill generally attend the committee; and, as it is most material to avoid an adjournment *sine die*, or for a period beyond the duration of the session, by which the bill is lost, the parties connected with the bill usually inform members from day to day of the time when the committee sits; and, to avoid confusion, each party for or against the bill arranges daily which of his friends shall call on or write to particular members, by which a double trouble to the latter is avoided.

12. When in committee, care must be taken to keep out of the room witnesses who attend to be examined, for occasionally

their evidence is objected to on that account. The evidence is taken down and copies delivered out by the committee clerk every night, and copies of such evidence are made and handed to the counsel employed in the case.

13. Before, and pending the committee, the parties in general prepare statements in favor of the bill, and objections to it, as well as answers and replies to opposing statements. These statements and objections, which are given to members, should be clear and concise, otherwise they will not be read.

In short, (to use an expressive colloquialism,) no stone must be left unturned to excite the attention of members, so that they may take an interest in the bill, and the more numerously they attend the committee, the more likely is justice to be done. Statements or objections are frequently printed and put into the hands of members at or before the second reading of the bill, but the necessity for so doing will depend upon the views and intentions of the parties as to the time and mode of opposition.

14. Should there be no opposition to the bill, still evidence must be given to prove the recital and facts stated in the preamble.

15. If the bill pass the committee, it is reported to the House, and may then be read a third time. On the third reading amendments may be moved, or the bill may be opposed. It is, therefore, necessary to be on the alert by giving information to members of the time fixed for the third reading, so that they may be present if they think fit.

16. The report on the bill must be made on or before the day fixed by the House in their sessional order for bills to be reported, but if this cannot be done, the House, upon the application of the committee, frequently enlarge the time for making their report.

17. The bill, when reported, must lie on the table seven days, at the expiration of which time it will be read a third time, and passed or rejected.

We hope to be able, in a future number, to give some hints as to the practice in soliciting bills through the House of Lords, and in opposing bills in either House. But in the mean time, the standing orders of both Houses of Parliament, and the publications of the late Mr. *Ellis*, who was a solicitor, of Mr. *Sherwood* the parliamentary agent, and of Mr. *David Pollock* the barrister, relative to the practice on private bills, may be read with advantage.

## COLONIAL LAW.

We take up this subject, not only on account of its intrinsic importance, but for the peculiar interest which it is calculated to awaken at the present time, in regard to the great question of the *Slavery Laws*; and incidentally (as will very remarkably appear) to the establishment of *New Local Courts*.

We shall adopt as our text books the three Reports of Mr. Dwarris, one of the commissioners appointed to inquire into the administration of justice in the West Indies, (*a*) and Mr. Howard's Work on the Laws of the British Colonies (*b*). Our survey will be somewhat wider than that of the commissioners, and somewhat more contracted than that of Mr. Howard. The commission extended only to Barbadoes, Tobago, Grenada, St. Vincent, Dominica, Antigua, Montserrat, Nevis, St. Christopher, and the Virgin Islands. Mr. Howard's work embraces not only the whole of the West India Islands, but the British dependencies on the American continent, both northern and southern. Passing over for the present the North American colonies, we shall extend our inquiries to the West Indies, and the settlementson the southern division of the continent, embracing, in addition to the islands visited by His Majesty's commissioners, those of Jamaica, Trinidad, St. Lucia, the Bahama and Bermuda islands, and the continental settlements of Berbice, Demarara, and Essequibo. These colonies vary considerably in extent, and in number of inhabitants. Some of them were originally English settlements, others have come into our possession by conquest or treaty. As we may have occasion hereafter to advert to their size, population, and mode of settlement, we shall make a few brief remarks, historical and statistical, preparatory to our inquiry into the state of the law in each colony.

*Barbadoes*, though discovered by the Portuguese, was first settled by the English. It afforded a refuge to the royalists during the Protectorate of Cromwell, as Jamaica, at a later period, did to the republicans. The island is twenty-one miles long, by fourteen broad, and contains about 100,000 acres. Its population, in 1829, was as follows: whites 14,959, free coloured 3119, free blacks 2027, slaves 76,059.

*Tobago* is twenty-five miles long, and twelve broad. Its population in 1829 was, whites 321, free black and coloured 1163, slaves 12,748. It was one of the four neutral islands, but was taken possession of by the English in 1737, and ceded to them by the treaty of 1763. In 1781 it was taken by the French, and was retained by them at the peace of 1783. It was retaken by the English in 1793, confirmed to them at the peace of Amiens, and has remained in their possession ever since.

*Grenada* was discovered by Columbus, and was afterwards taken possession of by the French; surrendered to the English, February 1762, and was formally ceded to England by the definitive treaty, signed the 10th of February, 1763. It shared the fate of most of our West Indian possessions during the American war, having been taken by the French in 1779. The peace of 1783 restored it to England. It contains

(*a*) *Reports of the Commissioners of Inquiry into the Administration of Civil and Criminal Justice in the West Indies.*

(*b*) *The Laws of the British Colonies in the West Indies, and other parts of America concerning Real and Personal Property, and the Manumission of Slaves, with a view of the Constitution of each Colony*, By John Henry Howard, *solicitor*. 2 vols. 1827.

about 80,000 acres, but, being very mountainous, only a comparatively small part has been brought into cultivation. In 1828 the white population amounted to 782, free coloured and black 3743, slaves 24,342.

*St. Vincent* was settled by the English, captured by the French in 1779, and restored at the peace of 1783. It contains about 84,000 acres. The return of 1825 gives the following amount of population; whites 1301, free people of colour 2824, free blacks 7380. The number of slaves, in 1828, exceeded 20,000.

*Dominica* was one of the neutral islands, but had a majority of French settlers. It was conquered by the English in the glorious 1759, when the British arms were triumphant in every quarter of the globe, and confirmed to them by the peace of 1763. By the disgraceful negligence which left the colonies without protection during the contest with France and America, it was for a time lost to this country, having been taken by the French in 1778, but was restored at the peace of 1783. It contains about 186,000 acres. In 1793, according to Edwards, the French in this island were more numerous than the English. In 1829 its population was, whites 840, free coloured 3602, slaves 14,483.

*Antigua* is about fifty miles in circumference, and contains about 60,000 acres. In 1827 its white population amounted to 1980, free coloured and black, 3895. In 1828 the number of slaves was 29,839. It was in this island that Governor Parke terminated a life of unbridled profligacy, by a violent death. There was such romantic villany in the character of this man, and his career was altogether so extraordinary, that we are tempted to extract Brian Edwards's account of him, especially as a part of it will illustrate the state of the law at that time in Antigua.

"Mr. Parke was a native of Virginia, and was distinguished for his excesses at a very early time of life. Having married a lady of fortune in America, his first exploit was to rob his wife of her money, and then desert her. With this money he came to England, and obtained a return to parliament, but, gross bribery being proved against him, he was expelled the house. His next adventure was to debauch the wife of a friend, for which, being prosecuted, he quitted England, and made a campaign with the army in Flanders, where he had the fortune to attract the notice, and acquire the patronage, of the Duke of Marlborough. In 1704 he attended the duke as one of his aides-de-camp; and as such, on the event of the battle of Hochstet, having been sent by his grace to England with intelligence of that important victory, he was rewarded by the queen with a purse of a thousand guineas, and her picture richly set with diamonds. The following year the government of the Leeward islands becoming vacant, Mr. Parke, through the interest of his noble patron, was appointed to succeed Sir William Matthews therein, and he arrived at Antigua in July 1706. As he was a native of America, and his interest with the British administration was believed to be considerable, the inhabitants of the Leeward islands, who were probably unacquainted with his private character, received him with singular respect; and the assembly of Antigua, even contrary to a royal instruction, added a thousand pounds to his yearly income, in order, as it was expressed in the vote, to relieve him from the expense of house rent; a provision which, I believe, has been continued ever since to his successors in the government.

The return which Mr. Parke thought proper to make for this mark of their kindness, was an avowed and unrestrained violation of all decency and principle; he feared neither God nor man; and it was soon shewn of him, as it had formerly been of another detestable tyrant, that he spared no man in his anger, nor woman in his lust. One of his first enormities was to debauch the wife of a Mr. Chester, who was factor to the Royal African Company, and the most considerable merchant in the island. Apprehending that the injured husband might meditate revenge, the worthy governor endeavoured to be beforehand with him, by adding the crime of murder to that of adultery. Mr. Chester having about this time had the misfortune to kill a person by accident, his excellency, who had raised a common soldier to the office of provost-marshal, brought him to a trial for his life; directing his instrument, the provost-marshal, to impanel a jury of certain persons, from whom he doubted not to obtain Chester's conviction; and the execution of this innocent and injured man would undoubtedly have followed, if the evidence in his favor had not proved too powerful to be overborne, so that the jury were compelled to pronounce his acquittal.

Another of his exploits was an attempt to rob the Codrington family of the island of Barbadoes, (of which they had held peaceable possession for thirty years,) by calling upon them to prove their title before himself and his council; a measure which gave every proprietor reason to apprehend, that he had no security for his possessions but the governor's forbearance.

He declared, that he would suffer no provost-marshal to act, who should not at all times summon such juries as he should direct. He changed the mode of electing members to serve in the assembly, in order to exclude persons he did not like; and not being able by this measure to procure an assembly to his wish, he refused to call them together, even when the French threatened an invasion.

He entered the house of Mr. Chester, the person before mentioned, with an armed force, and seized several gentlemen, (some of them the principal men of the island,) who were there met for the purpose of good fellowship, on suspicion that they were concerting measures against himself, most of whom he sent by his own authority to the common gaol, and kept them there without bail or trial.

By these, and a thousand other odious and intemperate proceedings, the whole country became a party against him, and despatched an agent to England to lay their grievances before the crown, adopting, in the first instance, all moderate and legal means to procure his removal; but, from the delays incident to the business, the people lost all temper, and began to consider forbearance as no longer a virtue. More than one attempt was made upon the governor's life, in the last of which he was greviously, but not mortally wounded. Unhappily the furious and exasperated state of men's minds admitted of no compromise, and the rash, impetuous governor was not of a disposition to soften or conciliate, if occasion had offered.

At length, however, instructions came from the crown, directing Mr. Park to resign his command to the lieutenant-governor, and return to England by the first opportunity; at the same time commissioners were appointed to take examinations on the spot concerning the complaints which had been

urged against his conduct. It would have been happy if the inhabitants of Antigua had borne their success with moderation, but the triumphant joy which they manifested on receipt of the queen's orders, provoked the governor into desperation. He declared that he would continue in the government in spite of the inhabitants, and being informed that a ship was about to sail for Europe in which he might have conveniently embarked, he refused to leave the country. In the meanwhile, to convince the people that his firmness was unabated, and that he still considered himself in the rightful exercise of his authority, he issued a proclamation to dissolve the assembly.

Matters were now coming fast to an issue. The assembly continued sitting, notwithstanding the governor's proclamation; and resolved, that having been recalled by his sovereign, his continuance in the government was usurpation and tyranny, and that it was their duty to take charge of the safety and peace of the island. On hearing of this vote, the governor secretly ordered a party of soldiers to surround them; but the assembly, having obtained information of his intentions, immediately separated to provide for their personal safety. The ensuing night, and the whole of the following day, were employed in summoning the inhabitants from all parts of the island to hasten to the capital, properly armed to protect their representatives. It was given out, however, that the governor's life was not aimed at; all that was intended was to secure his person, and send him from the island.

On Thursday the 7th of December, 1710, early in the morning, about five hundred men appeared in arms in the town of St. John's, where Colonel Park had been making provision for resistance in case of an attack. He had converted the government house into a garrison, and stationed in it all the regular troops that were in the island. On the approach of the inhabitants, however, his courage deserted him. The sight of the injured people coming forward as one man with deliberate valour, to execute on his person that punishment, which he must have been conscious his enormities well merited, overwhelmed him with confusion and terror. Although he must have been apprized that his adversaries had proceeded too far to retreat, he now for the first time, when it was too late, had recourse to concession. He despatched the provost marshal with a message signifying his readiness to meet the assembly at Parham, and consent to whatever laws they should think proper to pass for the good of the country. He offered at the same time to dismiss his soldiers, provided six of the principal inhabitants would remain with him as hostages for the safety of his person. The speaker of the assembly, and one of the members of the council, unwilling to carry matters to the last extremity, seemed inclined to compromise, and proposed themselves as two of the hostages required of the governor; but, the general body of the people, apprehensive that further delay might be fatal to their cause, called aloud for immediate vengeance, and instantly marched forward in two divisions. One of these, led by Mr. Piggot, a member of the assembly, taking possession of an eminence that commanded the government house, attacked it with great fury. Their fire was briskly returned for a considerable time, but at length the assailants broke into the house. The governor met them with firmness, and shot Piggot dead with his own hand, but received in the same moment a wound, which laid him prostrate. His attendants seeing him fall, threw down their arms, and the enraged populace, seizing the person of the wretched governor, who was still alive, tore him into a thousand pieces, and scattered his reeking limbs in the streets. Besides the governor, an ensign, and thirteen private soldiers, who fought in his cause, were killed, and a lieutenant and twenty-four privates wounded. Of the people, thirty-two were killed and wounded, besides Mr. Piggott. The governor's death instantly put an end to this bloody conflict.

*Edwards's History of the West Indies*, 1793, *vol.* 1, *p.* 439-445.

*St. Christopher* was named by Columbus after himself. Its length is fifteen miles, its medium breadth only four. It is the oldest of the British settlements, and was never planted or possessed by the Spaniards. Its population in 1827 was, whites about 1600, free coloured and black 3000, slaves 18,119.

*Montserrat* is an offset of St. Christopher, having been planted by settlers from that island, who quitted it, principally, in consequence of religious differences. They were chiefly natives of Ireland, and of the Romish religion. It was captured by the French during the American war, but restored at the peace. It is about nine miles long, by nine broad. In 1828 the following was the amount of its population: whites 315, free coloured and black 818, slaves 6247.

*Nevis* is a mere "rock in the ocean." It was an English settlement. Its population in 1828; whites about 700: free coloured and black 2000: slaves 8109.

The *Virgin Islands* were discovered and named by Columbus. The Spaniards, however, neglected them, and for a long period they were inhabited principally by Dutch Buccaneers. Some of them were ultimately settled by the English, and of those in their possession, Tortola is the principal.

*St. Lucia* is twenty-seven miles long, by twelve broad. It was settled by the English in 1637. Considerable numbers of French settlers subsequently disturbed its peace, and after much contention, it was agreed by the two powers that it should be considered neutral; but in 1763 it was formally ceded to the French. It was taken by the English in 1778, and restored in 1783. It was again taken by the English, in 1794 retaken by the French, and again taken by the English within a few months after. It was restored to the French at the peace of Amiens, but was once more taken by the English in 1803, and finally ceded to them in 1815. There is no accurate return of its population.

*Jamaica* is 150 miles long, 40 broad, and contains about 4,000,000 acres. It was discovered by Columbus, and settled by the Spaniards, who retained it for a century and a half, till it was captured by the English in 1655. As it greatly surpasses the islands hitherto mentioned in extent, so it unquestionably exceeds them in population; but from the imperfect nature of the returns, it is impossible to speak to this point with any approach to accuracy.

*Trinidad* was discovered by Columbus in 1498, but not taken possession of by the Spaniards till nearly a century after. It surrendered to the British forces under Sir Ralph Abercromby in 1797, and has remained in our

possession ever since. Its greatest length is seventy-nine miles; its greatest breadth fifty-six. In 1829 it contained: whites 4026, free coloured and black 16,412, slaves 22,436.

The *Bahama Islands* are four or five hundred in number, but a great proportion are nothing more than cliffs and rocks. They were the first fruits of the discoveries of Columbus. The English attempted to settle them in the reign of Charles the second, but they were little more than a refuge for Buccaneers until 1718, when Captain Woodes Rogers was sent out as governor. He expelled the pirates and fixed the seat of government at New Providence. In 1781 they surrendered to the Spaniards, but were restored in 1783. The return in 1829 gives the following amount of population: whites 4152, free black and coloured, (exclusive of black troops,) 2797, slaves 9297.

The *Bermudas* form a cluster of about four hundred islands, but the greater part have neither name nor inhabitants. The English established themselves here, early in the seventeenth century. During the civil wars, the number of inhabitants increased rapidly by the accession of persons who fled from the troubles at home. It became a sort of fashion to resort to these islands, and among others, they received a visit from the poet Waller, who has left a tribute to their beauties.

"For the kind spring which but salutes us here,
Inhabits there, and courts them all the year;
Ripe fruits and blossoms on the same trees live,
At once they promise what at once they give.
So sweet the air, so moderate the clime,
None sickly lives or dies before his time:
Heaven sure has kept this spot of land uncurs'd,
To show how all things were created first."

*Battle of the Summer Islands.* Canto I.

It was here also that the great and good Bishop Berkeley, to whom Pope has justly ascribed "every virtue under heaven," proposed to found a college for propagating Christianity among the American Indians, and he arrived in 1728 to carry his intention into effect; but the failure of the support from home, upon which he had depended, compelled him to relinquish his plan, and return.

*Demerara* and *Essequibo* are two districts forming one government of considerable extent on the South American continent. They were Dutch settlements, and were captured by the English in 1796. They were restored at the peace of Amiens, but in 1803 were again subjected to the British arms, and were confirmed to this country by the treaty of 1814. The population in 1829 was, white 3006, free black and coloured 6,360, slaves 69,368.

*Berbice* is another Dutch settlement, which came into our possession at the same time with the foregoing. In 1829 the population was, white 552, free coloured and black 1,151, slaves 20,899.

It is to these colonies that we intend at present to confine our attention. In future articles, we shall lay before our readers the state of the law in each of them, with such remarks and suggestions as circumstances may appear to require.

## DISTRICT COURTS IN AMERICA.*

The radical principles of bringing justice home to every man's door, and of making the administration of it cheap, have had a full experiment in America; and greater practical curses, I venture to say, were never inflicted upon any country.

The state of Pennsylvania will serve as a good example, because it is eminently democratic, and has been called, *par excellence*, the keystone of the republican arch. There they have done away with nearly all the technicalities of the law—there are no stamps—no special pleadings—and scarcely any one is so poor that he cannot afford to go to law. The consequence is, a scene of litigation from morning to night. Lawyers, of course, abound every where, as no village, containing above 200 or 300 inhabitants, is without one or more. No person, be his situation or conduct in life what it may, is free from the never-ending pests of law-suits. Servants, labourers, every one, in short, on the first occasion, hies off to the neighbouring lawyer, or justice of the peace, to commence an action. The law must decide every thing! The lives of persons in easy circumstances are thus rendered miserable; and the poor man, led on by the hope of gain—by an infectious spirit of litigation—or by revenge, is prevented from employing his time usefully to himself, and to the community, and generally ends by being a loser. The lawyer's fees are fixed at a low rate, but the passion for litigating a point increases with indulgence to such a degree, that the victims of cheap justice—or rather of cheap law—seldom stop while they have a doller left.

The operation of the much vaunted principle just alluded to, of bringing justice home to every man's door, is, in most cases, equally mischievous. It leads to the endless establishment of new courts, swarms of lawyers, and crowds of litigants. Thus, on a spot where the population increases, and it is found a hardship to go twenty or thirty miles for the pleasure of a law-suit, a new county town must forthwith be erected, with all its accompaniments of judges, clerks of court, marshals, and so forth. I have heard of a bad road being used as an argument before the legislature to obtain the establishment of a new county town.

* * * *

I have not been able to obtain any very exact returns of the number of judges in the United States, but it is certainly enormous in its extent. I was greatly astonished to hear, that in Pennsylvania alone there are upwards of 100 judges, who preside on the bench; besides several thousands of justices of the peace, who take cognizance of all suits not exceeding 100 dollars in amount. The number of persons, therefore, who administer justice in America probably exceeds that of their army and navy! and upon the whole, I suspect, justice will be found much dearer there than anywhere else in the world. At all events, nothing can possibly compensate for the boundless spirit of litigation, which, conjointly with that of electioneer-

* Extracted from Capt. Basil Hall's Travels in North America, vol. II.

ing, keeps the country in constant hot water from end to end.

The salaries of the judges, in consequence of their great number, are necessarily so small, that no first-rate lawyer can afford to take the appointment. I know of several barristers, every way fitted to do honour to the bench, who have positively refused to accept of office. Consequently, these very important stations are filled by a totally different class of men—many of whom are undoubtedly very excellent persons, but some of them likewise are quite unsuited for such duties.

* * * *

An appeal lies from the courts below to the supreme court on points of law; and as the proceedings in this, as in every other part of the suit, are cheap, these appeals are almost invariably made when the case is of any importance.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

AMONG the recent decisions which our number of this week contains, there are some well worthy of remark. That with respect to "privilege of Parliament," is important, not merely on account of the decision itself, but as it appears to be the first case in which it has been solemnly decided, that where a person without privilege is arrested, and while in custody of a gaoler, or of his bail, he becomes privileged by being elected a member of Parliament, he is entitled to his discharge, or an *exoneretur* may be entered on the bail piece. In the case of Trinder *v.* Shirley, *Douglas*, 45, the defendant had become a peer, whose privilege was for life, and there was no discussion of the principle. In Langridge *v.* Flood, quoted by Mr. *Tidd*, in the 1st vol. of the 9th edition of his Practice, p. 290, and which is mentioned in 4 East, p. 190, in the case of Grant *v.* Fagan, no report is to be found, except the brief notice by Mr. Tidd. That authority, it is true, was from the manuscript of Mr. Justice *Holroyd*, but it does not appear whether any discussion of the principle or the authorities took place. And, indeed, the contrary inference seems probable, since, in Burton's case, which occurred while Mr. Justice James *Parke* was at the bar, that most accurate and learned judge, Mr. Baron *Bayley*, doubted, on some old authorities, whether the court had the power to interfere. Now, if the case of Langridge *v.* Flood had undergone examination, and the court had pronounced a solemn decision upon it, we can hardly doubt that Mr. Baron *Bayley*, whose knowledge of cases is certainly unparalleled, would have been aware of it; yet he declined to interfere.

It is somewhat remarkable that the French legislature should, at the present time, be busied in making changes in regard to the freedom from arrest of the peers of France. By article 34 of the Charte, "no peer can be arrested for debt, except by authority of the chamber." How this authority is to be exercised is not stated. A committee, consisting of Count Portalis and others, was therefore appointed for the purpose of determining that question. They have reported their unanimous opinion, that every person who has obtained a judgment against a peer, ought to have the means of carrying it into execution; that the chamber ought not in any case to oppose it, and that, during the recess, the authority for arrest ought to be granted by the president. A project of a law to this effect was accordingly proposed, and ordered to be printed.

The *Master of the Rolls* has decided that the marquis of Hastings had a sufficient vested interest in the Deccan prize money to enable him to make a valid assignment.

Our readers will find some remarks of Mr. Justice *Alderson*, under the head of "Practice," in the case of Mitton *v.* Weston, on the subject of bringing questions of fact, instead of law, before the courts.

A question as to whether the grant of an annuity under rather special circumstances was usurious or not, will be found under the head of "Annuity."

The determination of Lord *Tenterden*, in the case of Monson *v.* Summers, under the title of "Attorney's Letter," is worthy of perusal by every member of the profession. Such a decision will be of the greatest efficacy in preventing vexatious suits, and inducing fair and honourable practice among attornies. Had the court decided otherwise, they would in fact have held out a premium for multiplying costs.

The report of the state of business before the Master of the Rolls is also deserving of particular attention by the practitioners in chancery.

### ASSIGNABLE INTEREST.

The plaintiffs, British merchants in India, claimed by virtue of two deeds of assignments from the late Marquis of Hastings, to be entitled to a portion of the fund, called the Deccan prize money, to which the marquis was entitled under the king's warrants of distribution of 1823 and 1824. In support of their claim, they set forth in their bill that they had been agents to the Marquis of Hastings when he was Governor General of India, and made him large advances of money; that from the year 1817, war was carried on with the Mahratta and other Indian tribes, and for the purpose of the war the British forces were divided into two armies, one called the grand army, under the command of the Marquis of Hastings, and the other distinguished by the name of the Deccan army, commanded by Sir Henry Hislop. In the course of this war, carried on for several years, considerable booty was captured, to which the marquis and the grand army, Sir Thomas Hislop and the Deccan army, and also the East India Company, made claims. In the year 1821 the marquis, by way of security and of ultimate payment of the sums advanced to him by the plaintiffs, gave them the assignments in question upon his share of the booty.

In the year 1823, the king's first warrant for the distribution of the prize money was issued. The Duke of Wellington and Mr. Arbuthnot had been appointed trustees for the distribution of the fund, and they were made defendants to the suit; the other defendants were the Marchioness of Hastings, the personal representative of the marquis, Sir Thomas Hislop, the East India Company, and the King's Attorney-General. The principal question, and that to which the part of the judgment of the

master of the Rolls here given, applies, was raised by the Marchioness of Hastings, for whom it was contended that the marquis, at the time of the assignments, by virtue of which the plaintiffs claimed, had no assignable property in the booty, and that nothing passed by these assignments, as the subject of them was not then capable of assignment.

The *Master of the Rolls*, after stating the facts of the case, said the first question was, whether this property was the subject of assignment in a court of equity. All booty was originally vested in the crown, and the act of the 54th of Geo. III. declared it to be so vested for the purpose of distribution, which was to be made as the king's warrant should direct. Although the king's warrant had not been issued at the time of the assignment by the Marquis of Hastings, yet as he and his army had contributed to the acquisition of the booty, the marquis had a well-founded expectation of a share in it. This was what may be called a vested expectancy. Prize money was said in argument not to be assignable, because it was in the nature of military pay, which just policy did not allow to be assigned. But prize money was not like military pay—it was a reward for past services, and an encouragement to future exertion. This booty was vested in trustees in 1823, for the purpose of drawing up a scheme of distribution. That scheme being drawn up, the king's warrants directed the portion that belonged to Sir T. Hislop and his army, and also that which belonged to the Marquis of Hastings and the grand army. Of this last, one eighth part was declared to belong to the marquis. It was part of his assets, and was assignable from the time of the capture.

In the case of Stevens *v.* Bagwell, 15 Vesey, p. 139, it was decided, that though no interest completely vested in prize money before condemnation, yet on condemnation it was considered to be the property of the captors, from the time of the capture. *Alexander* and Co. *v. Duke* of *Wellington* and others, Rolls Court, *M. T.* 1830.

CHANGE OF PRACTICE OF SOLICITORS.

The last cause in the list for the day being called on, no one appearing on it, his *Honour* said that it was an unfortunate thing that the business was not more advanced. The court was now at a stand: some causes which had been in the paper, were adjourned as not fit for hearing; in some the *subpœnas* for judgment were not returned, and in some orders had been granted to enlarge publication. This was the consequence of the long habit of the court. For the future no causes should be entered in the paper until the evidence was closed, publication passed, and they were in other respects ripe for hearing. Rolls Court, *M. T.* 1830.

PRIVILEGE OF PARLIAMENT.

*Barstow* showed cause, against a rule calling on the plaintiff to show cause, why an *exoneretur* should not be entered on the bail-piece. The ground of the application was, that the defendant had become a member of parliament for the borough of St. Ives, between the perfecting of bail and attaining final judgment. The facts were these: An action at the suit of the plaintiff had been brought against the defendant for £3,000, and he was arrested. Special bail was perfected, the defendant pleaded the Statute of Limitations, and the cause was set down for trial at the sittings after Easter Term. An application to settle the action was then made to the plaintiff. The defendant, by consent of his bail, gave a *cognovit* for the debt and costs. On the 28th of August, the defendant was elected a member of parliament for the borough of St. Ives. Judgment on the *cognovit* was entered up, and proceedings taken against the goods of the defendant.

Now the present application was made by the bail, to free themselves from the liability they had incurred by entering into their recognizances. He should submit two propositions to the court, first, that it was discretionary in the court whether they would grant the application or not; and secondly, that this was one of those cases in which the court ought, in its discretion, to refuse it.

There were two classes of cases which he should consider under the first proposition, first, those where the defendant was arrested at the time he was in parliament; second, those where he was in actual custody when he was elected a member of parliament.

Now as to the first class, the courts, in the earlier cases, appeared to have declined interfering, but left the party to his writ of privilege. Afterwards they had interfered, and he would concede that if the defendant had been a member of parliament at the time of this arrest, the court would at once discharge him (*a*). In the last case on the subject, however, Chester *v.* Upsdale, (*b*) the court expressly observed, that it was discretionary in the court whether they would grant the application or not.

With respect to the second class of cases, there was not one in which the court had interfered to discharge a defendant in actual custody, who had been elected a member of parliament. The course has been for the speaker to issue his warrant to the gaoler having the defendant in custody.

*Parke, J.* There was the case of Mr. Burton, who, while in actual custody, was elected a member for the borough of Beverly.

*Barstow.* There, this court did not interfere. That case was heard at chambers, and the application being refused, the speaker issued his warrant to the marshal, and in obedience to that warrant he was discharged. The gaoler would be bound to keep him in custody until he received an order from a competent authority for his discharge. He would be guilty of no breach of privilege of the House of Commons by detaining the defendant, for if he would, the sheriff's return that the defendant was elected, would be sufficient to entitle him to his discharge. But no case, no dictum, had gone to so great a length as this. Now the situation of the bail was analogous to that of the gaoler. The defendant was not in the actual custody of the bail, but he was in their legal custody. If then the court would not interfere with the gaoler, why should it interfere with the bail. He should contend it was an incontrovertible proposition that an *exoneretur* cannot be entered on the bail-piece, unless it be quite clear that the principal would be discharged out of custody by the court. Against this proposition, at first sight appeared to be the case of Trinder *v.* Shirley (*c*). That was an application on the part of the bail, that an *exoneretur* might be entered on the bail-piece, on the ground of the defendant having become a peer, and it was therefore no longer in the power of the bail to surrender. In that case the counsel for the plaintiff declared that he could not show any cause against the rule, upon which it was made absolute. No discussion took place, but the matter passed without any consideration of the question. In that case it was assumed by the defendant's counsel that the bail could not render him. Why could they not render him? When a man was delivered to his bail, he was as much in their custody in point of law, as if he were in the custody

(*a*) Executors of Skewys *v.* Chamond, 1 Dyer 60, (*a*) Holiday *v* Pitt, 2 Strange, 985, Com. 444.
(*b*) 1 Wilson, 278.
(*c*) Douglas, 45.

of the marshal. He might in case of escape be retaken, even on a Sunday. If he was in their custody, how would they be guilty of any breach of the privilege of parliament, by transferring him from their own custody to that of the officer of the court?

*Parke, J.* I don't think it would be adviseable for the bail to make such an experiment.

*Barstow*, in continuation. But the present question is, whether they are legally discharged. Then there was the case of Langridge *v.* Flood,(*d*) mentioned by Mr. Tidd. He had not been able to find any report of that case any where, although he had searched for it very carefully. The court was, therefore, unacquainted with what passed on that occasion. It did not appear whether it passed *sub silentio*, as in Trinder *v.* Shirley. Nor did it appear in what state the case was; whether it was in a state of pressure against the bail.

*Parke, J.* That makes no difference.

*Barstow*, in continuation. He apprehended that it did make a difference here; the bail here were not pressed for payment, but proceedings were now in progress against the defendant's goods. The bail might still try the question whether a man, having no privilege of parliament at the time of his arrest afterwards becomes privileged, is entitled to avail himself of it, without the court interfering on motion.

Now supposing a man having no privilege to be arrested, and then to be elected, and then to remain in parliament one day in order to be set at liberty, and then vacate his seat, could it be said that it would be a good plea for the bail that their principal had obtained this temporary privilege in the intermediate time?

*Parke, J.* Perhaps it would not be a good plea.

*Barstow.* Then if it would not be a good plea, how could they avail themselves of it now?

*Parke, J.* But bankruptcy or insolvency might be pleaded.

*Barstow.* Certainly, for there the defendant's person is absolutely discharged, and the court are expressly directed, by Act of Parliament, to liberate the parties if they are arrested after their discharge. But the case of a member of parliament is quite different; the party is not absolutely discharged by becoming a member of parliament; his liability is only interrupted or suspended while he is a member of parliament. This was probably the case at common law; but all doubt upon that point has been removed in a declaratory statute.(*e*)

In the case of a peer, too, a party is absolutely discharged from his liability to arrest. The case is, therefore, in this respect, distinguishable from the case in Douglas, even if that case had undergone discussion in court, which it did not.

From these observations it may be safely inferred, that the interference of the court is perfectly discretionary.

This brought him to the second branch of his argument, which was, that this was not a case in which the discretion of the court would be exercised to afford relief to the bail.

He would call the attention of the court to the proceedings in the cause. The cause was set down for trial at the sittings after Easter Term. It was proposed that the parties should come to terms, and the defendant, by consent of his bail, gave a *cognovit*. Promises were made that money was raising for the payment of Mr. Wellesley's debts. No payment having been made, application was made to his attorney, and the answer was, that he had been obliged to apply the money to other purposes. Since that period the defendant had expended, in a fruitless election, much more than would suffice to pay the debt due to the plaintiff. This was the conduct of the defendant. The *cognovit* had been given by consent of the bail. The terms of their consent were these: "we, the bail in this cause, do consent to the above *cognovit*, and that our recognizance shall remain in force, as if the plaintiff had obtained judgment by verdict in the ordinary course of proceedings in this cause." Now, by the ordinary course of proceedings, the plaintiff would have been able to compel a render in Trinity Term. The defendant would then have had no privilege of Parliament, and then, if put to the alternative of going to gaol or paying the money, he would have preferred the latter. The bail, by interfering, had thus prevented the plaintiff from obtaining payment. In addition to this, the defendant had admitted that he has given security to his attorney for £5000, to indemnify the bail.

He concluded by submitting, first, that it was doubtful whether the bail were discharged, in point of law or not; secondly, whether or not the interference of the court was discretionary; thirdly, this was a case in which the discretion of the court would induce it to leave the bail to their legal rights, and not assist them on motion.

*Comyn*, in support of the rule, submitted that the court would not put the bail to the peril of attempting to render their principal, when he was a member of Parliament. He was proceeding, when he was stopped by the court.

*Parke J.* I am clearly of opinion myself, that the bail are entitled to be discharged on motion; but, as the application is a matter of some consequence, I will speak to the other judges, and if they think the rule ought not to be made absolute, it will be intimated to-morrow morning. If no such intimation be given, the rule will be drawn up for entering the *exoneretur* on the bail-piece.

It will be understood that the bail are entitled to be relieved, where the principal, if surrendered, would be entitled to relief. The question here is, therefore, would the defendant have been entitled to be discharged if in custody, after final judgment? In my opinion he would. In the case of Mr. Burton, who was elected member for Beverley, I was counsel. It came before Mr. Justice Bayley, at chambers, and on producing some old authority, he doubted whether the defendant was entitled to his discharge, he having been elected a member of Parliament while in custody on final judgment. But the warrant of the speaker put an end to that doubt. On searching the precedents of the House, it was found that a person in custody, on final judgment, being elected a member of Parliament, was entitled to his discharge. The rule must therefore be made absolute.

*Phillips* v. *Wellesley*, M. T. 1830, K. B.

No further notice of the case was taken by the learned judge, who presided in this court the next day, and therefore the judgment of *Parke J.* is confirmed.

ATTORNEY'S LETTER—COSTS.

A rule was obtained, calling on the plaintiff's attorney to shew cause why all proceedings should not be stayed without costs. The following were the facts on which the application was made. A letter was written by the attorney against whom the application was made, requiring payment of the debt, and five shillings for the letter. The defendant answered the demand by a letter, requesting

(*d*) 1 Tid. 290, ed. 9, cited in 4 East, 190.
(*e*) 1 J. 1. c. 13. 1 Chit. St. 313.

a few days' time. The attorney, who lives in London, replied by letter to the defendant, who lives at Taunton, informing him that he had seen his client, that the time requested would be given, and desiring the defendant to remit the money, with 13s. 4d. costs for the letters and attendances. The payment of the costs was refused. A writ was then issued; the amount of the debt was then remitted, and an offer made to pay one pound in full discharge of all demands. The latter sum the defendant's attorney refused, but accepted the amount of his client's debt. He then continued his proceedings.

*F. Pollock*, in shewing cause against the rule, observed, that the present case was of no importance in point of amount, but very important in point of principle. The defendant had acted against good faith, and if the court decided against the plaintiff's attorney, they would make it the interest of attornies to sue out writs without making any previous application for payment of the debt, and also their interest not to give defendants an hour's indulgence.

*Jeremy* supported the rule.

*Tenterden*, C. J. In point of principle this is certainly a case of importance. I have no hesitation in saying, that if in answer to an application by a creditor's attorney for payment, the debtor applies for time, and receives the indulgence he desires, he ought to pay the attorney's charge for the application and for the attendance, which have been rendered necessary by his own request. I learn from the master, that in case of a writ being sued out, after an application for payment, the plaintiff is allowed the costs of that application, and I think very properly. And I think it is very important, even with a view to policy, to retain the present, practice for the purpose of encouraging attornies to make applications for payment before action brought, and not to discourage their giving indulgence. Thus much for the principle. It appears in the present case to be quite clear, that the defendant has been endeavouring, first to get the time which he desired, and having gotten it, to cheat the attorney out of his just charge. The present rule shall therefore be made absolute, but by no means on the condition which he desires, for it shall be made absolute, not only on condition of payment of the 13s. 4d. originally demanded, and which has since been the cause of this dispute, but also the costs of the present application.

Rule absolute. *Monson* v. *Summers*. K. B. M. T. 1830.

PRACTICE.

In an action of replevin, the defendant avowed as landlord of the plaintiff. It appeared, that the plaintiff had come in under another landlord, and the question in the case was, whether the plaintiff had by his own admissions precluded himself from disputing the title of the defendant. That question depended on the terms of some letters that had passed between the parties. The court, on a full consideration of all the letters, held that the plaintiff had not admitted the defendant's title, so as to preclude himself from disputing it in this action.

*Alderson*, J., said he concurred with the other judges, that a verdict must be entered for the plaintiff, but he confessed he could see no point of law in this case. He protested against matters of fact being thus brought before the court. Such a practice was an evil; it was increasing, and must be stopped. *Mitton* v. *Weston*, M.T. Com. P. 1830.

ANNUITY—USURY—EXECUTORS—COSTS.

*Wilde*, serjeant, shewed cause against a rule to set aside an annuity which, it was alleged, was void on account of usury. The annuity, which amounted to 120l. was granted, in 1808, by John Stewart and J. Cresset Pelham, to John Holland, for the lives of the said John Holland, of his wife, of Mary Ann Holland, and of Lucy Dalrymple, or the survivors or survivor of them. In the grant there was a covenant by the grantors, "that they would within thirty days next after the decease of such three of the said lives as should first depart this life, insure in some respectable office of insurance in London or Westminster for the use of the surviving grantee the sum of 1000l. to be paid on the decease of the survivor of the nominee; and would, on the completion of such assurance, make an assignment of the policy to Holland, his executors, &c. for his and their sole use." The party now called on to shew cause, had purchased this annuity at a public sale, where it had been put up to auction under the authority of the crown, Holland himself having been previously outlawed. On behalf of the parties applying for the rule, it was contended that the grant was usurious and void, as the effect of the abovementioned covenant was to protect the capital from being put in hazard; while it was admitted, that the interest given for the sum advanced exceeded that allowed by law. For the purchasers of the annuity, it was contended, that as the fourth life might drop within the thirty days, and the grantors were not bound to insure before the end of that time, the principal was clearly in hazard; so that upon the well-known principle which governed these cases, the annuity was good in law. It was replied, that the principal never could be in hazard, for that the covenant was express and absolute, and not on condition; so that even the act of God would not have excused the covenantors for non-performance.

The *Court* were of opinion, that the rule must be discharged. They agreed, that the principal must be put in hazard, or that the contract would be usurious; and they saw, that in this case there was no inconsiderable danger that the third and fourth lives might drop together. Besides which, even were the policy effected, and the life insured to drop almost immediately afterwards, the insurance might be of no value, on account of the rules adopted by insurance offices, to protect themselves from such contingencies. The covenant was not such a certain stipulation for the return of the principal as to make the contract usurious.

The rule was discharged. On an application being made to grant the plaintiffs their costs, as they had been *bonâ fide* purchasers of this annuity at a sale under the authority of the crown, and were consequently quite free from the imputation of having framed an usurious contract, it was answered, that the parties applying for the rule were executors, who had done no more than their duty in taking the opinion of a court of law, with a view to protect the estate they were administering.

The *Court* observed, that executors were sometimes fond of making experiments, particularly where they conceived themselves safe in the matter of costs. Their lordships then ordered the rule to be discharged, with costs. *Nash* v. *Stewart*, *Com. P. M. T.* 1830.

## NOTES OF THE TERM

BEFORE proceeding to submit to our readers such legal intelligence of the last Term as our plan of publication has prevented us from giving at an earlier period, we are desirous, in the first instance, to direct their attention to a subject of some personal concern to ourselves. In another part of our pages will be found a valuable communication from "An Old Solicitor," accompanied by a letter in which the

writer adverts to a rumour, that this Journal has been established in hostility to the bar, and particularly to oppose the plan of a general registry for deeds.

We might refer our correspondent to the Introductory Address, and the general tenor of our work, as a sufficient refutation of the charge; but having reason to believe that the communication proceeds from a highly respectable source, we are desirous of avowing most explicitly the principles by which in this respect we are guided. We have no wish to elevate ourselves to a "bad eminence" by personal altercation. There may, indeed, be occasions on which it will become our duty to investigate personal motives, and to scan the conduct of individuals; but we have assuredly no intention to oppose any measure except so far as we deem it injurious to the community, to the security of property, or to the ends of justice.

Instead of displaying any undue hostility to the plan of a *general registry*, we have been exposed to a complaint of reviewing too favourably the labours of the learned commissioners. The truth certainly is, that the pleadings on this subject have been merely opened, and the merits of the measure remain to be discussed.

We recently quoted the advice of Lord Chancellor BACON as the safest guide for effecting improvements in our system of jurisprudence. We may now add the recent determination of the *present* LORD CHANCELLOR, who, on the subject of reform of another kind, has declared "that he will take his stand on the *ancient ways of the constitution.* Without specifying the details of his plan on that occasion, he said he would merely state, that whatever might be the plan he should propose, it would be propounded with a view to conciliate the friends of that constitution, *as it existed originally in the days of its purity and vigour.* * * *. His proposition would be founded in the sacred principle of rational public freedom, *as established by our ancestors;* he was not for *revolution,* but *restoration;* and it was his object to *repair,* not pull down, *the temple of the constitution*" (*a*).

On the other topic to which our correspondent refers,—a supposed determination to oppose ourselves to another branch of the profession,—we can sincerely declare that we are as anxious to do justice to the learning and independence of the *Bar,* as we are disposed to venerate the dignity and wisdom of the *Bench,* or to maintain the intelligence and integrity of the general practitioner. If it be true (as the present lord chancellor has expressed it) that "all that we see about us, king, lords, and commons, the whole machinery of the state, all the apparatus of the system, and its varied workings, end in simply bringing twelve good men into the jury box,"—if such be the paramount importance of the administration of justice, (and no one will deny it,) then it is our duty to uphold alike the unsullied purity of the judgment-seat,—the zeal, the honour, and talent of the advocate,—and the fidelity, diligence, and practical skill, of the other department of the profession. Indeed, we do not believe that any man, unfit for a commission of lunacy, would seriously propose to supersede either branch of the profession, under a wild notion that the duties of both could be performed by one of them, or that it would be cheaper, if practicable, to effect such a change. The utility of the division of labour is too well understood to permit any man of ordinary experience or information to support a scheme for the destruction of the separate ranks of any profession. Holding this opinion, it is needless to inquire which of the two branches of the law could be abolished with the least injury to the community, to the interests and convenience of its various classes, or to the practical management of its complex and multiform state of affairs.

That there should be any hostile feeling between the members of the two departments of the legal profession, seems to us as incredible as its existence would assuredly be unwise. We do not believe that any such feeling exists. We do not believe that it ever entered, for a single moment, into the contemplation of the bar collectively, to consider themselves in a state of opposition to the other branch of the profession. A large portion of their body stands in near relationship to attornies. We could name several judges, as well as numerous barristers, whose sons, brothers, and other relations, belong to the class of practising solicitors. Many of this class, also, are the intimate friends of the most distinguished ornaments of the bar. We are therefore confident that no feeling of animosity can exist between the two departments of practice. We shall do all that lies in our power to remove the causes which may by possibility be calculated to give birth to such a sentiment, and wherever the germ of it may in any degree exist, we shall zealously endeavour to stay its growth, and nip it in the bud.

(*a*) *Mr. Brougham's Speech,* 2d Nov. 1830.

---

*Laws of Real Property.*

Mr. CAMPBELL has given notice of his intention to move for leave to bring in bills for the following objects:

1. For establishing a *general register* for all deeds and instruments affecting real property in England and Wales.

2. To amend the law respecting *inheritance* and *descent,* and to allow parents to succeed as heirs to their children, and collateral relations to succeed as heirs to each other, though of the half blood.

3. To amend the law respecting *dower* and *curtesy.*

4. To abolish *fines* and *recoveries,* and to substitute other assurances in lieu thereof.

5. To amend the law regarding prescription, and *limitation* of *actions* respecting real property.

The first of these bills will be brought in on the 8th of December, and the others after Christmas.

---

*Administration of Justice Amendment Act—New Rules of Practice.*

The teste and return of writs noticed by our correspondent G. C. cannot be regulated, we

presume, until the bill now pending to amend the late Act for the administration of justice has been passed. We doubt not that the learned judges will then settle the rules of practice according to the intention and authority of the 1st Will. IV. cap. 70.

The bill has passed the House of Commons, and on the motion of Lord Tenterden has been twice read in the House of Lords.

### *Local Courts.*

On the motion of the Lord Chancellor, leave has been given to bring in "a Bill for the more effectual Administration of Justice in England and Wales, by means of Local Courts."

### *Law Appointments, &c.*

An account of the judicial appointments which have recently taken place, with a list of the gentlemen called to the bar during the Term, and other information, will be given in the next number. In the mean time, we may mention that we understand the following appointments have been made by Lord Brougham:

| | |
|---|---|
| Principal Secretary - | Mr. Lemarchant, barrister. |
| Secretary of Bankrupts, | Mr. Vizard, solicitor. |
| Secretary of Lunatics - | Mr. Lowdham, solicitor. |
| Sec. of Presentations - | Mr. Dyneley, solicitor. |
| Gent. of the Chamber, | Mr. Haines. |

## MISCELLANEA.

#### A ROYAL OUTLAW.

The king of Spain was outlawed in Westminster hall, I being of counsel against him. A merchant had recovered costs against him in a suit, which, because he could not get, we advised to have him outlawed for not appearing, and so he was. As soon as Gondemar heard that, he presently sent the money, by reason, if his majesty had been outlawed, he could not have had the benefit of the law, which would have been very prejudicial, there being then many suits depending betwixt the king of Spain and our English merchants.—*Selden's Table Talk.*

#### CHURCH PATRONAGE.

Lord Loughborough, when chancellor, used to observe, that his greater livings gave him no trouble; their destination was either anticipated or easily determined; but, for his smaller livings, he had always a multitude of applications, and seldom or never one without "seven or eight small children at the end of it."—*The Sexagenarian*, [Rev. W. Beloe,] vol. 1.

#### LORD THURLOW.

It is well known that the manners of this nobleman were not distinguished by an excess of urbanity. Even in conferring favors he seldom acted very graciously. During his Chancellorship he bestowed a stall in the cathedral of Norwich upon Mr. Potter, the translator of Æschylus, who had been his schoolfellow. Mr. Potter, on receiving notice of the favor, came to town to make personal acknowledgment of his gratitude. He called several times at Thurlow's house, but could never obtain admission. At length he applied to his friend and neighbour, Sir John Woodhouse, and begged of him to see the Chancellor in the House of Peers, and ask when he might have the honour of waiting upon his lordship, as he had been some days in town, and was anxious to return. Sir John accordingly did this, and the answer was, "Let him go home again, —I want none of his Norfolk bows?"

*The Sexagenarian*, vol. 1.

#### A FAIR QUESTION.

The lawyers such a profit make,
As olden stories tell,
'Tis said that they the *oyster* take,
And clients get the *shell*;
But, should a pearl be found, good lack!
As pearls therein may dwell,
Would clients say—"Come, give me back
The *oyster* for the *shell*?"

#### CHEAP JUSTICE IN IRELAND.

The morning after the fair day in any country town in Ireland, the neighbouring magistrate has a crowded levee. Men with black eyes, and faces grimed with blood, and cut heads bound up with many-coloured garters, appear at the door, shouldering and thrusting themselves one behind another, into his honour's *prisence*, to get justice. Fumes of whiskey and of wet trusties, &c. instantly fill the room. The figures, who all look like poverty-struck demoniacs, stand still and silent for a moment, till they are spoken to by his honour,—"What's your business with me?"

"Plase your honour, see this cut in my head, it is what I was last night kilt and murdered by Terrence M'Grath here."

"Plase your honour, I never lifted my hand against him, good or bad, at all at all, as all the witnesses here will prove for me on oath, so they will."

Then, all at once, in various brogues, some long, some short, some Connaught, some Cork, some Kerry, they bawl, they foam, they gesticulate, possessed by the spirit of law and vengeance, then step forward to swear—"Plase your honour, if you'll just take my examination *again* him."

"Give me the book *till* I swear, plase your honour."

Then *by the virtue of this book, and of all the books that ever were shut and opened*, they swear not according to the best of their belief, but according to the worst of their wishes, and in terms such as turn what should be grave to farce. As, for instance, in the following extract from an examination lately taken by an Hibernian magistrate.

"Deponent being duly sworn, deposeth, that on the fair night of the 27th instant, he, the said Bartley Connor, did, in the presence of Garry M'Laughlin aforesaid, swear three several times that he would send deponent's soul to hell, which deponent verily believes he would have done if he had not been prevented by said Garry M'Laughlin.

*Mrs. Leadbeater's Cottage Dialogues among the Irish Peasantry*, 1811. *Note by Miss Edgeworth.*

LONDON:

PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, DECEMBER 11, 1830. No. VI.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

SOME PASSAGES FROM

## THE LIFE OF WILLIAM BARNIVALE,

*(A Tale of the Fifteenth Century.)*

### CHAPTER I.

THERE is a genius for every thing: the meanest action that can be performed requires its corresponding aptitude of intellect, its peculiar turn of mind. Notwithstanding the demonstrable universality of this rule, there are to be found persons (a great majority too) who will continually make exceptions, and give expression to an opinion, too absurd to be exposed,—yet frequently productive of much mischief in practice,—that the dunce of their family will answer sufficiently well for the high and responsible duties of the church, and the mere plodder make his way successfully in the profession of the law. That the qualification of genius is, at any rate, beneficial to the legal student, the story of William Barnivale will serve to verify, and we have therefore undertaken the task of transcribing from an old black-letter manuscript of the family, in which the life and fortunes of this extraordinary individual were ostentatiously exemplified, as we now set forth, in good German text or old English, the final act of a common recovery.

The family of William Barnivale, as his name will testify, was of a good stock, being derived from among "such nobles and gentlemen of marque who came in with William the Conqueror," as the Roll of Battle Abbey is intituled, and in which, as given in Fox's Acts and Monuments, (a strange place to find such a document,) and in Holinshed's Chronicle, (the most copious of all the lists,) the name of this family will be found recorded. At the period of which we are writing, (the fifteenth century,) the family were settled in Devonshire, a county which has the honour of being also the birthplace of Sir John Fortescue, the celebrated author of the important works, "De Laudibus Legum Angliæ;" and "The Difference between an Absolute and Limited Monarchy, as it more particularly regards the English Constitution,"—a circumstance which the reader will hereafter perceive it was not inexpedient to mention here.

Of the mode and place of education received by any of the great men who flourished about the date of our narrative, and for a considerable period after, it is difficult at this time to find any record. The prime purpose of biography was not, in that day, fully understood, and therefore but inadequately appreciated. Biographers then had no idea of describing the progress of intellect, much less its earliest manifestations; although nothing affords more important assistance and encouragement to the young and aspiring, than the record of the first indications, and the relative advancement of an individual mind,—thus tracing its gradual development from the first sunrise to the noonday, even until the grey shades of solemn evening decline and settle on the calm repose of an honourable old age. The writer of the manuscript whence this veracious history is extracted, had as little notion as his contemporaries of the now manifest importance of such a task; but, fortunately, there exist letters in the family, which throw some light upon this branch of our inquiry, and of which we shall, of course, avail ourselves.

Never was there a more erroneous conception passed into a principle of action, than the notion that the study of elegant literature is unfavourable, in an intellectual point of view, to a professor of the law. We say in an intellectual point of view; for, as it regards personal interests, the reputation of possessing a love of literature has been injurious, in the way of business, to many a legal practitioner. Notwithstanding, however, this public prejudice, the legal knowledge of such a practitioner may be both accurate and extensive; and, in most of such instances, it is so, because these very same literary pursuits are but one mode of exciting intellectual diligence, and the exertion of diligence in any mode is a pledge of its exertion in others. The one thing needful is *diligence*,—a diligent mind is the great *desideratum*, and where the existence of such an intellectual character is ascertained, the grand point is gained, and justice would require that credit should be given to such a mind for general industry. Neither is this a matter of speculation only, but is borne out by facts. Fortescue, Sir Thomas More, Bacon, and almost all of our earliest great lawyers, were men who, in literary acquirements, were second to none of their age.

It is, therefore, with great pleasure that we are enabled to record that William Barnivale was initiated by his parents into all the learning of his times, and was not debarred from the study of the classics, nor even of that ballad-lore, which formed then the humbler poetry of the age and country. With what delight he hung enamoured over the Gallo-Norman productions of the muse, which have now, and we must confess deservedly, fallen into obscurity, if not non-existence! Their characteristic excellence, as the Gallo-Norman poets thought it, consisted in wiredrawing their subject to an interminable extremity, which would now appear tedious, but which was not without its attraction for the readers of that uncultivated age, and to the youthful taste of Barnivale came not unrecommended. Nothing in poetry, frequently, delights the youthful reader more, than that verbosity, which many writers in metre contrive to "spin beyond the staple of their argument." Barnivale lived, however, to admire a severer style, such as the classics of Greece and Rome have left examples of, in productions which, outliving the country that produced them, are become the property of the world, and shall never perish, until

> "the sun himself,
> Grows dim with age."

The "Brut d'Angleterre," of Wace, had charms for his young fancy, and the overwhelming tediousness of the same writer's "Roman du Rou," or "Rollo," found in him a subject, who carried to the fullest extent, as a reader, the grand constitutional principles of passive obedience and non-resistance, to the lordly authority of a poet whose monarchy had not yet been limited by the salutary fear of critical decision, whether announced from the seat of judgment, weekly, monthly, or quarterly. Nor did he neglect to peruse the Latin verses of the monks and clergy of the twelfth century, who cultivated poetry with a degree of success not suspected by those who are unacquainted with their writings. Joseph Iscanus, or Joseph of Exeter, in particular, wrote an epic poem founded on the exploits of Richard the First, called "Antiocheis," a small fragment of which, in praise of King Arthur, alone remains, but of so much excellence as to make us regret the loss of the rest. His six-book epic, also, on the Trojan war, adapted from the apocryphal Latin history of Dares Phrygius, is written in a versification remarkably sweet and flowing. When tired with these more elaborate productions, the youthful mind of Barnivale made itself merry with the lighter effusions of Walter Mapes, the facetious chaplain of Henry the Second, and justly called the Anacreon of his age, whose celebrated drinking ode, in leonine verse, has a bacchanalian joyousness and defiance about it which have seldom been excelled.

It was with less pleasure that he waded through the metrical romances of a succeeding century. Robert of Gloucester could not possibly possess many attractions for a juvenile, and therefore, impatient, mind. Robert Mannyng, with his rhime entrelacée, is more readable, and was, by our hero, considered almost a model of easy versification. But his toil, whatever it was, of wading through these poets, was amply rewarded by what he found in their brethren of a little later date. "Piers Plowman's Vision," and "Piers Plowman's Crede," were well calculated at once to introduce him to a right conception of the capabilities of his native English tongue, and to expose the corruptions of the clergy belonging to a superstition ere long to be exploded; together with the abominations of monachism, the four mendicant orders of which the "Crede" unsparingly castigates. He rose into a higher region of imaginative poetry in the writings of the "moral Gower;" and in Chaucer arrived at the very summit of excellence, in this kind, to which the intellect of England had at the period of our story attained.

Thus, by addresses to the fancy and the imagination, the two faculties which are most excitable in youth, the mind of William Barnivale was not only instructed, but expanded. A power was thereby communicated to it, of which he soon began to feel the influence; it had acquired an energy which made it apt to conceive, and ready to retain, whatever was presented to it, either in the course of observation or study.

Need we say how the heart of one of the most affectionate of fathers rejoiced at these manifestations of intellectual superiority which his son was every day exhibiting? Verily, to use the expressive language of Ossian, "he rejoiced like the sun over the oak which his beams had quickened." But it is not to be expected that, in the age of which we write, any father would think of encouraging his son exclusively in poetical studies, as whatever esteem the art once enjoyed, it was in this century looked upon with a degree of contempt scarcely credible. A whimsical story is indeed related, which may show in what kind of estimation the sacred person of a poet was then held. Two learned mendicants came to the castle of a certain nobleman, who, understanding that they had a taste for poetry, commanded his servants to take them to a well, and to put one into each bucket, and so let them down alternately into the water, and to continue the exercise till each of them had made a couple of verses on his bucket; which ceremony was performed, to the great entertainment of the baron and his company.

Far other esteem—far higher regard—had the father of William Barnivale for the divinest of all arts; but he was desirous of directing the attention of his son to severer accomplishments. It was to the well of history that he particularly wished to send him in search of truth, which he thought was there to be found. In this, however, he was mistaken, as, in reality, there is more of what is actually truth in many works of fiction, than

in the over-vaunted tomes of history. These deal too exclusively in the external mechanism of human affairs, and intermeddle not with that inward life which, after all, is the principal though mysterious agent, whereby those visible accidents, the relation of which composes what is generally called history, are produced. But, however defective were the histories of that, as of later periods, in the high accomplishment of detecting this secret spring of worldly events, the knowledge of the mere outline is yet desirable to the student, and indeed is not to be dispensed with; for, though not a knowledge of truth, it is of facts, which are as indicative of the more hidden principles which make up truth, as the gnomon is of the hours which constitute time.

William Barnivale directed the energies of his mind to this new pursuit, and soon became proficient, laborious as the task then was, in the old historians of his country, from the "querulas Gildas" down to Sir Thomas de la Moor But what further he wished to know relative to the history of his own country he had to seek for in the chronicles of Sir John Froissart, a French historian, who travelled from land to land, in order to collect matter for his work, in which he has recorded what happened in England during the time that he resided in the English court, under the patronage of Philippa, queen of Edward III. In the reading of Froissart, we may readily believe that young Barnivale found more satisfaction than in the perusal of all the other historians combined. Of this delightful writer, it is sufficient praise to mention that he was an historian after Montaigne's own heart, who observes of him, "I love historians unaffected or excellent; the unaffected who have not wherewithal to add of their own, and who are only careful to collect and pick up every thing which falls within their notice, and to put down every thing without choice, and who, without sorting, give us the opportunity of wholly judging of their truth. Such, for example, is the worthy Froissart, who has gone on with his work with such a frank simplicity, that, having committed a fault, he is no way ashamed of avowing it, and correcting it at the place, where he is informed of it, and who tells us the diversity of rumours which were current, and the different accounts that were told to him. It is history, naked and unadorned; every one may profit from it, according to the depth of his understanding."

The study of Froissart was exceedingly delightful to William Barnivale, who was not slow in perceiving that his history, in fact, partakes of the times in which he wrote. Froissart was born to transmit to posterity a living picture of an age which preferred the hazard of war to the solid advantages of peace, which, amid the intervals of troubles almost continually agitating it, found relaxation only in the most tumultuous pleasures. His chronicle is, in truth, a complete body of the antiquities of the fourteenth century, delivered in the manner of a familiar conversation with a man of understanding, who has seen a great deal, and tells his story well. The amiable story-teller, besides, knows how, at times, and in particular when he speaks of any grand event, to unite the majesty of history with the simplicity of a tale. In matters of religion, however, Barnivale observed that, his author was over credulous, and not a little superstitious. The faults which are met with, contrary to historical exactness, Barnivale rightly ascribed to the natural confusion of the author's mind, the precipitation with which he wrote, and his unavoidable ignorance respecting many things which must be supposed to have escaped his inquiries. His manner of life is, indeed, retraced in his chronicles. We see in them tumultuous meetings of warriors of all ages, degrees, and countries; feasts, entertainments, at inns; conversations after supper, which lasted until a late hour, when every one was eager to relate what he had seen or done; after which the travelling historian, before he went to bed, hastened to put on paper every thing he could recollect. In addition to this, Barnivale sagaciously suspected that the historian carried even to the composition of his chronicles, his love of romance, and imitated the disorder which prevails in such works. We observe in these chronicles the history of events which happened during the course of almost a century, in all the provinces of the French kingdom, and of all the people of Europe, related without method. In a small number of chapters we frequently meet with several different histories, begun, interrupted, recommenced, and again broken off; and, in this confusion, the same things repeated, sometimes to be corrected, sometimes to be denied, and not seldom to be augmented.

The time had now arrived when it was proper that William Barnivale should devote himself to some profession. This his judicious parent wisely left to his own election. The reader is already aware that he became a law student, else it would have been a matter of reasonable curiosity, to inquire what profession a mind of such capabilities had voluntarily chosen. The motives which induced him to adopt the law as the profession of his choice, must be detailed in another chapter.

(*To be continued.*)

## RECENT STATUTES.

*Analysis of an Act, intituled, "An Act for altering and amending the Law regarding Commitments by Courts of Equity for Contempts, and the taking Bills pro confesso."* [1 Gul. IV. cap. 36. Royal assent, 16th July, 1830.]

THIS was the most popular Act of the last session, and very deservedly so. It will put an effectual stop to the distressing system of allowing persons committed by the court of Chancery to prison, to remain there for the rest of their lives, unnoticed and neglected. Under the former practice, if a party refused to appear, or to obey the process of the court,

he was committed to prison; he was brought into court, and, if he still refused, an appearance was entered for him, the bill was taken *pro confesso*, and he was again committed to prison. The course which must now be pursued is pointed out in the orders contained in the Act. See section 15 to the end of the Act.

By section 1, the former Acts, and parts of former Acts, relating to the subject, are repealed, except as regards any proceedings taken under them before the passing of the Act.

Sec. 2 enacts, that the warden of the *Fleet* prison shall keep a register of the names of all persons committed by the courts of equity for contempts, and make a quarterly report thereof to the lord chancellor.

Sec. 3 enacts, that if in any suit which hath been or hereafter shall be commenced in any court of equity, any defendant against whom any subpœna or other process shall issue, shall not cause his appearance to be entered upon such process, and an affidavit shall be made to the satisfaction of such court that such defendant is beyond the seas, or that he could not be found so as to be served with such process, and that there is just ground to believe that such defendant is gone out of the realm, or otherwise absconded, to avoid being served with the process of such court; then the court out of which such process issued, may make an order appointing such defendant to appear at a certain day therein to be named, and a copy of such order shall, within fourteen days after such order made, be inserted in the *London Gazette*, and published on some Lord's Day immediately after divine service in the parish church of the parish where such defendant made his usual abode within thirty days next before such his absenting; and if the defendant do not appear within the time limited by such order, then on proof made of such publication of such order as aforesaid, the court being satisfied of the truth thereof, may order the plaintiff's bill to be taken *pro confesso*, and make such decree thereupon as shall be thought just. (See 5 Geo. II. c. 25, s. 1.)

Sec. 4 enacts, that if any person against whom any decree shall be made upon refusal or neglect to enter his appearance, or to appoint a clerk in court or attorney to act on his behalf, shall be in custody or forthcoming, so that he may be served with a copy of such decree, then he shall be served with a copy thereof before any process shall be taken out to compel the performance thereof. (See 5 Geo. II. c. 25, s. 8.)

Sec. 5 enacts, that if any decree shall be made in pursuance of this Act against any person being out of the realm or absconding, and such person shall, within seven years after the making such decree, return, he shall likewise be served with a copy of such decree within a reasonable time after his return or public appearance shall be known to the plaintiff. (See 5 Geo. II. c. 2.)

Sec. 6 enacts, that if any person so served with a copy of such decree shall not, within six months after such service, appear and petition to have the said cause reheard, such decree so made as aforesaid shall stand absolutely confirmed. (See 5 Geo. II. c. 5, s. 5.)

Sec. 7 enacts, that if any person so served with a copy of such decree shall within six months after such service, or if any person not being so served shall within seven years next after the making such decree, appear in court and petition to be heard with respect to the matter of such decree, he may be admitted to answer the bill exhibited, and proceedings may be had thereon, or as if no former proceedings had been in the same cause.

Sec. 8 enacts, that persons not appearing within seven years, and making such petition, shall be absolutely barred. (See 5 Geo. II. c. 25, s. 7.)

Sec. 9 enacts, that the Act is not to affect persons beyond the seas, unless in certain cases. (See 5 Geo. II. c. 25, s. 8.

Sec. 10 enacts, that the Act shall not extend to courts having a limited jurisdiction. (See 5 Geo. II. c. 25, s. 9.)

Sec. 11 enacts, that if any defendant, by virtue of any writ of habeas corpus or other process issuing out of any court of equity, shall be brought into court, and shall refuse or neglect, or, being within the walls of any prison in *England* under or charged with an attachment or other process of contempt, shall, after fourteen days' previous notice in writing requiring him to enter an appearance, neglect to enter his appearance, or to appoint a clerk in court or attorney of such court to act on his behalf, such court may appoint a clerk in court or attorney of such court to enter an appearance for such defendant. (See 5 Geo. II. c. 25, s. 2.)

Sec 12 enacts, that in case any defendant having privilege of parliament shall, upon a return of process of sequestration issued against him for not putting in an appearance to any bill of complaint, neglect to appear, the court, upon producing the return of such sequestration in court, may, on the motion or other application of the plaintiff in such cause, appoint a clerk in court to enter an appearance for such defendant so having privilege of parliament. (See 45 Geo. III. c. 124, s. 4.)

Sec. 13 enacts, that when any defendant having privilege of parliament shall have appeared to any bill filed against him seeking a discovery upon oath, or when an appearance shall have been entered for such defendant according to the provisions aforesaid, and such person shall neglect to put in his answer to such bill, it shall be lawful for the plaintiff in such suit to apply to the court for an order that such bill shall be taken *pro confesso* against such defendant, and upon such application such court of equity shall make an order that such bill shall be taken *pro confesso*, unless the defendant shall within eight days after being served with such order shew good cause to the contrary.

Sec. 14 enacts, such bill in equity, or an examined copy thereof, so taken *pro confesso*, shall be taken as evidence of the facts therein contained, in the same manner as if such facts had been admitted to be true by the answer of the defendant put in to such bill; and in like manner every other bill of discovery taken *pro confesso*, under any of the provisions of this Act, shall or may be taken and read as evidence of the facts and matters and things therein contained, to the extent aforesaid. (See 45 Geo. III. c. 124, s. 6.)

Sec. 15 enacts, that the following orders and rules shall henceforth regulate the practice of courts of equity in regard to process and the taking bills *pro confesso*.

i. That where *non est inventus* has been returned on the writ of attachment, the sergeant at arms shall apprehend and bring the defendant to the bar of the court.

ii. That if any defendant, being in contempt for not answering the bill, shall have been brought to the bar of the court, and shall have been remanded back to the *Fleet*, the plaintiff may sue forth the writ of habeas corpus, provided that there shall be at least twenty-eight days between the day on which such defendant was so remanded back and the return of such writ of habeas corpus; and after the

return of such writ of habeas corpus, in case such defendant shall not have put in his answer, the court shall order the bill to be taken *pro confesso* against such defendant; but in regard to any defendant in custody before and at the time of the passing of this Act, there shall be at least thirty days between the time of passing this Act and the return of such last-mentioned writ of habeas corpus; and it shall not be necessary in the case of any defendant now in custody as aforesaid, who shall have been brought to the bar of the court as aforesaid, to sue forth more than one writ of habeas corpus in order to take the bill *pro confesso*.

iii. That the party prosecuting any attempt shall be at liberty, without order, to sue forth the several writs in process of contempt.

iv. Provides for prisoners being already in custody in another prison for misdemeanours.

v. That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an habeas corpus to the bar of the court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt: and where the defendant is in custody of the sergeant at arms, or of the messenger, upon an attachment or other process, the plaintiff shall, within ten days after his being taken into such custody, cause the defendant to be brought to the bar of the court; and in case any such defendant shall not be brought to the bar of the court within the respective times aforesaid, the person in whose custody he shall be, shall thereupon discharge him out of custody.

vi. That if a defendant, upon being brought before the court upon an habeas corpus, shall make oath, that he is unable by poverty to employ a solicitor to put in his answer, the court shall thereupon refer it to a master to inquire into the truth thereof, and to report thereon to the court forthwith, and thereupon the court may make such order as upon other reports of the like nature under the provisions hereinafter contained.

vii. That four times a year one of the masters of the court of Chancery, to be named by the court, shall visit the *Fleet* prison, and examine the prisoners confined there for contempt, and shall report their [q. his] opinion on their respective cases to the court; and thereupon it shall be lawful for the court to order, if it shall see fit, that the costs of the contempt of any such prisoner shall be paid out of the suitor's fund, and to assign a solicitor and counsel to such prisoner, for putting in his answer and defending him *in formâ pauperis*, and to direct any such prisoner, having previously done such acts as the court shall direct, to be discharged out of custody; provided that if any such defendant become entitled to any funds out of such cause, the same shall be applied, under the direction of the said court, in the first instance to the reimbursement of the suitor's fund.

viii. That it shall be lawful for the master visiting the *Fleet*, or to whom the case of a prisoner shall be referred by the court itself, to examine the prisoner, and all other persons upon oath; and to cause any ministers of any court of law or equity to produce upon oath any records, or other writings belonging to the said courts.

ix. That if the prisoner be an ideot or lunatic, a guardian may be appointed.

x. Provides for the amendment of bills when the defendant is in contempt.

xi. That in every case where the defendant has been brought to the bar of the court to answer his contempt for not answering, and shall neglect so to do, the plaintiff shall be at liberty, instead of proceeding to have the bill taken *pro confesso*, to put in such an answer to the bill as herein-after is mentioned, in the name of the defendant, without oath or signature; and thereupon the suit shall proceed in the same manner as if such answer were really the answer of the defendant.

xii. That in any case where, upon the application of the plaintiff, the court shall be satisfied that justice cannot be done to the plaintiff without an answer to the bill or to the interrogatories from the defendant himself, it shall be lawful for the court to order the defendant to remain in custody until answer or further order.

xiii. That where the defendant is in contempt for not appearing or not answering, and in actual custody under process for such contempt, or being already in custody shall be detained by an attachment for such contempt, and shall not, where the contempt is for not appearing, enter an appearance within twenty-one days after he is lodged in gaol or prison, or the attachment is lodged against him, (he being already in prison,) as the case may be, or, where the contempt is for not answering, put in an answer within two calendar months after he is lodged in gaol or prison, or the attachment is lodged against him, he being already in prison, the plaintiff shall (as the case may be), within fourteen days after the period computed from the expiration of such twenty-one days within which he may by the provisions of this Act be able to enter such appearance, cause an appearance to be entered for the defendant under the powers of this Act, and shall at the expiration of such two calendar months proceed to take the bill *pro confesso*, or in default of so doing the defendant shall, upon application to the court, be entitled to be discharged out of custody without paying any of the costs of the contempt.

xiv. That where a defendant is in custody for contempt in not answering, and shall be able to put in his answer by borrowing or obtaining a copy of the bill, without taking an office copy of the bill, he shall not be compellable to take any such copy, but the clerk in court may require him to make an affidavit denying his ability in consequence of poverty to pay for an office copy of the bill.

xv. Provides for the execution of deeds and assurances by persons in contempt.

xvi. Provides for the delivery of papers and documents by persons in contempt.

xvii. That in any other case of a commitment for contempt, not herein specially provided for, the court may make such order for the discharge of the prisoner, upon any such terms, and making, if the court shall see fit, any costs, costs in the cause, as to the court shall seem proper.

xviii. That where any person committed for a contempt shall be entitled to his discharge upon applying to the court, but shall omit to make such application, the court may compulsorily discharge such person from custody.

xix. That where any party obstinately retains possession of lands, after a writ of execution of a decree or an order for delivery of possession has been duly served, the party issuing it shall be at liberty, upon an affidavit of service of the writ of execution and demand of possession and refusal, to obtain the usual order of course for the writ of assistance to issue, and that the intermediate writs of attachment and injunction further commanding the party to deliver possession, or any other writ, shall be unnecessary.

xx. The keepers of every prison within the city of London to be masters extraordinary for the purposes of this Act.

Sec. 16 enacts, that the Insolvent Debtors Act shall extend to all process issuing from any court of equity for any contempt of such court for non-payment of money, or of costs, charges, or expences in any such court; and that in such case, the said discharge shall be deemed to extend to all costs which such prisoner shall be liable to pay in consequence or by reason of such contempt, or on purging the same. (See 7 Geo. IV. c. 7, s. 50 and 75.)

Sec. 17 enacts, that where the process of contempt is for the non-performance of an act, and he has not paid the costs of the contempt, or the insolvent has fully answered the plaintiff's bill or interrogatories, or otherwise cleared his contempt, except as far as regards the payment of the costs, or it has become in event unnecessary for him to do the act for the nonperformance of which he was committed or attached, the court of equity in which the suit is depending shall, upon the application of the party in contempt, discharge him from the same, except as the costs thereof, for which he shall remain in custody, and such costs shall be deemed within the provision lastly herein-before contained, and he shall be dischargeable therefrom, and from the process of contempt, in like manner as if the process of contempt were for nonpayment of money or costs.

Sec. 18. Powers given to the court of Chancery to extend to the lord keeper.

Sec. 19 enacts, that such of the rules to be adopted by the court of Chancery as are numbered from five to twenty, both inclusive, shall be adopted by the court of Exchequer.

Sec. 20 enacts, that the powers contained in such last-mentioned rules are extended to the court of Exchequer.

Sec. 21 enacts, that wherever this Act, in describing or referring to any person, or any conveyance, transfer, matter, or thing, uses the word importing the singular number or the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, and several conveyances, transfers, matters, or things respectively, as well as one conveyance, transfer, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction.

## JUDICIAL CHARACTERS.—No. I.

### LORD LYNDHURST.

In our last Number (*a*), we directed our attention to the judicial character of the late Lord Chancellor. We now resume the subject.

We shall first inquire the amount of business actually dispatched by the late lord chancellor. When he took his seat, the following matters were to be disposed of by him:

| | |
|---|---|
| Pleas and demurrers - - | 19 |
| Appeals and rehearings - - | 109 |
| Causes - - - - | 325 |
| Further directions and exceptions - | 149 (*b*) |

besides bankruptcy petitions.

(*a*) See ante, p. 65.

(*b*) This statement is taken from the books of causes set down for hearing, delivered to counsel at the beginning of every term. *See Cooper's Parliamentary Proceedings*, p. 142.

His lordship from Easter Term, 1827, to Hilary Term, 1828, disposed of thirty-four appeals, besides hearing bankruptcy and lunacy petitions, and motions, and presiding in the House of Lords; and he has since proceeded pretty nearly at the same rate. This was perhaps as much as could be expected of a judge unacquainted in a great measure with the practice of courts of equity. At the same time it is proper to observe, that the arrear in his lordship's court was considerable, and some fresh assistance or some other arrangement for the despatch of equity business was absolutely necessary.

It is undoubtedly the fact, that it was his lordship's practice to confirm the judgment in the court below. This in some measure tended to discourage appeals. It is to be observed, also, that he rarely changed an opinion once formed: it was, indeed, almost impossible to shake his fixed determination. His habit of examining an advocate during his address to him, although it often threw considerable light on the matter discussed, was, nevertheless, very embarrassing to the counsel, and often confused and interrupted his argument. The learned lord could not, apparently, entirely break himself of the mode of conducting a cause in the courts which had been most familiar to him, and was too apt to consider the counsel employed as *witnesses*, and mere depositaries of the facts of the case. It is proper to observe, however, that no judge ever treated the bar with greater kindness or courtesy. Indeed, perhaps no lord chancellor ever enjoyed so much personal regard with his own profession as Lord Lyndhurst.

The chief characteristic of his judgments was their direct application to the matter to be decided. They are, therefore, in general very concise. They do not attempt to decide or influence other points; they never run into generalities or wander into extraneous subjects; they never, to use a vulgar but appropriate phrase, *beat about the bush*; they are direct, plain, and straightforward; they go at once to the point, and they decide it on so clear and satisfactory a ground, that they can be safely acted upon in practice. A counsel can say, at any rate, he has the lord chancellor with him, and those who have to advise on the property and interests of their clients, and have had experience of the judgments of other judges, well know the value of this quality. His lordship carried to the bench the keen perception of the real difficulties of the case which so remarkably distinguished him at the bar. No judge who ever sat on the woolsack, discussed the evidence in the cause in so masterly a manner. This we think was his main qualification for his office. His knowledge of the doctrines of equity was necessarily limited, but he looked through all the cases on the subject before he decided; and as his information on the laws of property was very extensive, there is scarcely one of his decisions which has met with the disapprobation of the profession, and we are of opi-

nion that if he only had sat two years more, he would have been one of the best equity judges ever known.

We have now laid before our readers our own opinion on the judicial character of Lord Lyndhurst (*a*), and we have given them the means of correcting that opinion if it be wrong, and forming a juster one. We can have no reason for attempting to mislead them; we are only anxious that they should have ample materials for coming to the right conclusion.

---

(*a*) We are always anxious to present our readers with the opinions of others on the matters discussed in our pages, particularly when they differ from our own, as they have the means of forming a conclusion for themselves. We shall, therefore, quote from three contemporaries, three separate characters of Lord Lyndhurst.

We shall first give Lord Brougham's opinion of the late Lord Chancellor.

"Did any one doubt," said that eloquent statesman, in the first debate in the court of Chancery after Lord Lyndhurst's appointment, "that the present lord chancellor, though not educated in the Equity courts, was a man of great legal talents, and of a strong, manly, and independent mind? He possessed a remarkable power of simplifying and dealing with the most complicated questions. It was the remark of those who had the greatest experience in Westminster hall, that no man knew so well how to split the nut, throw away the husk, and get at the kernel. He was a man qualified for reforming the court and anxious to save its time; it was the general opinion that he excelled in this, and that he could make up for that defect in his education in not being brought up in a court of Equity, which was not his fault, but his misfortune."

We shall next quote two able characters, the first unfavorable, the last favorable, to the late lord chancellor; the former by the author of the "Lettres sur la Cour de la Chancellerie," the latter by the author of "The Life of a Lawyer."

"Le Garde de Roles, M. le Chevalier Copley, a commencé sa carrière judiciaire dans une cour dont toutes les regles et tous les principes diffèrent entierement de ceux de la Chancellerie; il fait donc en ce moment son noviciat dans cette dernière cour; et je vous avoué que ce plan me semble bien peu rational. Le Chevalier Copley est membre de la chambre de communes, ou je lui ai entendu prononcer un tres beau discours au sujet des Catholiques Irlandois, mais on m'a assure depuis que la meilleure partie de ce discours avait été pillée dans une brochure d'un certain Docteur Phillpotts. Il paroit que c'est son eloquence a la chambre qui lui a valve sa nomination à la place du Garde de Roles. J'ai rencontré le Garde de Rôles dans differéntes réunions, ses manieres et sa facon de s'habiller n'indiquent aucunement le magistrât et autant qu'on peut en juger, il est plus porté a ambitionner les succès de salon et ceux de la tribune politique, qu'il n'a de gout pour sieger dans une cour judiciaire. Au commencement de son entrée dans ses nouvelles fonctions il s'étoit donné la pèine de bien approfondir quelques proces difficiles: aussi ses jugements etoient ils plus soignés, comme s'il eut voulu prouver aux avocats que s'il avoit peu d'experience il y suppléeroit par son talent et son esprit. Mais ce beau zele n'a pas duré: il est facile de s'apercevoir que la cour n'est que l'objet secondaire de ses pensées. D'un autre côté on peut ajouter a ce portrait que ces manières agreables et polies en font un homme bièn vu dans le monde et qu'a l'exception de quelques anciens avocats jaloux de son élévation il est generalement aimé par le barreau."

Under the name of Lord Harderly we easily recognize the traits which distinguish Lord Lyndhurst.

"Perhaps I may be allowed to give my opinion of Lord Chancellor Harderly, as a judge in equity, as I had very considerable opportunities of forming a correct judgment of him. He had practised all his life in the courts of common law; and a man of less talent might have shrunk from the enormous duties which a lord chancellor has to perform, a part of which he was necessarily unacquainted with. He applied himself, however, to its business with all that vigour, energy, and devotedness to the subject, which distinguished him so remarkably whilst at the bar. It was a great thing to see him struggling boldly with the most difficult questions, because his attention must, in his former life, have been but little, if at all, directed to them; and even on these he would often throw a stream of light which astonished those most conversant with their intimacy. His most admirable quality was, his manner of seizing upon the most important feature of the case, from a mass of other topics which was presented at the same time to his view. He also exercised a most useful control over the bar. No judge could show more benignity or kindness to an unexperienced advocate. The attention and respect which he paid to the youngest barrister who addressed him, the encouragement he offered to the timid, and the protection he extended to those who were likely to be oppressed by the more fluent and ready, acquired for him the universal love and veneration of the bar. But he was also remarkable for his skill in restraining the exuberance of the practised advocates of his court. Without ever giving offence, he always endeavoured to direct the arguments to the proper channel; he immediately detected any thing that was fallacious or likely to obscure the matter in dispute; he rigidly pointed out the difficult portion of the case. By these means he introduced a more logical style of reasoning among the counsel, and saved much of the important time of the court. He always prevented diffuseness of argument; and checked all inquiry into extraneous matters.

"As to his judgments they never displayed any profound knowledge of equitable principles; but they were always clear, decisive, and precisely to the point. The grounds of the decision were always distinctly shown; the cases that were referred to never distorted with a view to show his own ingenuity. He very soon acquired a competent knowledge of the practice of the court, a portion of his duty which at first must have been difficult, if not distressing; nor was he slow in contriving a remedy for any evils therein. He very soon established a practice of his own, which was much more serviceable for effecting the just purposes of the court than the one he superseded; and this he did not attempt all at once, but from time to time issued such orders as were necessary, well knowing the evils of destroying a mass of technical formality at one blow, which, however absurd in itself, (and much was indeed absurd in the practice of the court of Chancery) had become entwined with the habits and customs of the practitioners."

## CHANCERY REFORM.

THE substance of the following suggestions was printed for private distribution last session, and mentioned with approbation during the debates. With the author's leave, we publish them in an abridged form. They were originally written on the occasion of Mr. Spence having published a project of Chancery Reform.

They assume, that the way is cleared, and interested opposition obviated, by a general measure for taking into hand most of the existing fees, and forming an accurate account of all *lawful* gains; so as to continue to present occupiers their existing *lawful* incomes, (until proper remuneration for the efficient officers is matured by persons appointed for the purpose,) and to secure compensation for those who are permanently reduced.

They assume also, that the head of the court should henceforth be paid by a salary, and not by fees.

### I. *Subpœnas and other Writs.*

A stamp to be deposited at a public office for sealing writs, at all times, at a fixed fee of small amount. Subpœnas to be open writs, prepared and brought by solicitors for sealing. Other writs to be also open, and brought in the same manner by the party making them out. All the defendants to be named (if plaintiff chooses) in one subpœna, which should be served by copy; and to be returnable six days after service in the country, and four days in town. Private seals to be abolished, and all other charges and dues which at present attend the operations of the great seal.*

### II. *Six Clerks.*

The office of these gentlemen, and of course their fees, to be abolished. Two record keepers, or filers, to be appointed instead; to be paid by a fixed fee on each proceeding.

Answers in town to be sworn before the record keepers at their office, and filed at the same time.

### III. *Clerks in Court.*

Office copies to be made in a useful form, on brief paper. The charge not to exceed 6d. a folio, being 2d. more than a remunerating charge of 4d., as a compensation for a clerk in court's attendances, advice, &c.

Their attendances and fees on taxations will be abolished, as unnecessary, on the appointment of taxing masters.

As these and other necessary reforms will diminish the occupation and gains of these officers, their number to be reduced.

### IV. *Answers, Examinations, &c.*

These should be sworn, in country cases, before any master extraordinary, the opposite party having notice, and bringing a second master if he likes They should then be sent by post (under seal of the master taking them, and of the post-master receiving them of him,) to the record keepers; and not by special messengers.

Commissions for these purposes (with all their accompanying charges of orders, certificates, &c. where now wanted,) to be abolished as useless.

### V. *Evidence, Examiners, &c.*

This head requires separate and most careful investigation; and some experiment should at least be made for improvement: nothing can well be more unsatisfactory and irrational than the present plan. The "Chancery Report" on this head satisfied no one.

Country depositions to be sent to the record keepers by post, as before observed; all office copies to be on brief paper, as above.

### VI. *Affidavit Office.*

Office copies to be made in a useful form, on brief paper, and at 4d. a folio; which leaves ample profit. A fee of 6d. to be paid besides for filing, and for searches.

Affidavits in town to be sworn at the affidavit office, on filing them.

To prevent delay, every person filing an affidavit should deliver a copy the same day to the opposite party, who should be at liberty to examine it, for a small fee, with the original.

### VII. *Interlocutory Orders.*

All orders of course to be replaced by rules (as side-bar rules at common law) without counsel's hand. Short printed forms to be always ready, so that no delay may take place in having what is wanted on application.

The subjects of many *common motions or petitions* (within limits to be defined, but including all matters of ordinary practice, applications to tax bills, &c.) to be capable of being *sought by summons, without counsel:* for which purpose one judge, or two of the masters, to sit twice a week if necessary. Nothing would more effectually cut off expense and delay than this.

The subject matter (or part of the subject matter) of what is sure to be the decree at the hearing, to be anticipatable by motion or petition.

### VIII. *Decrees, Orders, &c.*

Recitals of pleadings, (except the prayer of the bill,) reports, &c. to be abolished.

Might not the court often save references by computing interest in court, or on affidavit before the registrar? It could do it as well as judges do at Nisi Prius.

### IX. *Enrolments.*

Enrolments of decrees, &c. to be abolished as wholly useless; the registrar's book being a sufficient record.

### X. *Appeals.*

Appeals to be limited to a certain fixed period after the decree or order, unless by

* This suggestion is contained in a communication by a former correspondent, but we leave it here, in order to render the present series complete.

special leave of the court, and on affidavit showing satisfactory cause for the delay, and stating the ground of the supposed error, and denying purposes of vexation or delay. Counsel's certificates in appeals to be either dispensed with, or to be made by *one* counsel, and more specific.

Petitions of appeal and re-hearing to state the order only, and not all the pleadings or proceedings.

The deposits to be paid to the accountant general, and paid out in a summary way, as now by the registrar.

XI. *Writs of Execution of Orders and Injunctions.*

These writs to be abolished, and the orders to be served instead; or the writs to be short, and to contain only the mandatory matter.

The court to be armed with proper writs of execution of its decrees for levying money, &c.

*(To be continued.)*

## COMMON LAW.

### *Interpleading Bill, and Payment of Money into Court.*

Mr. Editor,

I have read the Bill brought into the House of Lords, and which is now in the House of Commons, with great satisfaction, and I am sure it will be approved by the profession generally, because it will save time, trouble, and expense, and confer benefit on the public. But I hope some provision will be introduced into the bill, authorizing the court to order the money in dispute to be laid out in exchequer bills or stock; otherwise it may remain unproductive for a considerable time, to the great injury of the party entitled thereto. The consideration of this subject brings to my mind the propriety of all moneys which are paid into a court of law, being invested in the Bank of England, in the name of a public officer, to be drawn for in the same manner, and with the same safeguards as are adopted in the courts of equity; and of authorizing parties when money is paid into court under a plea of tender or otherwise, to apply to a judge or to the court, for leave to direct such money to be laid out in exchequer bills or stock.

It will not for one moment be supposed that I mean to raise the slightest possible doubt as to the integrity of the present most excellent officers of the court, to whom monies are paid, and who have the full power and control over such monies; but a time might arrive when an officer, whose duty it would be to receive money, might be of a totally different description, and whose extravagance, necessities, or imprudence, might lead him to *use* the suitor's money. Such a state of things ought to be guarded against, and I see no reason why the same security which prevails in courts of equity, should not prevail in courts of law.

The present seems to be a fit and proper opportunity for establishing those guards, as I well know, from my own practice and experience, that very large sums are frequently paid into the court of Chancery in cases of interpleader, and there remain for a considerable time.

I would add, that there seems to be an omission in that part of the bill which relates to certain claims to property seized by the sheriff. I allude to the omission of a clause similar to that in the first part of the bill, which authorizes a judge or the court to bar the claim of a party, in case he shall not appear, or shall neglect or refuse to comply with the rule or order of the judge or court.

I hope that the use I am now making of the *Legal Observer*, is in accordance with the spirit and intention of its establishment.

I am, sir,
Your humble servant,
An Early Subscriber.

## ARBITRATION BILL—JUDGMENT AND EXECUTION BILL—WITNESSES' BILL.

Mr. Editor,—The passing of the *Bill*, compelling parties to go to an *arbitration* where the subject of an action is matter of account, which cannot properly be gone into by a jury, will be hailed with pleasure by the profession, who are frequently exposed to the most unpleasant reflections from their clients, when, having in proper cases advised a reference to save expense, the award happens to be made against them. But it appears to me, that there are some omissions in the bill, which I take leave to point out.

1. The nomination of an arbitrator. Parties frequently prefer three arbitrators, each having one, and the third being named by the two. The bill, therefore, should provide for the appointment of arbitrators, in case the parties wish for more than one. But in case the two arbitrators should not agree in the third, then the court, or judge, ought to appoint such third.

2. Swearing of witnesses. The bill does not provide for the swearing the parties, and for authorizing their examination, should the arbitrators or parties require them to be examined.

3. Power of the arbitrators to proceed *ex-parte*. This should be given in cases where the opposite party does not attend after an appointment of the parties living in town, or within five miles of the place of meeting of six, or in the country, and at a greater distance, of ten days.

4. Enlargement of time. The time within which an award ought to be made often expires, and is by mistake of the arbitrator omitted to be enlarged. When this is the case, and I have experienced it to the great loss of my client, the court, or judge, should have power to revive the arbitration, or to send the case to another arbitrator.

5. Power to make an interlocutory award. In many cases where an arbitration has lasted a long time, great injustice has been done by the want of power in an arbitrator to make an interlocu-

tory award. For example; suppose, as is often the case, that accounts are so voluminous and complicated they cannot be finally wound up or concluded in a short time, or that it becomes necessary to send to foreign parts for returns, or account sales, or other information: if it should appear that one party clearly has in his hands a sum of money belonging to the other, or owes such other, at all events, a certain sum, liable to have it increased, but not diminished, the arbitrator should have the same power as a court of equity, either to order the money to be brought into court, to abide the final award, or to be paid to the opposite party. At present the arbitrator can make no interlocutory award, but must wait the final award. This, I can affirm, is no fanciful case, for such has passed under my own observation.

6. Power should also be vested in a judge, or in an arbitrator, to order a commission to examine witnesses, &c. as on a trial.

I cannot, however, part with the subject of arbitrations, without avowing, that in many cases they have been more tedious, more expensive, and less satisfactory, than any action at law, or any suit in equity, and therefore those who believe that arbitrations are so beneficial to the public, are greatly deceived.

### *Judgment and Execution Bill.*

However desirable it may appear to issue an execution as soon as an inquiry is executed, or a verdict obtained, such a proceeding will be productive of great distress and misery. In disputed claims, where a defendant conscientiously believes he has a righteous defence, what will be his situation if a verdict contrary to his expectation be found against him? A judge cannot be aware of a merciless creditor, or of the state of a defendant's funds. Not expecting a verdict against him, a defendant will not, and cannot be prepared to pay the amount, and consequently the ruin of himself and family, and the total destruction of his credit from the exposure of his inability, will inevitably follow. I am not now adverting to mere trade debts, but to claims which may be established, although fair matter for litigation. To provide for the amount of such claims, time should be allowed to the defendant, not as matter of grace and favor, but as a right, otherwise the latter alternative which I have adverted to, will take place. For I might fairly ask, how few men are there in the middle walks of life, who could call in their debts or sell off their stock at almost a moment's notice? The Bill would seem to allow time to be granted only where the subject is deemed fit for consideration or review by the court above. For the sake of the public, and to avoid the dreadful consequences which would follow from hasty executions, I do hope the bill will, in some respects, be modified; but I by no means wish to screen or guard the fraudulent debtor, who would take advantage of the time which elapses between the verdict and judgment, to fly the country and defeat his creditors.

In the same bill is contained a *repeal of the clause in the Bankrupt Act*, which refers to executions under *cognovits;* but why should not the clause be repealed so far as concerns judgment by default? It is, indeed, a deplorably hard case for a plaintiff, after he has sued his debtor to judgment and execution, to be deprived of the benefit of that execution, because it was not obtained after *verdict.* This clause, as in the Bankrupt Act, has led to the increase of trials and expense far beyond what might be conceived. I trust, therefore, the repeal clause will include judgments by default, as well as judgments under *cognovits.*

### *Witnesses' Bill.*

This is an excellent bill, and will be most advantageous to the suitors, and the public. There is, however, no power given to execute in this country commissions from the courts in our foreign dominions. This power seems to be necessary and proper for the benefit of His Majesty's subjects in those dominions, and will therefore, I hope, be included in the bill.

Indeed, the difficulty of executing commissions in foreign parts, when the witnesses refuse to be examined, and of executing commissions in this country from such foreign parts, when a like refusal takes place, is such, that I hope treaties between nations hereafter to be made, will contain reciprocal powers on this head, and that they will be legalized by the legislature. This, however is beside the present bill.

The clause restraining the use of depositions under commission, unless the party be beyond the jurisdiction of the court, or dead, or unable to attend from permanent sickness or infirmity, will, I hope, be relaxed, in case the party is proved to be so ill as to render it impossible for him to attend the trial, although not previously sick or infirm.

If I have made any suggestions useful to the public, or the profession, I hope that representations will be made to the Attorney-general and Solicitor-general on the subject, by the Law Society, or some influential member of the profession, and I flatter myself they will be attended to and considered; but, whatever may be the fate or effect of the suggestions, or representation, I shall be content with having contributed my mite on this occasion.

In the case of a recent Act I have reason to believe that, had some suggestions made by practical men been attended to, much litigation and expense which have arisen upon the construction of the Act would have been avoided.

I am, Sir,

Your obedient servant,

A PRACTICAL MAN.

---

## REVIEW.

1. *An Estimate of Mr. Brougham's Local Court Bill.* By an Observer. London, 1830. Maxwell.

2. *A Letter to those Persons who have frequent occasion to sue for the recovery of Debts, or who necessarily give or take Credit on the proposed District Law Courts; Arrest for Debt; and Insolvency. With the form of a Petition to Parliament thereon, and against imposing heavy Burdens on the Country, and seriously increasing the influence of the Crown, by the establishing such Courts.* London, 1830. Hodson.

Both these writers are averse to the establishment of the proposed local courts. We intend to give the substance of their arguments, with a few extracts from each pamphlet.

It is argued that all sweeping innovations are injudicious and dangerous; which opinion is fortified by the authority of the *Edinburgh Review*, in the following quotation:

"We believe it may be laid down as a maxim invariably true, and of the most universal application, that the best and most effectual plan of improvement is that which does the smallest violence to the established order of things; requires the least adventitious aid, or complex machinery, and as far as may be, executes itself. It is from ignorance of this principle that the vulgar perpetually mistake a great scheme for a good one; a various and complicated, for an efficacious one; a showy and ambitious piece of legislation, for a sound and useful law. Hence too their almost invariable discontent with the most salutary measures, grounded on knowledge of human nature, regulated by cautious circumspection, pointed towards attainable objects, and reaching them by safe and familiar courses. The history of human laws is full of passages fatally illustrating this remark; for unhappily the lawgivers themselves have too often belonged to the vulgar class of reasoners, whose errors we have just described."—*Edinburgh Review*, vol. xxxiii.

Alterations being contemplated in various parts of common law procedure, it is urged that the whole of these alterations should be brought under the consideration of the same persons, and at the same time; that otherwise, the different parts of the system can never work well together: that, for instance, the avowed object of Sir J. Scarlett's proposal for altering the law of arrest, was to check injudicious credit; while the Local-court Bill would have a directly contrary effect: and again, that while three new judges have recently been added to the superior courts, the new bill would, according to the estimate of its proposers, withdraw from those courts nearly the whole of the business: that the new courts are unnecessary, as the proposed objects may be achieved, with greater certainty and less inconvenience, by the removal of abuses in the superior courts; that the convenience of making the metropolis the centre of legal proceedings, has been long felt and acknowledged, and that even the real-property commissioners are recommending metropolitan registration: that the alleged benefit of bringing justice home to every man's door is fallacious, inasmuch as it is assumed that debtor and creditor live in the same neighbourhood; whereas they frequently reside at a considerable distance from each other; that in these cases the bill directs that the venue shall be laid in the district where the defendant resides; and consequently, a London plaintiff suing a defendant in Northumberland, must take his witnesses to Newcastle; a plaintiff at Birmingham, suing a defendant at Penzance, must take his witnesses into Cornwall, and so forth. It is matter of notoriety that the far greater proportion of the debts contracted in the great seats of manufacturing and commercial industry, are by persons residing at a considerable distance.

It is contended also, that the proposed advantage, in point of expedition, is equally fallacious. In the county of Kent, the Bill provides only two sittings in the year, except in the town of Maidstone, and there are already two circuits. The author of the Estimate adds, that "with regard to cases arising between parties at a distance from the county town, a better arrangement of the circuits would go far to meet the evil."

But the great argument of the advocates of the new system, is founded on its superior cheapness. This is also controverted by the writers before us. They contend, first, that the evils of the existing system are greatly exaggerated; for, though it may be true that the costs of going to trial for a small debt have often exceeded the debt itself, it should be remembered that more than nine tenths of the actions commenced, accomplish their object without going to trial at all; and that a great majority of those which actually go to trial, do so without there being any question to try, and only because, writs of error being checked, the present state of the law points this out as a convenient mode of gaining time. If the evil of this latter practice be sufficiently crying to demand a remedy, it cannot be necessary to change the whole system of the administration of justice, in order to find one.

But our authors not only vindicate the existing law, but maintain that nothing would be gained by the new system in point of expense; that, on the contrary, an increased burden would be thrown on the public.

"The expense of the proposed plan is also a formidable objection to it. Judges and their officers, at the salaries proposed, (without taking any account of the necessary expenses in many places of providing suitable places of business,) offer a sum total greater than the whole cost of the upper courts. It is true that the fees are expected to reimburse this in part. But if the suitor has to bear fees adequate to raising any considerable amount, he will be no gainer by the change; and, moreover, the loss on compensation to the officers of the superior courts will, for a long while, absorb all that can be received. And we should also take into account that the fees of all the courts, if thus subdivided, (instead of central offices doing the whole business, as experience shews that they can,) must be placed permanently on a far higher scale than would otherwise be necessary."—*Estimate*, p. 20.

"As to the fees of practitioners;—there was a hiatus in the published plan of last session [the one

of this session has not yet been printed,] the more to be regretted because great part of the question hinges upon the way in which it shall be supplied. Either the proscribed class of suitors must have proper professional assistance, or they must have another misfortune added to their ban of exclusion from the best law store, that of not even having the best article which the inferior market will supply. If they are to have respectable professional assistance, why are we to assume that the fees ought to be lower than the remuneration likely to be fixed for the same work in the upper courts. Mr. Brougham will, I believe, find that the scale of fees allowed is the same, or nearly so now, as it was fifty years ago. The expected saving will arise therefore from lopping off extraneous and unnecessary formalities and causes of collateral expense in the progress of a suit. These prunings are as applicable to one court as another, and it is not probable that the *real work* can in any court be paid for at a less rate than that which has continued so long. This, however, the commissioners will doubtless inquire into. Those who would push reduction of charge beyond reasonable bounds, should consider whether it is likely to be a benefit to the community, to throw the whole of this business, by inadequate remuneration, into the hands of those who will make up in quantity and indirect advantages what is wanting in the fair course of practice."—*Estimate*, p. 25.

Great misapprehension seems to exist as to the expense arising from London being made the centre of judicial proceedings. The facts that in every cause a considerable portion of business must be transacted in London, and that it must be heard in the capital in the last resort, have been complained of, as imposing great additional expense upon suitors. "It must," it has been said, "be discussed in London, and to London the agents must be sent, with great delay, and a great and unnecessary expense." An unprofessional person might make such an assertion from ignorance; a professional man could make it only from heedlessness. We quote on this subject the statement in the first pamphlet.

"By the established system of practice, the resort to one centre of justice is (contrary to the assumptions commonly made) attended with very trifling expense indeed. As much misconception on the subject seems to pervade not only the Edinburgh Reviewer's argument, but Mr. Brougham's speech, it may be right, once for all, to quote the substance of some practical observations on that point from a periodical publication. It appears, that on the present plan of conducting business, there are only a few shillings difference in the cost of a town and a country cause, arising partly from postages, (which add three or four shillings to the Term-fee,) but chiefly from the lengths of pleadings copied, which the proposed alterations will greatly reduce: that, part of the business being done in town, and part in the country, the fees allowed, (which, except as before mentioned, are exactly the same,) are apportioned between the country attorney and his agent, on the principle of a division of labour, without extra cost to the suitor: and that this division even takes place, in some cases, in town; there being town attorneys who, though on the spot, find it convenient to employ an agent to attend to the practical department of their common law business, for the purpose of avoiding labour, responsibility, and the expense of having a part of their establishment adapted to such matters."—*Estimate*, p. 12.

In another place, the author says—

"It may be useful to consider, what, in opposition to the present facility of communication for notices, summary applications, &c., will be the practical position of the parties in an action in one of the local courts; the attorneys often living at some distance, in cross countries, even supposing that the controversy is almost between neighbour and neighbour, and not, as it must very often be, between inhabitants of different counties and distant neighbourhoods.

"Where the distance is even ten miles, one journey to serve a notice or arrange a proceeding, will cost more than the whole difference of expense at present existing as between a town and a country cause. But how is the plaintiff to manage who has debtors at a distance? He naturally consults his attorney where his case is, where his cause of action arose, and his witnesses live; and must that attorney have an agent in every district town? If he has not, how is he to serve notices, &c., and to be served with the like? and if he has, a much worse and more expensive system than the present would arise from it; because no such arrangement could take place as the quantity of business which must be so done enables the country attorney and the central practitioner now to form between themselves. By it the latter is treated as identified with the former, as much as a partner or clerk would be, and on that account no charges on correspondence or transactions as between them are allowed to increase the cost of a suit. But the variety of the communicating points have always rendered, and would continue to render this impossible to be arranged in cross country correspondences; so that these transactions must be much more expensive. The second attorney employed has to be separately paid for what he does, as well as the original practitioner for instructing him."—*Estimate*, p. 23, 24.

The inconsistency of the proposed local courts, with the policy which dictated the abolition of the peculiar jurisdiction of the Welsh judges, is dwelt upon in both pamphlets. The abolition of the Welsh local courts, by the almost unanimous voice of the legislature, and the immediate introduction of other local courts, so as "to astonish the inhabitants of the Principality with their old friends under a new name,"* *does* seem a little extraordinary. In exposing the evils of the Welsh system, the writers have the powerful assistance of THE PRESENT LORD CHANCELLOR.

"Mr. Brougham's own picture of the defects of the local courts and judges of Wales, and the remedies, might save the trouble of enlarging on this point. '"In England you have the first men—men of the highest education and experience—to sit in judgment upon life and property. In Wales you have as judges, I will not say inferior men, but certainly not the very first, nor in any respect such as sit upon what Roger North calls the 'Cushion in Westminster hall.' I shall here show three great defects requiring a remedy most imperatively: Oftentimes, those persons have left the bar, and retired to the pursuits of country gentlemen. I do not say that they are, for that reason, unfit for the office of judge, but still they cannot be so competent as men in the daily administration of the law, and forming part of our Supreme Courts. In some cases they continue in Westminster hall, which is so

* Estimate, p. 10.

much the worse, because a man who is a judge one half the year, and a barrister the other, is not likely to be either a good judge or a good barrister. But a second and a greater objection is, that the Welsh judges never change their circuits. One of them, for instance, goes the Caermarthen circuit, another the Brecon circuit, and a third the Chester circuit, but always the same circuit. And what is the inevitable consequence? Why, they become acquainted with the gentry, the magistrates, almost with the tradesmen of each district, the very witnesses who come before them, and intimately with the practitioners, whether counsel or attornies. The names, the faces, the characters, the histories, of all those persons are familiar to them; and out of this great knowledge grow likings and prejudices which never can by any possibility cast a shadow across the open, broad, and pure path of the judges of Westminster hall. * * * I verily think that the Principality would itself cheerfully pay the first cost of a better system. At all events, add two judges to your present number, and let them take, with the other twelve, their turn and share in the business of the country. Let the principality of Wales be divided into two circuits, and then you will have the work well done, and quickly done, especially if you transfer the equity jurisdiction to the two courts of Westminster."—*Estimate*, p. 17, 18.

Sir Robert Peel also agrees with Lord Brougham upon this point.

"Sir Robert Peel, on the 19th of February, after suggesting the propriety of adopting in Wales the English system of preventing the same judges from constantly going the same circuit, observed, "I have a high opinion of the gentlemen who fill those offices, *but I think it almost impossible for any gentlemen who go constantly to the same towns and districts, not to form local and familiar connexions and personal attachments.*"—*Letter*, p. 6.

"Mr. Brougham so eloquently exposed the dangerous consequences of judges going continually the same rounds, that I shall not state my poor opinion on the liability to prejudice and corruption of these local courts, or presume to do more than refer to the consideration of Mr. Brougham's opinion on that head, requesting the reader at the same time to recollect that if so much objection could be made to the Welsh judges who did *not* usually *reside* in their districts, how much more may be made to the judges who are to *live all the year* amongst the suitors of their courts."—*Letter*, p. 15.

The following powerful picture of local law in Wales is from a respectable periodical.

"The judicial organization of Wales has recently become the subject of very general complaint. What are its defects? The despised jurisdiction, the suspicion of partiality, the conflicting practice! Insufficient judges appointed by the government, because in a great measure out of view of the public at large: so few barristers of ability attending on account of the narrowness of the field, that the plaintiff may easily secure a certain advantage by retaining one or two leaders: and attorneys, on the contrary, so abounding by reason of the low rank they hold in the Principality, and the cheapness of the very inferior education they receive—so ignorant from their limited practice, and so needy and rapacious withal, that no suit is ever dropped for want of care in fostering, no angry feelings are permitted to subside, and a greater crop of litigation is produced on a given extent of territory, than four times the space in England would bear."—*Law Mag.*

We shall resume the subject in our next Number.

*A Collection of Statutes, comprising all the Public Acts, Civil and Criminal, and Acts relating to the Colonies, passed in 2 Geo. IV. and 1 Wm. IV. with Notes, showing the alterations made in the Law by each Statute, and an Index.* By Alfred S. Dowling, esq. *Barrister at Law.* London, 1830. Pheney.

THIS is a very useful manual. The design is good, and the execution attests the editor's care and industry. The preface, which we shall quote, states concisely, but clearly, the intention of the work; and we have only to add that what is proposed is satisfactorily performed. We trust that the volume will receive sufficient encouragement to induce Mr. Dowling to persevere in his design of publishing a similar collection annually.

"It has been frequently remarked, that a large portion of the mass formed by the annual statute book is perfectly useless to the lawyer, magistrate, or general reader. The editor, therefore, thought that a publication freed from this disadvantage would be desirable. With that object it is proposed that the present work shall contain all public Acts of Parliament, civil and criminal; local acts, when their provisions appear likely to interest a considerable portion of the community; and all Acts relating to the colonies. Every Act which contains an alteration of the previously existing law will be accompanied by notes, stating the law as it before stood, and the extent of the alteration thus effected. It will thus form a useful appendix to the collections of statutes already published by Messrs. Tyrrwhit and Tyndale, Collier, and Chitty. Local, temporary, annual, Scotch and Irish Acts, will be omitted. The first two classes can be interesting to a limited extent only, the third have appeared in every collection of the statutes already published, and the two last are not likely to be of interest to residents in this country.

It is hoped that a work may be published annually on this plan, which will present every important legislative enactment in a convenient form and at a moderate price. The Acts will be printed verbatim, and the reader may depend on their accuracy.

Our next articles of Review will be as follow: Supplement to *Tidd's* Practice; *Gow* on Partnership.

## MINOR CORRESPONDENCE.

[UNDER this new head will be inserted the Hints and Scraps of those who are too much engaged to write long communications—Queries—Answers to Correspondents, &c.]

LORD TENTERDEN, in bringing in his five bills this session, said he conceived "too much caution could not be observed in innovating upon the usages of the common law courts, sanctioned as they have been by experience, and the authority of the most eminent men of the legal profession."

Z. would wish to see a title of *The Legal News*, containing an account of the changes and reported changes in the profession—Bills

in Parliament—New Acts—Births—Marriages and Deaths in the profession.

*** We are aware this would greatly increase the value of our work, but it would also nearly double its expence, by rendering it liable to the newspaper stamp duty. We trust that for the encouragement of literature and the diffusion of knowledge, this impost will be reduced, if not abolished. At present we can only accomplish the object of our correspondent by a monthly supplement.

---

A review of the work on legal Book-keeping, (a most essential and much neglected branch of legal study and *practice*,) would be desirable, especially since Lord Tenterden's Act, 9 Geo. IV. cap. 14, had a most serious effect on the bills of the profession. Young men intended for clerks, should be well grounded in book-keeping before they commence.

---

J. C. would like to see an account of the old law bookseller's shop, which is nearly pulled down in Inner Temple lane. It was formerly Uriel's, and then Pheney's. Tottell lived in Fleet street, near the Middle Temple gate.

---

A full list of the *English* and *Irish* law books published in 1830, would be a useful article in January, 1831; and a list of *American, Scotch,* and *French* law publications for the year. Communications to the Editor would add to the correctness of the lists.

---

L. S. S. would be obliged by any communication on the history of *bankers' checks,* with their form in early times—the investigation will educe some curious matter.

---

P. P. has heard that many valuable donations have been presented to the library of the Law Institution. It would be gratifying to the members, to receive some information on this subject.

---

AUDAX, who has assumed an appropriate name, (as would be sufficiently evident, if we published the whole of his letter,) tells us that "if the *Legal Observer* contained more law, it would be a good publication." He avers that "our subscribers want *information,* not *amusement.*" The biographical articles have particularly excited his wrath. This gentleman should add to his *boldness* a little consideration for the wishes of others. So far from our literary articles being objected to, we have been again and again urged to render our pages of a still more popular character. We shall, however, be mindful of the necessity of combining the useful with the agreeable, and we trust each number will be found to contain a sufficient quantity of professional information, to entitle the work to the support of practical men.

### RETURNS OF WRITS.

The inquiries of several correspondents were answered, so far as we are enabled to do so, by the abstract of the Bill inserted in Number V. page 69, which we presume will soon pass into a law. The first return of writs will then be the third day exclusive before each Term. The first and second days before term will also be return days, as well as every day in Term, except Sundays and except the last three days of Term. The new Act, we understand, will not alter the first general return of next Hilary Term as it now stands under the last Act, namely, *Saturday the 8th day of January next,* the last Act requiring it to be the fourth day before Term *inclusive,* and the proposed Act making it the third day *exclusive.*

## QUERIES.

WE insert the following questions at the request of "a Constant Subscriber," and shall occasionally reserve a space for similar articles. We do not undertake regularly to answer them, and should prefer that our young friends would exercise themselves in looking through the authorities, and sending us the result of their research. Such exercises will be useful.

A., who resides in London, draws a bill upon, and gets it accepted by, B., who resides in Dublin, is such a bill a foreign or an inland bill?

A., who resides in Guernsey, draws a bill upon B., who resides in London. As stamps are not used in Guernsey, must such bill be on stamped or unstamped paper?

## RECENT DECISIONS IN THE SUPERIOR COURTS.

THE first decision, under the title "Insolvent," is in accordance with that in the *King* v. *Dunne,* 2 *Maule* and *Selwin,* 201, and the *King* v. *Edward Clifford,* 8 *Dowling* and *Ryland,* 58. It is quite clear that the defendant would not have been entitled to his discharge, if he had been in execution on a judgment obtained against him in an action for the recovery of costs. The cases of *Roylance* v. *Hewling,* 3 M. and S. 282, and *Tinmouth* v. *Taylor,* 10 B. and C. 114, are direct authorities to that effect, for the costs become a debt by the judgment. It would seem from both the last mentioned cases, that the court thought plaintiffs in execution on a judgment were not within the 48 Geo. III. c. 123. The words of that statute evidently allude to defendants only. In the King's Bench, the application for the discharge of a debtor under the above Act is a rule absolute in the first instance, after due notice of the application to the plaintiff or his attorney, (*Davies* v. *Rogers,* 2 B. and C. 804, 4 D. and R. 361, S. C.) In the Common Pleas it is only a rule *nisi* in the first instance. (Ex-parte *Neilson,* 8 *Taun.* 37, *Magnay* v. *Gilkes, ib.* 467.) Perhaps this variance of practice would be worthy the correction of the

judges, who are to settle the practice of the courts under 1 W. IV. c. 70, s. 11.

The opinion of Mr. Justice Littledale, in the second case, under the head of "Insolvent," appears to us a very correct one. We mean the opinion entertained by himself, and not the one on which he acted in accordance with the determination in *Robinson* v. *Sundell*. It certainly could not have been the intention of the legislature to enable a man, who originally owed above 20l. exclusive of costs, to obtain his liberation, and to keep in custody a man who originally owed a less sum, merely because he had given a warrant of attorney for the amount. A debtor would thus be placed in a worse situation, because he had sufficient honesty to endeavour to secure his creditor, by giving a warrant of attorney. For it is quite clear, that he would have been entitled to his discharge at the end of the twelve successive calendar months, if he had not given the warrant of attorney.

We refer, also, to an important case, in which it has been decided that auctioneers are not liable to pay interest on the deposits in their hands.

INSOLVENT—COSTS.

*Lee* moved for a rule to shew cause, why a defendant should not be discharged out of the custody of the sheriff of Yorkshire, under 48 Geo. III. c. 123, he having remained twelve successive calendar months in custody on an attachment for non-payment of costs, there not being a debt due exceeding the sum of 20l. exclusive of costs. The defendant had been arrested on an attachment for non-payment of 35l. 3s. 6d. costs, in an action of ejectment, pursuant to a rule of court, and the master's allocatur thereon.

*Scotland* shewed cause. The case of a defendant in custody on an attachment, was not within the statute. If it was within the statute, then the defendant was in custody for a debt exceeding 20l. and therefore not entitled to his discharge.

The court held the defendant not entitled to his discharge, as the case of a defendant in custody on an attachment was not within the 48 Geo. III. c. 123. *Littledale*, J., M. T. 1830, K. B. *Doe d. Upton* v. *Benson*.

—

INSOLVENT—COSTS.

On an application to discharge a defendant out of custody, under the 48 Geo. III. c. 123, on the ground of his having remained in execution above twelve successive calendar months, on a judgment for a debt under 20l. exclusive of costs, it appeared that the original debt owing by the defendant was between 8 and 9l. For the recovery of this, proceedings were taken, and the defendant ultimately gave a warrant of attorney for the payment, by instalments, of the original debt and costs, which together amounted to more than 20l. The instalments not being paid, judgment was entered up, and the defendant taken in execution.

It was contended, in opposing the application, that the debt for which the defendant must be considered as in execution, was the sum for which the warrant of attorney had been given. It was for that sum the judgment was entered up. Now the words of the statute were, that "all persons in execution on any judgment" not exceeding 20l. were to be entitled to its relief. Here the defendant was in custody on a judgment for a sum exceeding 20l. and therefore was not entitled to relief. *Robinson* v. *Sundell*, 6 *Moore*, 287, was cited in support of this argument.

The court was of opinion, that the original debt, "exclusive of costs," was the sum of between 8 and 9l. and that the difference between that sum and the amount for which the warrant of attorney was given, must be taken as costs. It was only by a technical and artificial construction, that the debt and costs, for which the warrant of attorney was given, could be considered as the debt for which the defendant was in execution. However, as the Common Pleas, in the case of Robinson v. Sundell, had ruled that the debt must be taken to be the amount for which the warrant of attorney was given, the court must be bound by that decision. Rule refused. *Littledale*, J., M. T. 1830, K. B.

——— v. White.

—

AUCTIONEER—INTEREST.

In an action against an auctioneer for the recovery of interest on a sum of money deposited in his hands as part of the purchase money of an estate, the following appeared to be the facts. The defendant, the auctioneer, had been employed by the plaintiff to sell an estate for him. The sale took place in 1813, and the defendant received 2,000l. as a deposit, the amount of the purchase money being 10,000l. Some objections were made to the title. An application was made to a court of equity for a specific performance, and the objections being overruled, the remainder of the purchase money was paid. In 1816 the defendant was required by the plaintiff to invest the 2,000l. in exchequer bills. This he refused to do, unless the consent of the purchaser was obtained. No such consent being procured, he retained the money in the hands of his banker, where it went into his common account. On nineteen twentieths of the whole amount he received interest. In 1822 the objections to the plaintiff's title were over-ruled. The action was therefore brought to recover interest on the 2,000l. from the year 1816 till 1822, when he paid over the principal to the plaintiff. A verdict was found for the plaintiff; and after the argument on a motion for a new trial, the Court thought that there was an essential difference between the character of an agent and a stakeholder. As soon as an agent received money on account of his principal, it became the property of that principal, but a stakeholder received money for both parties, and not for one only. His duty was to hold the money in his hands, to be paid in one event to the vendor, and in another to the purchaser. He held it in the same way that a banker held the money of his customers, and he was bound to pay it the moment it was demanded by the party entitled to receive it. If he chose to invest it, and any loss accrued, he was answerable for that loss; and it was but reasonable, therefore, that he should be allowed to derive any incidental advantage in the way of interest, for the risk which he ran. In the present case the court were of opinion that the defendant's liability was not varied by the requisition on the part of the plaintiff to invest the money. In the case of a stakeholder, the authority of one of the parties was not sufficient. The defendant had offered to lay out the money if the plaintiff would procure the purchaser's consent, and the plaintiff not having done so, the defendant was not bound to invest, nor would he have been justified in investing the money. There was nothing, therefore, in the special circumstances of this case to take it out of the general rule, so as to deprive the defendant, as stakeholder, of the advantages which the law gave him on the one hand, or to exempt him from the ob-

ligations which it cast upon him on the other. *Tenterden, C. J. M. T. 1830, Harrington v. Hoggart.*

BAIL—NOTICES OF JUSTIFICATION.

*Clarkson* opposed bail, and contended, that the defendant must deposit the costs with the master, as three notices of justification had been given. He produced an affidavit of this fact, but did not produce the notices.

The court refused to make the defendant deposit the costs, as the notices themselves were not produced. *Littledale*, J., M. T. 1830, K. B.

## NOTES OF THE VACATION.

We have just obtained a copy of Lord Brougham's New Bill for establishing Courts of Local Jurisdiction. The alterations made since the introduction of the former bill, appear chiefly to consist of the omission of those clauses which relate to the payment of the salaries and pensions of the proposed new judges, registrars, &c. These clauses, we presume, are intended to be restored in the House of Commons, *if the bill should ever arrive there!*

Those parts of the new bill which relate to attornies are somewhat altered in regard to the language which was used on the former occasion. His lordship has been pleased to leave out the expressions regarding their "*presuming*, under any pretext whatever," to charge their clients with any sum which ought to be paid by themselves.

The schedule marked F., intended in the former bill to be appended to it, and to comprise a list of the attorney's fees, but which exhibited a melancholy blank, is, on the present occasion, altogether omitted. Whether this change has been made on the ground that such fees form a matter of finance, and are therefore left to the House of Commons, (though of course it is not intended they should be paid, like salaries and pensions, out of the public revenue,) or whether the judges of the new courts are to be empowered to settle a scale of fees, we are not informed. It is however very important to the public, not only to know what they are to pay under the new system, so that they may be sure it will be cheaper on the whole, including the various kinds of appeal and rehearing, but also to ascertain that a class of persons, either identical or similar to the attornies of the superior courts, *on whose integrity the suitors may rely*, can be induced to practise in the district courts.

We refer to an analytical review of two pamphlets on this subject, which will be found in another part of the present Number.

Lord Wynford's bill for shortening special pleading on the one hand, and introducing a plan on the other for examining the parties on interrogatories, is not yet printed.

Mr. Campbell's bill for establishing a grand Metropolitan General Registry Deed Office, will not be introduced until the 16th instant.

Mr. Spence's motion for Chancery reform is intended to be made after Christmas. The objects of the learned gentleman are so numerous and comprehensive, being designed to abolish several existing offices, to create new ones, and to make so many changes in all the departments of Chancery practice, that we presume it will be necessary to introduce a variety of separate bills, in order that the merits of each may be distinctly considered.

We seem thus to have before us an ample supply of materials for the consideration of our professional brethren, and we shall present them with abstracts of the several measures so soon as they can be obtained. It cannot now be said, that lawyers are opposed to reform. We apprehend, however, that in the conflict of so many plans, either nothing will be effectually accomplished, or there will be so much inconsistency, that the public will gain but little by the change.

*New Judicial Appointments.*

It may be proper to record in our columns, the recent judicial appointments, although they are generally known to our readers.

On Friday, November 12, Mr. Taunton and Mr. Patterson took their seats as judges of the court of King's Bench; and on the same day, Mr. Alderson took his seat upon the bench of the court of Common Pleas. The three new judges had, on the preceding day, presented themselves at the bar of the court of Common Pleas in their sergeant's robes, and gone through the ceremony of counting of pleadings, as sergeants at law. Mr. Justice Bayley, it will be recollected, quitted the King's Bench for the Exchequer, which made two vacancies in the former court.

If parliament had any intention to establish local courts, by which it is alledged five sixths of the cases now brought before the superior tribunals would be withdrawn, the public, in this season of retrenchment and reform, might reasonably have required that these expensive new appointments should have been avoided; and the inference of course is, that no such additional burden would have been imposed, had there been any probability that the local courts would be established.

On Monday, November 22, the Right Hon. Henry Brougham took his seat on the woolsack in the House of Lords. On the following day the new chancellor sat for the first time to hear appeals. On Thursday, November 25, (having been created Baron Brougham and Vaux,) he took his seat in the court of Chancery, at Westminster. His lordship entered the court accompanied by the Dukes of Sussex and Gloucester, Prince Leopold, Marquis of Lansdowne, Marquis Wellesley, Marquis of Anglesea, Earl Grey, Lord Durham, the Master of the Rolls, the Vice Chancellor, and two of the masters. Mr. Wilbraham, clerk of the crown, administered the oaths.

LONDON:
PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, DECEMBER 18, 1830. No. VII.

"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## METROPOLITAN GENERAL REGISTRY OF DEEDS.

[FROM A CORRESPONDENT.]

DE LOLME compares the English constitution to a venerable building encumbered with scaffolding around it, apparently unnecessary, yet the removal of which would endanger the edifice. To prevent the destruction of this building, I address myself to you. By the law of the *Locrians*, he who proposed the abrogation of an old law, and the enactment of a new one, was compelled to make his proposal with a rope round his neck, and if his new law proved not better for the commonwealth than the old one, he was to be hanged with it! *Solomon* adviseth, not so much as to meddle or have any thing to do with those who are given to change; and in the changing of laws, above all things, it has been observed, there is the most danger; and therefore, though they are mutable in their own nature, yet ought they not to be changed as often as innovators may propose to substitute others which may seem better, but only for great and weighty reasons. Lord *Coke* also observes, that there is a great difference between a good beginning or a foundation capable of a building, and a bad one which wanteth foundation upon which no building can stand.

I am at a loss to find out "the great and weighty reasons" which require the law of real property to be altered. For my part, I am satisfied with it as it now stands, and has stood for ages.(*a*) I have no fault to find with the present mode of conveying it. All our limitations of estates are bottomed upon plain common sense and reason. There was a mode of conveyance long before writing, and afterwards, long before technical words were invented. The first is proved by scripture, and the latter by several ancient grants. Take, for example, the two principal estates, the fee simple and the estate tail, and you will see that *time* was their common measure. When land was granted for a time without end it was a fee; and, if for a time so long as there was issue of the body, it was an estate tail; but, when the law became a science, those estates were distinguished by the words, "heirs, and heirs of the body." On this subject, reference may be made to *Plowden*, and the inflexible import of those words occasioned the famous rule in *Shelly's* case.

With respect to the present form of conveyance, what can be more simple, and a better protection against fraud, than the feoffment, accompanied by livery of seisin?—what more concise than the bargain and sale inrolled, which requires no covenants, and may be contained in a single sheet of paper? The reason why the feoffment and bargain and sale are not in general use is because the lease and release require not the notoriety and the supposed inconvenience of livery, and the bargain and sale (although built upon the statute of uses,) does not admit of any limitation of use except to the bargainee; and being, therefore, an absolute conveyance, it lets in the consequences of dower, which the lease and release obviates, for by it the releasee is made tenant for life with an interposed estate to a third person, with remainder in fee; and as the estate for life and the remainder cannot unite, dower is excluded, and the expense of a fine avoided; which expense, as well as that of a common recovery, (against both of which there has been so much clamour,) is for 19*s.* out of every 20*s.*, occasioned by the stamp duties and the fees of certain officers and patentees.

What the new mode of conveyance will be I am at a loss to conjecture, but it seems that the technical words now in use, the meaning of which cannot be misunderstood, and which long experience has sanctioned, are to be disused and others substituted, which, in all likelihood, may allow of a twofold construction. Mr. *Locke* observes, that in the interpretation of laws, whether divine or human, there is no end; comments beget comments, and explications make matter for new explications: and of limiting, distinguishing, varying the signification of words, there is indeed no end.

Some, if not all of the commissioners, have

(*a*) I would suggest one morsel of improvement of the law in favor of purchasers, as to judgments. Let their present lien on the land be destroyed, and confine their effect to the very day the writ of inquisition or extent is delivered to the sheriff.

suggested that the public would be benefited by the repeal of the statutes *de donis* and of *uses*, and that *fines* and *recoveries* should be abolished.(*b*)

The antiquity of these statutes and common assurances, ought to induce us to pause before their destruction is determined upon. "A spirit of innovation is generally the result of a selfish temper and confined views. People will not look forward to posterity, who never look back to their ancestors. Fines and recoveries, like a power once gained in mechanics, may be applied and directed, by means of the statute of uses, to an infinite variety of movements." If estates in fee simple are to remain, why should not estates tail and conditional fees continue? Every thing, human and divine, is in danger of being sacrificed by the present race of projectors. I can fancy I hear one of them suggesting the following scheme:

The seats of learning level down,
Transfer or bring them nearer town;
Let *Cam* and *Isis* be no more,
Call each of them the scarlet whore;
Erect on some *pancratic* site
An university of light;
To London shopmen give degrees
Of *wranglers* and of *optimes*;
Attack, and with unsparing hand,
All things you cannot understand;
With eyes of eagles pry for flaws,
And have no mercy on the laws;
Propose a new code of you're own,
Turn every thing quite upside down:
Let all commissions of the peace
To parsons given, ever cease;
Place women on the bench or forum,
To be inroll'd upon the *quorum*;
Restore to them their long lost rights,
In all the shires to vote for knights;(*c*)
Destroy the useless ceremony
Of solemnizing matrimony;
Make it, like partnership in trade,
To be dissolv'd as soon as made;
Make *fees* all *tails*, and *tails* all *fees*,
And make the freeholds what you please;
Make all the terms, both great and small,
To be estates at will,—and all
Estates at will conditional.
Explode the rule in *Shelly's* case,
And put a better in its place;
Insist that it is clearly seen,
That words of *purchase* ever mean,
By legal ratiocination,
The same as those of *limitation*;
Don't let the judges have the pow'r
To interfere at all with dower;
Nor secretly examine wives,
However chaste may be their lives;
Give married women, one and all,
The power collateral we call,
Who then, if they shall so incline,
May pass their lands without a fine;
And as to tails, with equal ease,
They may be barr'd and turn'd to fees,
Without the hugger-mugger rout
That old *Tanturum* set about;
Make trusts and uses just the same,
They only differ now in name;
Make law and equity entwine,
Like oil and vinegar combine;
And, if there nothing is to do,
Add to the twelve, three judges new!

Excuse my wandering from the subject: digressions, you know, are "like sauce to a bad stomach." I will now direct your attention to fines and to the above-mentioned statute of uses, and quote some old black-letter law for their vindication. "Fines have been at the common law, as long as there has been any court of record. And by the common law they were the highest assurance, and of the greatest force and puissance. And so they are termed by the statute, *de modo levandi fines*. And the reason thereof is, because they make an end of the law in bringing quiet and repose, for the law has no other end but repose, and the law was ordained to put a stop to contention and to make peace. Peace and concord is the end of all laws, and the law was ordained for the sake of peace. *Dyer* said, that for peace Christ descended from Heaven upon the earth, and his law, which is the New Testament, and the old law, which are the divine laws, were given only for peace here and hereafter. And *Weston* cited St. Augustine, who says, *et concordiâ stat et augetur respublica, et discordia ruit et diminuitur*. And *Catline* said, that peace is described in this manner: *Pax, mater alma opulentiæ, vehitur curru; currus, ubi pax vehitur, dicitur unanimitas; auriga, qui currum, regit, dicitur amor; duo equi currum trahentes sunt concordia et utilitas; comites pacis sunt justitia, veritas, diligentia, industria, omnium artium parendarum*, which description is made up of the nature, properties, and advantages of peace, and of the accidents thereof; and therefore peace, which is attended with so many conveniences, ought to be preserved beyond all other things. And hereupon *Dyer* said, that one of the articles which the king at his coronation swears to his subjects to perform and keep, is that he will preserve the peace, for a

---

(*b*) If deeds are to be printed bookwise, as some have recommended, the principal part, namely, the recitals, the parcels, and the names of persons, must be written; and, if the whole of a deed is to be written bookwise, then, in either case, one half part of the parchment will be useless, for it is very difficult to write or to print on the back of a skin of parchment. I have seen deeds occupying seventy skins, and if they are to be made up bookwise, they will require binding, because, if not bound, their transmission (which I shall notice hereafter,) will afford an opportunity for forgery and fraud by interpolation.

(*c*) By a collection of Hakewell's, in the case of Catherine *v* Surry, the opinion of the judges, as he says, was, that a *femme sole*, having a freehold, might vote for a member of Parliament; and precedents are on record to show that women paid Parliament men their wages. On the other hand it has been contended that ladies ought not to have the privilege, because the choice of Parliament men required an improved understanding, which they were supposed not to have. In the Mirrour of Justices, a woman is said to have been a justice of the peace: vide Olive *v.* Ingram, 7 Mod. 263.

more beneficial thing he cannot grant to them, and, therefore, those laws which bring the greatest peace, are the most estimable. And *Carus* said, that certainty is the mother of repose, and incertainty is the mother of contention. And *Periam*, chief baron, cited the case in Brook's Abridgment, and he said that uses have extended themselves into many branches, and are to be resembled to Nebuchadnesser's tree,(*d*) for in this tree the fowls of the air build their nests, and the nobles of the realm erect and establish their houses, and under this tree lie *infinita pecora campi*, and great part of the copyholders and farmers of the land for shelter and safety, and he said, if this tree should be felled or subverted, it would make a great print and impression in the land."

Let us now consider the proposed plan for the establishment of a General Registry of all Deeds relating to every acre of land in the kingdom, which, the commissioners say, is necessary to prevent the evils of forgery and fraud, which they conceive to be of daily occurrence; but, during the last sixty years, I never heard of more than three or four cases of *forgery*, and, with respect to *fraud*, the civil law and our own Doctor and Student might have informed them, that to legislate upon such a subject as fraud, against which common prudence and caution may be a sufficient security, is downright folly. A contract may be entered into by a designing knave with a man as simple as *Justice Shallow*, or with one just as wise as Paglarences of old, who, on his sow producing eleven pigs, and his ass but one foal, went to law with his bailiff for cheating him. It is long since I read Wood's Institutes of the Civil Law, but I believe, upon reference to it, you will find the following rule: "He that contracts with another, ought to know who he deals with, his state and condition."

The plan for a general registration has been matured in a strange un-Englishlike manner. The registers of Austria, Prussia, Bavaria, Norway, Sweden, New York, Nova Scotia, and various other places, have been referred to; and it seems that the one now to be adopted by the legislature contains the quintessence of them all. There was a time when our ancestors cried out with one voice, "*Nolumus leges Angliæ mutare;*" and I do hope, that their posterity will act with the same firmness of temper as *they* did at the famous parliament of *Merton*.

It seems that *every acre of land in the kingdom is to be registered, and every man's private concerns laid open*, and that *no person is to be intrusted with his own title-deeds*, for they are all to be impounded. I know of no precedent for this, except that of William the Norman, commonly called the Conqueror, who had a survey made of all the lands in the kingdom, and whose Domesday Book, according to Camden, was no other than a *librum censualem*, or tax-book. Now, for the sake of consistency, I should not be surprised if the learned commissioners, in their next report, were to recommend the repeal of the statute *de tallagio non concedendo*.

I will now call your attention to the practicability of the proposed plan. The following Table, furnished by the learned commissioners, contains an example of an index to a registered title.

SYMBOL 10.

| No. | When Registered. | Where Registrd. Bk. | Page | Date of Document | Indexes to Books of Title. Bk. | Page | Brought from. | Carried to. | Specifications. | Entry in directory. Bk. | Page |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 1 | 1831. May 6 | 1 | 36 | 1831. May 5 | 1 | 9 | ,, ,, | ,, ,, | ,, ,, | 11 | 56 |
| 2 | 1831. May 6 | 1 | 45 | 1831. May 6 | 1 | 9 | ,, ,, | ,, ,, | ,, ,, | 1 | 56 |
| 3 | 1842. July 7 | 3 | 64 | 1842. July 6 | ,, | ,, | ,, ,, | ,, ,, | ,, ,, | 2 | 73 |
| 4 | 1854 Aug. 9 | 4 | 73 | 1854. Aug. 6 | 2 | 63 | ,, ,, | ,, ,, | ,, ,, | 3 | 54 |
| 5 | 1856. Sep. 1 | 6 | 53 | 1856. Aug. 30 | ,, | ,, | 9Bk. 1, p. 6 | 12 Bk. 8, | ,, ,, | 5 | 62 |
| 6 | 1862. Oct. 2 | 7 | 82 | 1862. Oct. 1 | ,, | ,, | ,, ,, | p. 7. | Lands in the Parish of A. | 6 | 74 |

The plan is, that a building should be erected, not quite so extensive as *Bethlem Hospital*, but large enough to hold all the books which may accumulate for eighty years; that is, forty years after the battle of Armageddon, and the end of the world.

| | | |
|---|---|---|
| Salaries of officers, | £15,000 | |
| Rent - - | 1000 | |
| Stationery - | 500, | much too small a sum for packing 70,000 paper parcels. |
| Fuel, &c. - | 1500 | |
| | £18,000 | per ann. for England and Wales. |

so that the whole expenditure will not exceed 20,000l. per annum.

The expense of registration will be,

| | |
|---|---|
| 6s. | for registering, |
| 2 | postage to town, |
| 8 | office copy to be sent down to the purchaser, |
| 2 | office copy postage down, |
| 18 | |
| 7 | solicitor's charge for letter and transmission, |
| £1 5 | |

A fee of 6s. will afford at once, say the learned commissioners, 21,000l. per annum to

(*d*) Thus were the visions of mine head in my bed: I beheld a tree in the midst of the earth, and the height thereof was great; and the tree grew, and was strong; and the height thereof reached unto heaven, and the sight thereof to the end of all the earth. The leaves thereof were fair, and the fruit thereof much, and in it was meat for all; the beasts of the field had shadow under it, and the fowls of heaven dwelt in the boughs thereof, and all flesh was fed by it.—*Dan.* iv. 10, 11, 12.

pay the above expense. And nine books are to be provided for all the counties in England and Wales; and it is computed that 70,000 deeds will be annually registered forthwith, and that the number will be constantly increasing.

The mail coaches are to bring up the deeds, namely, 70,000 paper parcels every year, and carry down 70,000 other paper parcels, containing office copies of the same deeds.

It will be necessary, therefore, to increase the number of mail coaches, because 200 paper parcels must be brought up and carried down every day, to the annoyance, if not the total exclusion, of the inside passengers, until railways shall have been erected. And if the mail coaches are increased, the mail carts traversing the cross-roads must not only be multiplied, but much enlarged, for those vehicles strongly resemble certain spiders with long spreading members, but with hardly any body at all.

Let us suppose that the business of registration is to commence on the 1*st day of April* now next ensuing. On that day, although 200 paper parcels, containing so many deeds, may have been despatched for registration, yet making due allowance for accidents, inundations, storms, and tempests, or something worse, not more than 190 can be expected to arrive at the General Post office in safety. These same paper parcels, for their safe conveyance to the registry, will occupy all the omnibuses built for the service of the General Postmen; and those omnibuses will render Chancery lane (the site of the intended building,) impassable at ten in the morning, and at seven in the evening, at which hour they must return to supply the mail coaches with a fresh cargo of paper parcels, containing the office copies of the deeds brought up in the morning.

The hours of business will therefore be from ten in the morning until seven in the evening, making nine hours. Now, on the 1st day of April, and on every day, and within those nine hours, and in the nine books, (wherein only nine persons can write at the same time,) 190 entries must be made; and, besides those entries, and within the same time, as many office copies must be made, and packed up in as many parcels, the packing of which will occupy nine other men as porters at least five hours every day; and, if great care is not taken in directing the parcels, the Norwich mail will perhaps start with those designed for Lancashire, and the Liverpool mail with those intended for Norfolk. Of all the preposterous schemes ever heard of, this for general registration appears to be the worst. The projects for extracting silver from the bones of dead horses, and of sunbeams from cucumbers, were not half so absurd.

FORTESCUE'S GHOST.

---

## CHANCERY REFORM.

[CONTINUED.]

### XII. *Registrars' Office.*

The registrars should be relieved of the obstruction created by their having to sign cheques, and receive no more deposits.

Two additional registrars to be appointed; or the present registrars to attend in an evening, to meet parties, and settle their minutes and orders.

Salaries alone will not promote proper activity in this office, in times of pressure. The registrars therefore to be paid by a new scale for decrees or orders, on these being shortened.

### XIII. *Masters.*

The necessity of attending at the public office to be abolished, the duties done there being distributed elsewhere. The attendance at the House of Lords to be also put an end to.

Masters and their clerks may have fixed salaries in part, but the former to have an additional settled fee for every special report that is issued; and the clerk to be allowed to receive not exceeding 1*s.* a folio for drawing the body of it, by way of gratuity, as at present, to ensure despatch of business.

On the two first vacancies a taxing and an accountant master to be appointed at fixed salaries: one more of each to be appointed if necessary.

The difference made in taxing costs between party and party, to be as much as can be abolished; the successful party to have his actual costs, properly incurred.

No party to be bound to take copies of any proceedings; those taken to be charged at 3d. a folio.

Composition and biddings money to be abolished, and moderate fees to be substituted for attending sales.

The master, wherever practicable or requested, to proceed on a reference throughout, and not by successive and distinct warrants.

On a careful revision of the forms of proceedings in the masters' and other offices, (by persons intimate with the practice, and also with the forms of other courts,) greater simplicity and much saving of time and expense might be effected.

The revision of the fees in masters' offices may undoubtedly obviate much of the objections to multiplying reports or certificates; as, by a little arrangement, those for which 1l. 17s. 6d. and more is now paid, might certainly be easily issued for 5*s.* or 7*s.*; and short printed forms might be settled for use in all the offices, so as to be filled up, whenever wanted, at once. But several of the reports or certificates as now given, of course might be abolished altogether.

Reports to be absolute at once where no objections were left; and in all cases in eight days, unless the opposite party, within that time after the date, files exceptions.

Exceptions to be set down short with pleas and demurrers.

Common debts to be proved, as in bankruptcy, by mere affidavit; and one or two days to be named by the master in each advertisement for creditors; on which days, at an hour to be named, the master will sit, to receive any proofs that come in, without warrant "on leaving" or "to proceed," unless he, seeing the matter to be of importance, so directs.

XIV. *Summary Proceedings by Petition.*

There are certainly several cases where the relief sought is clear, distinct, and single enough for a petition to answer all the purpose of a regular suit, often at a twentieth part of the cost.

Nothing more urgently calls for the adoption of some easy remedy of this sort, than the calling an executor to account of personal estate in the common way by a legatee. If this could be done in a cheap form, the recourse to it would be immense.

XV. *Practice generally.*

The new orders to be revised throughout, particularly those regulating the proceedings for bringing a cause to issue.

The present precedence at the bar to be abolished, and not more than two counsel heard in any stage but the hearing of the cause.

The forms of pleading to be reconsidered by a person (or two persons) specially appointed.

XVI. *Judicial Department.*

The relief to be now afforded to the court of Chancery, (and certainly it will require some, as a reform in its proceedings would greatly increase the quantity of equity business,) should be gained by making the equity side of the Exchequer efficient; placing the lord chief baron at its head, and giving him the assistant equity judge lately proposed to be established. The court would thus form "The chancery of the Exchequer," and the judges might be its chancellor and vice-chancellor. There is in the Exchequer an establishment fully formed and adequate (subject to reform, to assimilate it to a reformed court of Chancery) to the despatch of all the business which can be sent to it; and there is no difficulty in feeding it with branches of business, such as bankruptcy and lunacy, now a dead weight to the court of Chancery.

The great advantage of adopting the exchequer would be, the separation it would easily create in the bars; as it would then have adequate employment for a wholly distinct bar. At present nothing can be worse than the same outer bar practising in four courts, sitting at the same hour.

Arrangements should be made for ensuring the attendance of the lord chancellor in his court at least five days in the week, and for a full day's work. Unless Mr. Cooper's excellent suggestion were adopted, of the lord chancellor leaving the court altogether for the lords and the presidency in a proper court of appeal; his place in chancery being supplied by a third judge; the three being in that case of equal rank, and without appeal, except at once to a proper and accessible superior court; unless it be thought advisable to give an *optional*, and in that case final appeal, from any one to the other two.

## SIR WILLIAM JONES'S CHARACTER OF MR. DUNNING.

JOHN DUNNING, a name to which no title could add lustre, possessed professional talents which may be truly called inimitable; for, besides their superlative excellence, they were peculiarly his own; and, as it would scarcely be possible to copy them, so it is hardly probable that nature or education will give them to another. His language was always pure, always elegant, and the best words dropt easily from his lips into the best places, with a fluency at all times astonishing, and, when he had perfect health, really melodious. His style of speaking consisted of all the turns, oppositions, and figures, which the old rhetoricians taught, and which Cicero frequently practised, but which the austere and solemn spirit of Demosthenes refused to adopt from his first master, and seldom admitted into his orations, political or forensic. Many at the bar, and on the bench, thought this a vitiated style; but, though dissatisfied as critics, yet, to the confusion of all criticism, they were transported as hearers. That faculty, however, in which no mortal ever surpassed him, and which all found irresistible, was his wit; this relieved the weary; this calmed the resentful, and animated the drowsy; this drew smiles even from those who were the objects of it, scattered flowers over a desert, and like sunbeams sparkling on a lake, gave spirit and vivacity to the dullest and least interesting cause. Not that his accomplishments, as an advocate, consisted principally in volubility of speech, or liveliness of raillery: he was endued with an intellect sedate, yet penetrating; clear, yet profound; subtle, yet strong. His knowledge too, was equal to his imagination, and his memory to his knowledge. He was not less deeply learned in the sublime principles of jurisprudence, and the particular laws of his country, than accurately skilled in the minute, but useful practice of all our different courts. In the nice conduct of a complicated cause, no particle of evidence could escape his vigilant attention; no shade of argument could elude his comprehensive reason. Perhaps the vivacity of his imagination sometimes prompted him to sport, where it would have been wiser to argue; and perhaps the exactness of his memory sometimes induced him to answer such remarks as hardly deserved notice, and to enlarge on small circumstances, which added little weight to his argument: but those only, who have experienced, can in any degree conceive the difficulty of exerting all the mental faculties in one instant, when the least deliberation might lose the tide of action irrecoverably. The people seldom err in appreciating the character

of speakers; and those clients who were too late to engage Dunning on their side, never thought themselves secure of success, whilst those against whom he was engaged were always apprehensive of defeat.

The following tribute was paid to him by Burke, in a speech delivered to his constituents at Bristol, of which place, it will be remembered, Dunning was recorder. "I shall say the less of him, because his near relation to you makes you more particularly acquainted with his merits; but I should appear little acquainted with them, or little sensible of them, if I could utter his name on this occasion without expressing my esteem for his character. I am not afraid of offending a most learned body, and most jealous of its reputation for that learning, when I say he is the first in his profession; it is a point settled by those who settle every thing else; and I must add, what I am able to say from my own long and close observation, that there is not a man of any profession, or in any situation, of a more erect and independent spirit, of a more proud honour, a more manly mind, a more firm and determined integrity."

## MR. DUNNING'S LETTER ON THE STUDY OF THE LAW.

DESIGNED as our work is, in a considerable degree, for the benefit of the junior part of the profession, we have been urged by several correspondents to devote a due proportion of our space to articles on the study of the law. Some of our readers, probably, may think that we have been already sufficiently attentive to this part of our duty; but, having received from two several correspondents, a copy of Mr. Dunning's celebrated letter to a student of the law, who had requested the favor of his advice upon the most eligible course of reading, we insert it as an appendix to the memoir of that distinguished individual. It will be found replete with valuable suggestions. The list of works to which reference is made in the letter, is comprised in the article "on the Study of the Lawe," page 54 ante.

*Lincoln's Inn; March* 3, 1779.

DEAR SIR,

"The habits of intercourse in which I have lived with your family, joined to the regard which I entertain for yourself, make me solicitous, in compliance with your request, to give you some hints concerning the study of the law.

"Our profession is generally ridiculed as being dry and uninteresting, but a mind anxious for the discovery of truth and information will be amply gratified for the toil in investigating the origin and progress of a jurisprudence which has the good of the people for its basis, and the accumulated wisdom and experience of ages for its improvement. Nor is the study itself so intricate as has been imagined, more especially since the labours of some modern writers have given it a more regular and scientific form: without industry, however, it is impossible to arrive at any eminence in practice; and the man who shall be bold enough to attempt excellence by abilities alone, will soon find himself foiled by many who have inferior understandings, but better attainments. On the other hand, the most painful plodder can never arrive at celebrity by mere reading; a man calculated for success must add to a native genius, an instinctive faculty in the discovery and retention of that knowledge only, which can be at once useful and productive.

"I imagine that a considerable degree of learning is absolutely necessary; the elder authors frequently wrote in Latin, and the foreign jurists continue the practice to this day. Besides this, classical attainments contribute much to the refinement of the understanding, and the embellishment of the style. The utility of grammar, rhetoric, and logic, are known and felt by every one. Geometry will afford the most apposite examples of close and pointed reasoning; and geography is so very necessary in common life, that there is less credit in knowing, than dishonour in being unacquainted with it. But it is history, and more particularly that of his own country, which will occupy the attention and attract the regard of the great lawyer. A minute knowledge of the political revolutions and judicial decisions of our predecessors, whether in the more ancient or modern eras of our government, is equally useful and interesting. This will include a narrative of all the material alterations in the common law, and the reasons and exigencies on which they were founded. I would also recommend a diligent attendance on the courts of justice, as by that means the practice of them (a circumstance of great moment,) will be easily and naturally acquired. Besides this, a much stronger impression will be made on the mind by the statement of the cause, and the pleadings of the counsel, than from a cold uninteresting detail of it in a report. But, above all, a trial at bar, or a special argument, should never be neglected. As it is usual on these occasions to take notes, a knowledge of short-hand will give such facility to your labours, as to enable you to follow the most rapid speaker with certainty and precision.

"Commonplace books are convenient and useful, and, as they are generally lettered, a reference may be had to them in a moment. It is usual to acquire some insight into real business under an eminent special pleader, previous to actual practice at the bar; this idea I beg leave strongly to second, and indeed I have known but few great men who have not possessed this advantage. Wishing that you may add to a successful practice that integrity which can alone make you worthy of it,"

I am, dear Sir,

Your most obedient humble servant,

JOHN DUNNING.

## MR. DUNNING.

*To the Editor of the Legal Observer.*

Sir,

In your fourth number you have given a biographical sketch of the late Mr. Dunning, one of the greatest men of the last century, and you have given *two versions* of the occasion of his abandoning his original intention of practising as a country attorney for more ambitious pursuits. As you intend to resume this article in your next number, the communication of a third may not be considered intrusive. I received it from an old inhabitant of Devonshire. According to his report, the following circumstance occasioned Mr. Dunning to emerge from his obscurity. A nobleman returning from a foreign embassy landed at Plymouth or Falmouth, and, being in bad

health, was travelling to London by easy stages. He stopped at an inn in Ashburton to dine, intending to remain till the following morning. The weather was gloomy, and finding himself lonely, he inquired whether there was any man of education in the town, whose society might relieve the tedium of a solitary afternoon. The clergyman of the parish was first named, and invited to take his wine with his lordship, but he happened to be from home. A similar accident deprived the principal medical gentleman of the town of the intended honour. Mr. Dunning (the elder,) was then sent for, but he also was from home, and his son imagining that the invalid nobleman might want professional assistance, perhaps a will prepared, proceeded to the inn to tender his services. He was invited to spend the evening with the stranger, who was so much pleased with his conversation that he strongly recommended him to try his success at the bar, and perhaps assisted him with the means of doing so. This story was current in Devonshire fifty or sixty years ago, though my informant has forgotten the name of the nobleman. He thinks it was Henry Earl of Shelburne, who died in 1751.

I am, sir,

Yours very obediently,

HENRY R. HILL.

12, *Copthall Court; Nov.* 30, 1830.

## CASES IN POINT.

"CAN you produce any authority for that position?" inquires his lordship of the learned counsellor X., who, conscious of the unfavorable aspect of the cases, is indulging in a few ipse-dixits, with an emphasis proportioned to the badness of his cause, and spinning some distinctions so ingenious, subtle, and refined, that it is quite a pity they are not to be found in any of "the books."

"Please your ludship," replies Mr. X., "I confess that I am not prepared with a bead roll of cases at my fingers' ends: but, my lud, I argue upon principle;" whereby the learned gentleman merely means, that it is his principle to decry the cases to the extent of his abilities and his lungs, whenever they happen to make against the cause which he advocates, though he is always a great stickler for them if they are favorable to his clients.

But the "simple laity," as the old lawyers were wont politely to designate all the rest of the world except themselves, not being in the secret of the learned gentleman's distaste for the authorities, will be apt to applaud so liberal and enlightened a disavowal of the narrow prejudices of his profession; and the young apprentice of Themis, just entered into a solicitor's office, or commencing his *status pupillaris* in chambers, having already had a slight taste of the horrors of looking up cases in point, sympathizes with so convenient a disregard of black-letter law, as he scornfully designates all law which has had the misfortune to be printed. Indeed, inexperience or indolence will generally be found at the bottom of the vulgar outcry against precedent: inexperience, which is not aware that a strict adherence to foregoing decisions is the landmark of property, and indolence, that would fain jump to conclusions, instead of arriving at them by the more tedious, but safer route, provided by the stepping-stones of established authorities.

In the profession itself there are but few principle-mongers; for a diligent study of the law will almost infallibly lead to a conviction of the vital importance of certainty, so far as it can be attained, in the rules by which the multifarious transactions between man and man are to be regulated; and the general mischief and confusion that must ensue, if such rules might be altered or modified in order to suit individual notions of natural equity in particular cases. But, no doubt, it is a very prevalent notion with that part of the public whose avocations have not led them to pay particular attention to the subject, that the reverence for precedent is carried by lawyers to an absurd and mischievous extent; and that, in submitting a question to the test of judicial rules and decisions, the essence of justice often evaporates in the process. It is supposed that there is the common-sense view of a case, (such is the popular phrase,) as distinguished from the light in which that case is placed by the refined subtleties of the law. The error consists in a party's assuming, as a matter of course, that his own particular opinion is necessarily the only one compatible with common sense; much in the spirit of the learned divine, who defined orthodoxy to mean his own doxy, and heterodoxy the doxy of any other man. If the suffrages of those who profess to be guided by the dictates of common sense alone were to be collected on any complicated question, common sense would be found strangely inconsistent with itself. On the other hand, where, after a full, deliberate, and impartial investigation, of all the circumstances of a case, and after every thing has been stated, *pro et con.* which ingenuity or experience can suggest, a decision has been pronounced by a competent person, whom the nature of his pursuits has peculiarly fitted for giving the proper weight to every fact and every argument which is urged upon his attention, is there any thing absurd or unnatural in being guided by such a decision, in preference to listening to the crude and self-sufficient *dicta* so complacently referred by their authors to reason and principle, though they will generally be found, on a strict examination, to be opposed to both? As for the niceties and refinements ascribed to the law, they spring out of circumstances; and it is as unfair to charge them upon the members of the profession, as it would be to taunt an astronomer for descending into the minute and intricate calculations rendered necessary by the nature of the sublime science to which he is devoted.

The young student, at the commencement of his noviciate, is naturally impatient of the restraint which is imposed by a continual reference to the opinions of others, and irritated at the nice and troublesome scrupulosity which

exacts a case in point for every position. But, upon consulting the authorities to which his attention is directed, he finds the question on which he is inclined to come to a hasty conclusion placed in so many new and important points of view, so many difficulties to be encountered, and consequences to be obviated, which had never suggested themselves to his inexperience, that, if he is possessed of any degree of intelligence, he begins at length to suspect his own infallibility, and to entertain some respect for opinions which are the result of knowledge and experience. He gradually becomes expert in applying the principles of former decisions to every case which is brought under his notice, and the habit of investigation will moreover enable him to consider a subject in all its bearings, and to grapple with its difficulties even where the authorities fail him: his judgment becomes matured, and he has laid in all the elements of a sound lawyer. The "enlightened public," or that class of persons who style themselves such, will probably represent him as having now become thoroughly imbued with the prejudices of his profession: but he will be consoled by the consciousness of having qualified himself to discharge the most important and responsible duties of that profession with credit to himself and advantage to the community.

## REVIEW.

1. *An Estimate of Mr. Brougham's Local Court Bill.* By an Observer.
2. *A Letter on the proposed District Law Courts, &c.*

(*Concluded.*)

We proceed with our abstract of the contents of the two pamphlets which stand at the head of the present article.

The difficulty of finding forty or fifty persons fit for the office of judge, and willing to accept it, in one of these courts, is obvious; our limits will not allow us to enlarge on this part of the subject, but we must be permitted to quote from one of the pamphlets before us, some observations on the probable effect of these courts on the bar and the bench.

"What will be the consequence, in a few years, of taking nearly all the business from the superior and concentrated courts, and distributing it amongst fifty inferior tribunals? 'Will the structure continue to stand when the supporting columns are struck from under it? Can a living body be sustained in vigour when the sources of vitality are gone?' 'The English bar owes its weight and respectability entirely to the concentration of the courts. It is solely because the principal law business of the kingdom is brought to a focus, that the study of jurisprudence holds out a sufficient inducement to men of fine talents and finished education, that the profession has been elevated to the high station which it occupies.' Such being the case, where will the next generation look for judges? Where will a Mansfield, a Kenyon, an Ellenborough, or a Tenterden be found? Not amongst the petty practitioners of the local courts, most assuredly; and where else is the crown to seek? The common-law bar will not present sufficient inducements to men of learning and talent to embrace the profession. And if sixty judges are to be found instead of fifteen, inferior men must be taken, and the judicial seat degenerate. Besides, will the population in the districts be satisfied; will not the judges of one district, London for instance, see more practice than the judge of Cornwall? the consequence will be dissatisfaction; and, I anticipate, they will have reason to exclaim, 'Give us durability rather than cheapness; equal laws instead of a variety; a dignified bench in place of a mean one; and fair practice in lieu of pettifogging!'" *Letter*, p. 14.

It has been urged as an argument for cheap law, that a demand of small amount is a matter of importance to a poor man. For that very reason it is imperatively required that such claims should be properly decided. Nothing can be more monstrous than for the law to have two measures of justice—one for the rich, and the other for the poor. On this point the writers are again aided by the opinion of the PRESENT LORD CHANCELLOR, clothed in his usual vigorous language. "*Cheap justice,*" said he, "*is a very good thing, but costly justice is much better than cheap injustice.*"

It is a striking and important fact, that public opinion has always been against such courts as are now contemplated. The decent part of the community feel it discreditable to resort to them, and even the very rabble despise them. It is clear that their utility must be much impaired by this state of public feeling. Courts of justice, to be beneficial, must be respected: petty courts are not respected, and never will be. The feeling towards them is the same in America, as in this country; there, though they abound, and though the lower classes eagerly avail themselves of the ready means of litigation which they afford, there is yet no confidence in their decisions, and appeals are multiplied without number and without end.

The want of uniformity in the decisions of these courts is one of the evils apprehended from their establishment.

"Again, discrepancies creep in; each judge is the centre of a petty system; 'The judge of Exeter differs in opinion from the judge of York. Divided as they are by distance, neither may know of the discrepancy; and thus points of distinction imperceptibly accumulate, till uniformity is altogether lost.' It may be said the bill gives a power of appeal; true: but how few can afford, or will attempt, so expensive a course? Indeed, to suppose a multiplication of appeals is to anticipate a total failure." *Letter*, p. 14.

Some observations are made on the deficiencies, delays, and difficulties of the mode of appeal, and the non-provision of any means of interlocutory application. Our limits again restrain us from extracting more than the following passage.

"To deny a ready appeal from the inferior courts, is to sanction injustice and let law run wild; to grant it without restriction, involves the suitor, whom the legislator means to serve, in two suits instead of one. Take a middle course,—impose treble costs

on the unsuccessful appellant,—and what is this but to put a check on the application of the only principle which can keep the machine right; and (what is worse) to place in the poor man's way an obstruction which the rich man does not feel."—*Estimate*, p. 13.

The power of dispensing with trial by jury meets with animadversion, and here again the authority of the LORD CHANCELLOR is referred to.

"Mr. Brougham, on the motion before alluded to, the 19th of February, is reported to have said, He 'recommended by all means to uphold the trial by jury, *and to extend* with a steady hand that which had already produced such valuable effects in facilitating the administration of justice.'" *Letter*, p. 7.

The immense increase of patronage which would be created by the new courts, does not escape notice, and the expressed opinion of the LORD CHANCELLOR on the subject is once more found to coincide with that of the opponents of local courts.

"Mr. Brougham, on Mr. Peel's motion on bringing in the fees of court bill, on the 19th February last, is reported to have said, 'Now, if the *eight* Welsh judges were to be abolished, and *two* judges only substituted, let the House see *what a difference that made in the patronage of the crown*. Was the appointment of two judges for Westminster hall to be compared, in point of patronage, with eight places that would be given away to the relative or friend of some member of parliament, or some peer, who may be selected for the place, not for his knowledge or acquirements as a judge, but for qualities very different from those which are said to make a good judge?'" *Letter*, p. 6.

The number of local judges for England and Wales, would not be *eight*, but somewhere about *fifty!*

Lastly, the arbitration and reconcilement courts are condemned as visionary; in some cases impracticable in their objects, and in others injurious to the just rights of parties. It is asserted, that where the reconcilement courts have been tried, they have failed.

"The *Exposé des Motifs* of the second book of the above code, shews these courts had, on the whole, disappointed their founders. 'Le premier titre est celui de la conciliation. Que cette idée etait philosophique et salutaire de n'ouvrir l'accès des tribunaux qu'après l'épuisement de toutes les voies de conciliation! pour quoi faut-il qu'une si belle institution n'ait pas produit tout le bien qu'on devait en attendre, et que les effets aient si peu répondu aux espérances?'"

"If the reconcilement measure has not succeeded in France, where the *juges de paix* are almost as thickly strewn as our justices of the peace, and where the plaintiff is forced to proceed in the first instance in the reconcilement court, how much less can it be expected to succeed where neither party is constrained to attend, and where the court can only be attended at certain periods in the year, and then generally at a distance from the party's residence? Will creditors await for months the arrival of the judge, with the pretty near certainty of the debtor not being so weak as to attend at all?

"Attempts are now frequently made, and some think often successfully, to prejudice the judges on the trial of causes by insinuation of references having been proposed and not acceded to; in such cases, however, the dissenting parties have at least the excuse of not being able to agree on arbitrators who were likely, in their opinions, to deal out impartial justice; but will it be prudent to suggest such an excuse where the arbitrator proposed is the judge presiding at the trial between the parties? Is it therefore proper to give either party the opportunity of taunting the other with his refusal to abide the arbitrament of the judge, who, whatever may be the party's objection to him as an arbitrator, necessarily presides at the trial of the cause, and has the opportunity of influencing the jury?" *Letter*, p. 10-11.

The author of the Estimate expatiates upon the improbability of the judge-reconciler effecting any reconciliation. He pursues him through his multiform and dissimilar duties, and represents him as—

"Administering the law, after all his contrivances to keep the people from resorting to it have brought it into contempt. And this, too, when we have removed (as Mr. B. will do if his plan succeeds according to his wish) all the reconciling powers now operating so strongly in the form of the delays, risks, and costs of litigation, which are now urged by every respectable practitioner in the promotion of amicable adjustment to an extent of which I believe Mr. Brougham has little conception. When law is to be at every man's door, and rather a luxury than a trouble or a peril, what hope can *conciliation* have under such a system? Read what Captain Hall says of the local courts in America, which we have already seen characterized in their legal results! Consult this picture of the spirit of fierce and uncontrollable litigation, of scorn for every idea of referring any thing to any other decision than the ultima ratio of strict law.—*Estimate*, p. 32-33.

Captain Hall's account of the local courts in America we gave in our fifth number. (*a*) After quoting it, the writer before us not unaptly asks, whether it can be believed that attornies oppose such a system of multiplied litigation from *interested* motives.

It has been said, that all that is now proposed is merely to make an experiment. The author of the Estimate answers, 1st. That it is not likely that an experiment of sufficient length will be allowed to afford a just conclusion. 2d. That possibly *two* persons may be found able and willing to fill the office of judge in the two districts with which it is proposed to begin, but it is a different matter to find *fifty* such persons. 3d. That at least one of the proposed districts—Kent, is by no means a fair subject for the experiment, being remarkably isolated both as a whole and in its district divisions; having no manufacture, and little commerce—consequently few external connexions: and finally, possessing a very even distribution of populous towns, furnished with suitable conveniences for such a tribunal, so as to reduce the expenses of outfit. He might have added that no experiment is wanted. The experiment has already been made in our own country, upon a scale not inconsiderable, and for a length of time sufficient to develope all the good, as well as

(*a*) Page 74.

all the evil of the system; not for one or two, or ten, or twenty years, but for centuries. In the Welsh courts, the experiment was made for us under circumstances more favorable than are likely to attend their revival. The system there, enjoyed a portion of the respect which men, in spite of themselves, yield to ancient institutions—from its long establishment, the state of the law and the habits of the people, had become in some degree assimilated—while the judges were men superior to the average of those who can be calculated upon in the new local courts, and were not resident in their respective districts. Yet the system has been found intolerable. Sentence of abolition has gone forth against it, and been executed. In this sentence, all the friends of peace and justice have rejoiced; and none more than THE EMINENT PERSON WHO NOW HOLDS THE GREAT SEAL OF ENGLAND.

From the extracts which we have given, our readers will be able to judge of the merits of the two pamphlets. The writers, we apprehend, are not much accustomed to literary composition, but they appear to be sensible, practical men, well informed upon the subjects which they discuss; and their facts and arguments deserve serious attention. We have by no means extracted all that is worthy to be read: neither our limits nor our sense of fairness towards the authors would permit this. We therefore dismiss the subject for the present, by recommending the two tracts to the notice of our readers.

## MINOR CORRESPONDENCE.

N. G. S. observes, that great inconvenience is constantly experienced by persons who are desirous of suing *partnerships*, in consequence of their not being able to ascertain the names of all the partners in the firm, which either prevents the creditor from proceeding to recover his just demand, or, if hardy enough to proceed, subjects him to a plea in abatement. In a country of such great commercial importance as our own, in which credit is carried to such an extent, and where a tradesman cannot, without offence and the risk of losing custom, ask the names of those whom he is about to trust, it seems to be a most desirable thing that tradespeople should have greater facilities afforded them of ascertaining the names of parties, but more especially the names of partners in firms, with whom, in the ordinary course of business, they may think it desirable to deal. Our correspondent, therefore, suggests that it would be a most beneficial thing to the commercial world at large, if an office were established by law, where all partnerships, *i. e.* the names of all partners in every firm throughout the kingdom, should be registered, and also all dissolutions of partnership, with such other particulars as might be necessary for enabling tradesmen to recover their just demands. To compel registration under a penalty, and to make all partnerships and dissolutions of partnership void, unless registered, would ensure a punctual registration. If such a thing were established, we should not then have so many unincorporated joint stock companies, and others of the same character, laughing at those who have been foolish enough to trust them, and holding their creditors at defiance.

---

QUÆRENS has favored us with the subjoined note:

"I observe that sec. 36, of the 1st Wm. IV. c. 70, respecting *ejectments*, (vide your first number, page 5,) has no language that appears applicable to premises in London or Middlesex, the words 'commission day' and 'assizes' being exclusively employed with reference to the time and place of trial. Is the section confined to country causes? and if so, why? If not intended to be so limited, what can be the reason that acts of parliament so frequently fail to express the meaning of the legislature? With whom does the fault lie? And is a remedy impossible? Really there is no reform of the law more urgently called for, than one that should render the statutes *at large* not only smaller, but clearer and more accurate."

---

J. M. makes the following suggestion on the subject of a *General Registry of Deeds*: "If a lease for a term of years, which has been registered in pursuance of the statutes, be determined by ejectment, I am not aware of any means by which the premises (or even the parties in cases where judgment goes by default,) can be identified, so as to enable the judgment to be placed upon the register in such a form as to be available on search. It is obvious that the usual description in the judgment itself, such as two messuages, two cottages, &c. &c. in the parish of A, recovered by John Doe, on the demise of B. C., against Richard Roe, affords no information useful for the purpose, and I believe that there are very many leases which have been long since determined by judgments in ejectments, which for any thing that appears on the registry are still subsisting and unincumbered."

---

### ANSWERS TO QUERIES.

F. G. has favored us with the following answers to the two queries on Bills of Exchange contained in our last number:

1. The bill being drawn on a person "out of Great Britain," is a *foreign* bill; the schedule to 55 Geo. III. cap. 184, has these words: "*Foreign* bill, (*or* bill of exchange drawn *in*, but *payable out, of Great Britain,*) if drawn singly," &c. Indeed, Mr. Chitty says "that bills are foreign when drawn by a person abroad upon another in *England*, or *vice versa*." On Bills, p. 10, ed. 7.

2. The bill must be on *un*stamped paper: this is a necessary conclusion from the cases deciding that bills are to be stamped according to the law of the place wherein they are drawn.

Snaith *v.* Mingay, 1 M. and S. 87. Crutchley *v.* Mann, 1 Marsh 29 (*a*).

### QUERIES.

F. G. inquires whether the case of Laugher *v.* Pointer, 8 D. and R. 556, 5 B. and C. 547, on which the judges of the K. B. were equally divided in opinion, has been carried any further?

Also, whether *Jews* born in this country are capable of purchasing and holding to their own use real property?

### THE LAW REGARDING LIFE INSURANCE.

*To the Editor of the Legal Observer.*

SIR,—It appears that no person has a sufficient interest in the life of another to enable him to effect a policy of insurance upon such life in his own favor, unless the subject of the insurance be a debtor to the assured: 14 G. III., c. 48, sec. 3.

In Godsal *v.* Boldero, 9 East, 72, it is laid down, "that if the debt be in any way paid, the insured cannot recover upon the policy," as in the case of an attempt to recover upon a policy effected upon the life of Mr. *Pitt*, whose debts were paid by Parliament.

When it is considered that many persons, in the arrangements of their affairs, are constantly effecting insurances in their own favor, without having any pecuniary interest in the life insured, and to how great an extent the interests of families are affected by the present law, you will not, perhaps, think it irrelevant to the object of the "Legal Observer" to take a opportunity of adverting to the subject, and, by warning the profession of the invalidity of such a transaction, impede the progress of the evil.

I am, sir, yours, &c.

CLIO.

### ACKNOWLEDGMENTS TO CORRESPONDENTS.

We owe many thanks to HOMO for his elaborate review of a pamphlet on the proposed alterations in the Law of Real Property, and feel reluctance in declining to insert it in its present shape. The greater part of the article consists of critical remarks, ably written indeed, but relating to the style and language of the author of the pamphlet, and to topics in which we apprehend our readers would not be generally interested.

Our limits render it necessary that we should principally confine ourselves to the notice of the subject, rather than the manner of treating it. We leave the minutiæ of literary and verbal criticism to our periodical brethren. If the pamphlet in question contains important objections to a general registry, which can be concisely answered, we shall be most ready to insert an article comprising an examination of the objections. We are willing to alter the review accordingly, but we cannot adopt it as our own.

We have elsewhere noticed a "philipic" by one of our *alphabetic* correspondents: and have received another hint from no unfriendly pen, of the same kind. We cannot help wishing that the courtesy of our critics equalled their honesty and courage. We hope they will give us credit for some portion of integrity and independence. We venture to assert that we yield to none in zeal for the best interests of the profession, but we must be allowed to exercise our discretion in selecting the proper means of effecting the objects which we and our correspondents are mutually anxious to promote. Were all the communications we receive like those alluded to, we should have no difficulty in acting on many of the suggestions they contain; but if we were to submit a tenth part of our correspondence to these carpers, they would be conscious of difficulties and responsibilities, which we suspect they are now altogether unable to appreciate.

We shall, in compliance with the wishes of a correspondent, furnish as early as possible an explanation of the *objects and constitution of the Law Institution*, an account of the *origin* of which we have already given.

We are favored with an able article on the "Propriety of an Alteration in the Law by making universally receivable the Evidence of Parties interested," which we hope to nsert at an early period.

The communication on the "Abuses in the administration of the Law in Guernsey and Jersey," is well worthy of insertion, but must give way at present to matters of more immediate interest.

The letter of "an Attorney" pleases us, and the contribution it contains on the Bills of Costs of the profession, we shall lose no time in bringing before our readers.

Since our last number we have read the manuscript of X. Y. which is sensible and well expressed, but we do not feel justified at present in complying with the conditions proposed. We shall, however, be obliged by an occasional contribution (*a*).

We continue to receive valuable papers on the subject of the proposed Local Courts, and

(*a*) We have received a similar answer on both questions from C.; R. S. adds on the 2d question a reference to 5 Taunt. 529, and to *Boeham* v. *Campbell*, Gow. 56. On the 1st question, R. S. appears to have mistaken the point stated.

(*a*) Since the paper above noticed of X. Y., we have received a contribution on "the proper education of an attorney," which we think particularly valuable; and we cannot but regret that our arrangements regarding articles of this kind preclude us from meeting the views of our correspondent, the excellent spirit and good feeling of whose compositions are equally valuable with the matter they contain.

shall in each succeeding number avail ourselves of their contents.

Other communications, and the acknowledgment of many letters, conveying advice, encouragement, and approval, must be deferred.

## ATTORNIES' CHARGES.

In the *Morning Chronicle* of the 27th of November, 1830, it is stated that—

Lord Tenterden intimated, that in making up cases for the opinion of the court, those who prepared them when it was necessary to bring letters under the notice of the judges, ought to put them in an appendix, instead of introducing them into the bodies of the cases; the difference was material, as when the letters were put in the body of the case they were charged for by the attornies as original drawings, whereas, if put in the shape of an appendix, they were charged for only as copies.

It is conceived that his lordship was misunderstood by the reporter, for it makes no difference to the attorney whether letters or any other documents are set forth in the body of the case, or by way of appendix. Special cases were formerly drawn by the associate from the judge's notes of the trial, for which he was paid one shilling per folio, but they are now drawn by counsel, who is paid a fee by the attorney, according to the length, and the associate still receives his former fee of 1s. per fol. for the body and 4d. per fol. for the appendix, as if he had drawn the one, and copied the other; and all that the attorney gets, is 4d. per fol. for the copies of the special case furnished to the judges and counsel, whether it consists of body or appendix.

## RETURNS OF WRITS, SPECIAL AND COMMON.

Mr. Editor,—Your last Number puts the profession in possession of the Act now before parliament for amending the Act of 1 Will. IV. c. 50, as far as its provisions affect the Terms.

By the amendment proposed, "all writs heretofore returnable on general return days may now be made returnable on the third day before the commencement of any Term, and on any subsequent day up to the third day before the end of the Term," which provision is in itself sufficiently clear in its direction as to general returns.

In the ordinary mesne process of the court of King's Bench, which is returnable on a particular, and not on a general, return day, the practice is to make the process returnable on any day in Term, specifying the days of the week and month.

Upon these two cases of practice, arising under the new provisions of the legislature, the following queries have occurred to me, which you may possibly think deserving of insertion in your valuable publication, in order to their being explained.

1. In what manner is a distinction to be now preserved in process (and it is to be remarked that the Acts expressly recognize a distinction) between *general* and *particular* returns?

2. How is the distinction taken by the new Acts, compatible with the provision of the Act of 1 Will. IV. c. 70, for the assimilation of the practice of the three superior courts?

3. For what purpose is the distinction preserved at all?

I am, Sir,
Your obedient servant,
Civilis.

*** We conceive that there will be no distinction between *general* and *particular* returns. Writs, whether by special original, or common process, may be returnable on any of the three days preceding the Term, or any day (except the last three) during the Term. At least we can discover nothing in the recent Act, or the amendment, to prevent either kind of writs being so returnable. There will still remain the distinction in the *form of the writs* until the judges carry the intention of the Act into effect by assimilating the practice of the courts. In reply to our correspondent's inquiry we may observe, that the distinction between the returns of special and common writs was probably owing to the greater length and difficulty of preparing a *special* original writ, compared with a common one, and therefore the former was returnable weekly or thereabouts, and the latter daily, during Term. We cannot undertake to "render a *reason*" for every practical distinction. But whatever was the ground of the practice formerly, it is evident it ought no longer to exist. The writs, whether common or special, are prepared by attornies, and there can be no reason why they should not be returnable as soon as they are capable of being executed. No doubt the judges will readily provide for the altered state of things in this respect.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

Under the head of "Sheriff's Indemnity," our readers will find two decisions on the question as to where the court will interfere for the relief of the sheriff, when he is called on to decide on adverse claims. The circumstances are rather special, and the decision of Mr. Justice Littledale, in the latter case, important.

Our readers' attention should be directed to the several arrangements made by the Lord Chancellor and Master of the Rolls for the future transaction of the business of their respective courts.

### SHERIFF'S INDEMNITY.

A rule to shew cause why the rule calling on the sheriff of Sussex to return the writ of *fieri facias* directed to him to levy on the goods of a person named Woollan, should not be enlarged until the sheriff should be indemnified, was obtained, and the following facts were disclosed. On the 11th of November, 1829, a *fi. fa.* issued against the goods of Woollan, at the suit of a man named Gale, returnable on Saturday, after eight days of St. Martin, to levy 273*l.* On the 24th of November, a *fi. fa.* issued at the suit of a person named Clegg, returnable on Saturday, after fifteen days of St. Martin, to levy 458*l.* 10*s.* The goods were ap-

praised by order of the sheriff at 217l. 11s. 6d. This sum not being enough to satisfy the first execution, Gale indemnified the sheriff, and the goods were assigned to him on the 17th of December, 1829, in part liquidation of his claim of 273l. The sheriff was then ruled to return the writ in Clegg's execution. He returned *nulla bona*. In Hilary Term, 1830, an action was brought by Clegg, in the Common Pleas, against him for a false return, on the suggestion that Gale's execution was fraudulent. A verdict for 240l. was found in favor of the plaintiff. A new trial was granted, and at the Summer Assizes in 1830, a verdict was found the same way, and for the same amount. Immediately after the verdict in the former case, the plaintiff having ascertained that the goods originally seized under the first execution, and assigned to Gale, were still in the possession of Woollan, sued out another *fi. fa.* against them for 218l. 10s. that being the difference between the amount recovered, in the action against the sheriff for his false return, and the original debt, which the sheriff was commanded to levy under the second *fi. fa.* This was directed of course to the new sheriff,—the sheriff, to whom the two former writs had been directed, having gone out of office. The sheriff accordingly levied on the above goods, Woollan having no others in the county. A notice was then served on the sheriff's officer in possession, that the goods on which the sheriff had levied did not belong to the defendant, but to Gale. The sheriff was then ruled to return the writ. He applied to Gale and the plaintiff for an indemnity, but without avail. The sheriff then obtained a rule to shew cause why the time for returning the writ should not be enlarged in the second execution at the suit of Clegg, and why all further proceedings should not be stayed until an indemnity should be given to the sheriff, either by Gale or the plaintiff.

On the part of the plaintiff it was contended, that he was not bound to indemnify the sheriff, because he had a right to seize the goods of the defendant wherever he could find them. The fact of the goods being the same as had been formerly seized was of no importance. They were still the defendant's goods, as had been shewn by two verdicts, and therefore liable to seizure. The recovery against the sheriff was only a punishment for his false return.

On the part of Gale it was submitted, that he was bound to give no indemnity, as he was clearly the owner of these goods. Whatever doubt might have arisen as to his right on the first seizure, it was clear that he was entitled to the goods, since the price of them had been paid by the sheriff, whom he had indemnified in the action brought for the false return.

The court, having taken time to consider, said that as there was considerable difficulty in determining which of the parties was entitled to have the goods, the sheriff ought not to be called upon to come to that determination; the sheriff ought therefore to be indemnified. The rule for enlarging the time for returning the writ, must consequently be made absolute. Rule absolute. *Clegg* v. *Woollan*. *Littledale*, J., M. T. 1830, K. B.

—

SHERIFF'S INDEMNITY—BANKRUPT ACT.

A rule having been obtained to show cause why the sheriff of Surrey should not have further time to return the writ of *fi. fa.* directed to him, and under which he had levied, on shewing cause the following facts were disclosed. Two writs of *fi. fa.* had issued at the suit of two creditors with separate interests, named Robinson and Ibberson, against the goods of the defendant Dicas, and the sheriff had levied. As soon as he had put a man into possession, he received notice from the assignees of the defendant under the second of two commissions of bankrupt, which had issued against the defendant, stating that, as the defendant's estate under the second commission had not paid fifteen shillings in the pound, his property vested in the assignees under that commission. Both commissions were before 6 Geo. IV. c. 16. The sheriff having been ruled to return the writ, the above rule was applied for. Whether the property of the defendant vested in the assignees or not, depended on the construction to be put on 6 Geo. IV. c. 16, s. 127. The words of that section are these: "And be it enacted, that if any person who shall have been discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent Act, shall be or become bankrupt, and have obtained, or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife, and children) *shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property, of which such a bankrupt was possessed at the issuing the commission.*" The words in italics are new.

The court was of opinion, that this section did not vest the goods of the defendant in the assignees under the second commission. The provision with respect to vesting such property in the assignees was not contained in the 5 Geo. IV. c. 30, the previous Bankrupt Act. It was a new provision therefore, and there were no words in the section which could shew that it was the intention of the legislature to extend it to the cases under the former Bankrupt Acts. On the contrary, the language of the section clearly shewed that it was intended to be prospective. Though that was the opinion of the court, yet as it appeared a question liable to doubt, the sheriff ought to have time to consider the course he would pursue. The rule therefore would not be made absolute in the common form, but for enlarging the rule to return the writ until the end of the next term. He might of course in the mean time come to the court, and apply to enlarge the time still further. Rule absolute. *Littledale*, J., K. B. M. T. 1830, *Ibberson* v. *Dicas*, and *Robinson* v. *Dicas*.

—

AGENTS' SIGNED BILL.

It was decided in this case that the plaintiffs, who were attornies, and acted as agents of the defendant, (also an attorney,) were bound to deliver and sign a bill before bringing the action. *Heming* and *Baxter* v. *Wilton*.

—

PRACTICE—ATTORNEY'S NAME.

*Archbold* obtained a rule on behalf of the defendant, calling upon the plaintiff to shew cause why the bill of Middlesex, and declaration, should not be set aside for irregularity, with costs, no attorney's name and address being endorsed on the copy process served on the defendant. *Hoggins* shewed cause, and read the affidavits of the plaintiff's attorney, and his clerk, shewing that the defendant had been written to before action, demanding payment; that about an hour after the defendant had been served,

the clerk recollected that the attorney's name and address was not endorsed on the copy, and on going to his house, found that he had gone out; the clerk then wrote the name and address on a card, and gave it to defendant's servant, (who afterwards stated that defendant had received it.) On defendant's being served with process, he said to the clerk, "Oh, this is from Mr. ———," (meaning the plaintiff's attorney,) and promised to go out of town to get the money to settle.

*Littledale, J.*, thought the defendant was quite aware of the attorney's name and address by whom the writ was served, and therefore discharged the rule with costs. *Stocken* v. *Brewen*, M. T. 1830.

—

PRACTICE—ATTORNEY'S PRIVILEGE FROM ARREST.

The applicant had been arrested while employed at the borough of Tregony by one of the candidates there during the last election. He moved to be discharged on filing a common appearance, on the ground that he was an attorney of the court. His affidavit stated, that he had for three years taken out a certificate as an attorney, but did not aver that he was actually a practising attorney.

The court adopted the principle of Brooks *v.* Bryant, 7 T. R. 25, and held that, as the applicant did not swear that he was in actual practice as an attorney, (and being engaged at an election, was not that practice,) he was not entitled to their interference.

Rule discharged, but without costs. *Exparte Polwheele, C. P. M. T.* 1830.

—

FUTURE SITTINGS OF THE ROLLS COURT.

The Master of the Rolls observed to the bar, that, as the new Act of Parliament, which directed an alteration, was passed without any communication with the judges of the courts of equity, and was for the convenience of the courts of common law, he did not feel disposed to make any change as to the sittings of this court from the former practice. There was no reason for extending the duties of this court, or of his office, beyond the usual time, in consequence of that Act. He had consulted the late lord chancellor upon this subject, and they both agreed that they should not alter their sittings. He would speak to the present lord chancellor on it. At present it was his intention to sit in this court during the advanced Term, but he was not to sit during the advanced Term, and afterwards to sit as if the Term had not been advanced. He had not more leisure than was necessary for the efficient discharge of the duties of his office, and his labours were not to be extended for the convenience of the common law courts. His honour asked the bar, whether it was their wish he should sit as usual? Mr. Pemberton considered that it was desirable no change should be made.

—

ARRANGEMENT OF BUSINESS IN THE COURT OF CHANCERY.

The *Lord Chancellor*, in the course of the day, said, that seeing so many of the gentlemen of the bar of this court then before him, he wished to arrange with them the time of sitting before next Hilary Term. By the new Act of Parliament, that Term would begin on the 11th of January, 1831, instead of the 23d. This would shorten the usual Christmas vacation. Admitting that long vacations were not desirable in the state of business in this court, he was sure, however, that some vacation was necessary to enable both the court and counsel to do justice to the suitors of the court, and to enable suitors themselves to get their suits in train for hearing. He, considering the advantages of the suitors, and of the court itself and of counsel, desired to know if it would answer all purposes if he sat one day before Term? He knew it was the practice to sit eight days here before Hilary Term, but the continuance of such a practice now would, in consequence of the alteration of the Term, break in too much upon the vacation, or rather leave no vacation at all.

Sir *Edward Sugden*, and the Solicitor General, and several other gentlemen within and behind the bar, said that arrangement would satisfy all parties. By the new orders, one seal at least should be held before Term, and that seal could be held on the tenth of January, the day before Term.

The tenth of January was then fixed for holding the first seal, and for the commencement of the sittings of this court. The lord chancellor said he would arrange the commencement of business in the Rolls' and Vice-Chancellor's court, with the judges of those courts; but, on the suggestion of counsel, that the master of the Rolls said he would not sit till the 24th of January, as was his former practice, and that these courts need not sit simultaneously, his lordship acquiesced, and left the arrangement just made to stand.

His *Lordship*, on rising, also addressed the bar, and said it was right then to make known the duration of his sittings before Christmas. He believed it was not usual to sit up to Christmas eve except on extraordinary and pressing occasions. His intention was to sit up to the 23d inclusive, and hoped that would be convenient to all parties? Several of the counsel present answered in the affirmative. This court, therefore, will sit up to the 23d instant.

—

ARREST ON AWARD.

On a rule, which called on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on filing common bail, the objection was to the affidavit to hold to bail. It was for money due from the defendants in a certain action on an award made, which directed the payment of a sum of 25*l.* within a month after demand. It did not go on to state that the money was payable at a day now past. It was admitted, that in actions on promissory notes and bills of exchange, such allegations were usual, but in actions on awards, it was conceived to be otherwise. It was also said, that the award ought to have been set out, to shew how the money became due. If that were necessary, it then followed that the award must be set out at full length.

It was urged on the other side that this was not necessary, but that it was necessary it should appear to have been made on such a submission as would be binding on the parties, and that it was duly made. Besides, it was necessary that the money should have been stated to be payable on the award at a day now past, otherwise it could not appear that the money was due (*a*).

The court referred to Tidd's Forms (*b*), where in an affidavit to hold to bail for money due on an award made under an order of *Nisi Prius*, where the debt was due "at a certain day now past." That form also alleged the submission by consent, and the making of the award.

Rule absolute. *Parke, J.*, M. T. 1830.

(*a*) *Driver* v. *Hood*, 7 B. and C. 494.
(*b*) Cap. 10, § 78, p. 82, ed. 9.

PRACTICE—BAIL BOND.

On shewing cause against a rule to set aside proceedings for irregularity, it appeared that the notice of bail, of justification, and of render, were wrong in the spelling of the plaintiff's surname, and a subsequent notice given, with a view of bailing out the defendant in the long vacation, exhibited a mistake of a similar kind. No opposition was made; but after all these proceedings, the plaintiff took an assignment of the bail bond, and now proceeded on it. The plaintiff had demanded a plea while the defendant was in custody, and the court held that to be a waiver of the error in the surname. The rule for setting aside the proceedings was made absolute, and as the plaintiff's attorney had known of the blunder as soon as it was committed, and had taken no notice of it, but had lain by so long, in order to take advantage of it, the rule was made absolute against him, with costs. *Willey* v. *Austin*, *C. P. M. T.* 1830.

## NOTES OF THE VACATION.

We have inserted in another part of this number an article on the proposed alterations in the Laws of Real Property, and the establishment of a General Registry of Deeds, in which the plans of the commissioners are attacked with considerable vivacity, but, we trust, in no unfair spirit of discussion.

Some of our readers may be disposed to think that the views of the learned commissioners required a more serious tone of investigation, and a statement of the objections in a more formal and argumentative manner, than our correspondent has thought proper to adopt. He has, however, displayed considerable research on the various changes under discussion, and has pointed out many topics of important consideration.

The ancient Forms of Conveyance, he contends, were sufficiently simple, and the solemnities attending their execution sufficiently public, to prevent unnecessary expense on the one hand, and any fraudulent transactions on the other. And it is argued that the deviations from these ancient modes and formalities have been occasioned by the change in the state of things, by the necessities of society, and its complicated interests and transactions.

There are some of the plans of legal reform, now in agitation, which appear to have met with the almost unanimous disapprobation of all classes of the profession; but this project of a Metropolitan Registry has not been so unfortunate. So far as we have been able to collect the opinions of practitioners in London, there appears much diversity of sentiment, but we understand that in the country the opposition to the plan is very general, and we think that the great practical experience of provincial solicitors should have due weight with the legislature. It may be observed also, that the question is one of a mixed nature, and that some practitioners do not object to an extension of the plan of Registry adopted in Middlesex and Yorkshire, (under an improved system of management,) but are opposed to other parts of the proposed alterations in the Laws affecting Real Property.

Amongst the objections which seem to be of the most serious consequence, is that of the exposure, during the present circumstances of the country, of every man's private affairs. It is true that, to the large proprietors, who do not labour under any heavy incumbrances, the publicity of their condition will inflict no injury. But the mischief to the *small proprietor*, and to the *middle classes* of the community, ought to be taken into due consideration. To these persons it is often of the greatest importance that their transactions should not be generally known; and the mere fact of a man's borrowing money (the reasons for which he cannot always explain) will often be sufficient to destroy that credit upon which his prosperity depends. We shall be glad to see a candid and satisfactory answer given to this objection.

If we were forming a code of laws in a state of society which admitted the selection of that which was the most feasible in theory, there would probably be little difference of opinion in adopting a new mode of conveying property, and authenticating the evidences of title. But we are to look at society at it is, and to bear in mind the probable consequences of overthrowing of system so long established as our own.

---

Mr. Spence has given notice of a motion that the clerk of the chapel at the Rolls, or other proper officer, lay before the House of Commons a copy of the presentment of John Shuckburgh, Thomas Powle, and others, chosen by the Right Hon. Sir Thomas Egerton, knight, lord keeper of the great seal of England, to inquire and present upon articles for the better reformation of sundry exactions and abuses supposed to be committed by officers, clerks, and ministers, in Her Majesty's High Court of Chancery, made the 8th day of March, in the 40th year of the reign of Queen Elizabeth.

---

Mr. Spence also intends to move the following resolutions, in addition to those contained in our third number, p. 47, viz.

1. That it is expedient to appoint distinct officers for taking accounts in the Court of Chancery.

2. To enable the suitors in the country to have accounts taken there, and to appoint proper officers for that purpose in each county, and to provide for such officers taking answers and evidence, and doing such other matters as are now performed by Commissioners and Masters extraordinary.

3. To assimilate the practice and proceedings in the courts of Chancery and Exchequer.

---

Sir Edward Sugden has given notice to call the attention of the House of Commons to the state of the administration of justice in the Court of Chancery, in moving for certain returns connected therewith.

## MISCELLANEA.

### CHIEF JUSTICE SAUNDERS.

His character and his beginning were equally strange. He was at first no better than a poor beggar boy, if not a parish foundling, without known parents or relations. He had found a way to live by obsequiousness, (in Clement's Inn, as I remember,) and courting the attornies' clerks for scraps. The extraordinary observance and diligence of the boy made the society willing to do him good. He appeared very ambitious to learn to write, and one of the attornies got a board knocked up at a window, on the top of a staircase, and that was his desk, where he sat and wrote after copies, of court and other hands the clerks gave him. He made himself so expert a writer that he took in business, and earned some pence by hackney writing; and thus, by degrees, he pushed his faculties, and fell to forms, and by books that were lent him, became an exquisite entering clerk; and by the same course of improvement of himself, an able counsel, first in special pleading, then at large; and, after he was called to the bar, had practice in the King's Bench court equal to any there* *. As for his parts, none had them more lively than he; wit and repartee in an affected rusticity, were natural to him; he was ever ready, and never at a loss, and none came so near as he to be a match for Sergeant Maynard. **With all this, he had a goodness of nature and disposition in so great a degree, that he may be deservedly styled a philanthrope* *. As to his ordinary dealing, he was as honest as the driven snow was white; and why not, having no regard for money, or desire to be rich? and for goodnature and condescension, there was not his fellow. I have seen him for hours and half-hours together, before the court sat, stand at the bar with an audience of students over against him, putting of cases, and debating so as suited their capacities, and encouraged their industry.** While he sat in the court of King's Bench, he gave the rule to the general satisfaction of the lawyers.—*North's Life of Lord Keeper Guilford*, ed. 1826, p. 41-5.

### LORD ELLENBOROUGH.

In a former number an instance was given of his lordship's facility in classical quotation; the following is an equally happy specimen.

*Erskine* having been bred to the sea, was thought to have the advantage over *Law* in cases of shipping and insurance, which the latter by no means liked. *Erskine* having vaunted his knowledge in a shipping case at Nisi Prius, *Law* asserted his superiority in the words of Neptune, in the first Æneid, l. 138.

"Non illi imperium pelagi sævumque tridentem,
Sed mihi sorte datum: tenet ille immania saxa,
Vestras, Eure, domos: illâ se jactet in aulâ
Æolus, et clauso ventorum carcere regnet—

Claiming to himself the empire of the sea, allowing his antagonist the dominion of the winds only.

### MR. DUNNING.

The following anecdote has been transmitted as tending to confirm the statement in a former number, that Mr. Dunning's early diffidence gave place in after years to assurance. One of the choristers of Exeter cathedral was cross-examined by this celebrated advocate, who put several questions which the witness considered impertinent. At length the witness had occasion to mention the Lord Mayor. Dunning said, "will you please to give us the gentleman's name, sir?" "His sir-name," retorted the witness, "is Crosby, and if the judge and the jury wish to know his Christian name, they have only to look in your face, where they may read it." The name was *Brass* Crosby.

### BISHOP WARBURTON ON LAW AND LAWYERS.

To suppose that a consummate knowledge of the laws by which civilized societies are governed, can give no one good quality to the mind, is making Ethics, of which public laws are so considerable a part, a very unprofitable study. The best division of the sciences is that old one of Plato, into Ethics, Physics, and Logic. The severer philosophers condemned a total application to the two latter, because they have no tendency to mend the heart, and recommended the first as our principal study, for its efficacy in this important service. And sure, if any human speculations have this effect, they must be those which have man for their object, as a reasonable, a social, and a civil being. And these are all included under ETHICS, whether you call the science *morality* or *law*. With regard to the common law of England, we may justly apply to it what Tully says of the law of the twelve tables. "Fremant omnes licet, dicam quod sentio: bibliothecas mehercule omnium philosophorum unum mihi videtur pandectarum volumen et authoritatis pondere et utilitatis ubertate superare." But the best evidence of its moral efficacy, is the manners of its professors: *and these, in every age, have been such as were the first improved, and the last corrupted.*

*Pope's Works*, 1760, vol. ix., p. 21, *note*.

### CHEAP LAW IN THE UNITED STATES.

I visited the high court of justice, where but little talent seems necessary, and where the judge upon the bench, and the counsel, and crier below, all seem upon an easy familiar footing of equality, consulting together tête-à-tête about the time of opening court next day.

* * * *

The judges here have not legal knowledge enough for their station, and of course not weight of character, or dignity sufficient, to fill it well. Counsellors Jones and Key, of "*star-bespangled banner*" fame, influence and carry their honours almost as they please. The bar is greater than the bench! Litigation frequently arises here from the imaginary independence which one man has, or fancies he has, of others, to show which, on the least slip, a suit is the certain result. *It is bad for the people that law is cheap, as it keeps them constantly in strife with their neighbours, and annihilates that sociability of feeling which so strongly characterizes the English.* From the constant litigation amongst the people of this country, arise that universal apathy, and the want of those kindly feelings of the heart, which shew themselves on all occasions in the conduct and character of the people of the old country. There were more suits for debt in Washington county court, in a late Term, (seventeen hundred,) than perhaps in all England. Further comments are left to the reader. —*Faux's Memorable Days in America.*

LONDON:
PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, DECEMBER 25, 1830. No. VIII.

———"Quod magis ad nos
Pertinet, et nescire malum est, agitamus." HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## LORD WYNFORD'S BILL,
### *For preventing the Expence and Delay of* SUITS *in the* COMMON LAW COURTS.

WE shall present our readers with a copious analysis of this important bill, and it may facilitate the comprehension of the several details, if we first state the general scope of the measure.

The object being, as the title of the bill expresses, to *prevent* (or rather we should say to *diminish*) the expense and delay of suits in the common law courts, the noble lord recommends the following means to accomplish the end in view:

1st. By compelling the admission of *documentary evidence*, under the penalty, if refused, of subjecting the party to the costs of the proof (whatever may be the result of the suit) analogous to the rule adopted in cases where the proceedings in bankruptcy are unsuccessfully resisted.

2nd. To subject both parties to an *examination on interrogatories* for the discovery of the facts or documents in dispute.

This proceeding, as well as the former, may be adopted immediately after the commencement of the action, and it is anticipated that the merits of the case may be thus ascertained in the earliest stage of the cause, and future litigation prevented. Then,

3d. The court is to be empowered, after the examination, to hold either party to *bail:* the plaintiff to secure the costs, if *he* goes on; the defendant to secure both debt and costs if he persist in his defence.

4th. If the examination terminates in reducing the matter to a *question of law*, the court shall decide it on argument—thus avoiding the expense of a trial.

5th. To enable the defendant to know immediately the ground of action, a *particular of the demand* is to be delivered with the writ.

6th. As a measure, not bearing upon the expense or delay of legal proceedings, but as a matter (so to speak) of *merciful justice*, the judges are to be empowered to allow the defendant a reasonable time for payment; and, in cases where *bona fide* improvements have been effected on the property in dispute, the successful party must make due compensation.

The following is the analysis of the bill, to which we beg to call the particular attention of the profession:

The bill recites, that it is expedient the expences of suits in the common law courts of Westminster should be diminished, and that parties should be restrained from bringing vexatious or unnecessary actions, or preventing or delaying justice by false or frivolous pleas. It is therefore proposed to be enacted,

That from the first day of the term after the passing of the Act, in all actions then depending, or which may thereafter be brought in any common law court at Westminster, any party may give to the other party a notice in the form specified in the schedule, or as near as the circumstances permit, [viz.: that he purposes to adduce in evidence the several *documents* specified, and that the same may be inspected at the time and place named in the notice:] such notice to be served on the agent or attorney of the parties suing or defending, one week before the time appointed for inspection, and that the place appointed shall not be distant more than five miles.

If any party who appears in person be a prisoner, or be confined by illness or bodily infirmity, and shall within two days after the receipt of the notice, or two days after any such person required to inspect shall have been confined, send by the post a notice in writing addressed to the person from whom the party required to inspect shall have received such notice, at the place from which such notice is dated, a letter stating the cause and place of confinement of the person so required to inspect, then the party requiring inspection shall, by notice in writing to be sent by the post, fix any day, after one day from the time such notice will be received by the course of the post by the party required to inspect, an appointment for such inspection at the place where the party to inspect shall be confined.

All appointments for the inspection of documents to be between the hours of ten and four; and that the costs attending any persons travelling, and for the inspection of documents, and the production and inspection of the same, shall abide the event of the cause, if the party or parties inspecting shall admit all that such notices shall require to be admitted.

The documents produced to be distinguished and marked as copies or as originals. The parties not

to be obliged to admit documents unless at the inspection they receive copies of the documents, if they require them, and are allowed to compare them. If the party required to inspect documents does not give a consent to admit them on the trial and the service of the notice of inspection, the other party (on proving the documents and notice of inspection) shall be entitled to the costs of travelling, of proving and making copies of the documents, &c.

An admission in writing of the whole or any part of what is required by the notice, signed by the party, his attorney or agent, the signature to such admission being proved by affidavit or by a witness, shall be deemed sufficient proof, and shall entitle any party to read any document without further proof of their execution or genuineness, or, if copies, of their being correct copies of the originals, saving all legal objections to the admissibility of such documents, as if they had been proved in court.

The judge or sheriff to certify the production of documents, in order to enable the party to receive costs.

Cause may be shown on taxation why such admission could not have been required; and no costs to be allowed of preparing to prove any such document which shall have been incurred before the admission of it was required, or after an offer in writing by the adverse party to admit such document.

The plaintiff or defendant in any action may, at any time after the writ is served on any defendant, deliver *interrogatories* to the opposite party for the discovery of any facts or documents material to the support or defence of the suit, or to the proving or reducing damages, either on a trial or on the execution of a writ of inquiry, and may require such opposite party, by notice in writing, to be examined on oath before some commissioner to be appointed by the chief justice or chief baron of the court in which the action shall be brought, to answer on oath to such interrogatories; provided, that no party shall be obliged to answer interrogatories, unless there shall be annexed an affidavit of the interrogating party, and his attorney or agent, stating that the deponents believe that the party interrogating will derive material benefit on the trial or inquiry of damages from the discovery which such party seeks; that if such party be plaintiff, that the deponents believe that such plaintiff has a good and just cause of action against the defendant; or, if the party interrogating be a defendant, that such defendant has a good defence on the merits, and that the discovery is not sought for the purpose of delay. If proved to the satisfaction of a judge that the interrogating party cannot join in such affidavit, then an affidavit to the above effect by the attorney or agent only shall be made.

The commissioner is authorized to administer oaths, and take the examination of persons in prison.

The party to be interrogated may object to any of the interrogatories which the judge may quash or amend or require an answer to, and may allow time for answering, and may stay the proceedings pending the examination. An appointment for the examination to be made by the commissioner, and one week's notice at least to be given to the party to be interrogated, of the time and place of the examination. In case of default of the party to be examined, a judgment may be signed against him for such lands, tenements, or hereditaments as the plaintiff, and the attorney or agent shall, by affidavit, prove are unjustly withheld, or for the amount of any debt that shall in the same manner be proved to be owing, or if the action be brought for damages that cannot be satisfactorily ascertained by the affidavit of the parties aforesaid, interlocutory judgment shall be signed.

The parties may have the assistance of *counsel* upon notice given; and the party interrogating, his counsel, attorney, or agent, may object to the sufficiency or relevancy; and the party interrogated, his counsel, attorney, or agent, may support the sufficiency or relevancy of any answer that may be given; and the examiner shall decide, subject to review by any judge of the court or by the whole court.

The commissioner may explain to the party the meaning and effect of the interrogatories; but no question not contained in the interrogatories shall be put, unless it shall appear to the commissioner, from any answer or answers given to any interrogatory or interrogatories, that it shall be necessary that certain questions should be put to the party interrogated on any answer or answers given, in which case the commissioner may put such questions on the answers given as he may think proper; which questions so put by the commissioner, and the answers given to such questions, shall be reduced to writing, and added to the examination.

The parties, or the attorney, or agent, (the party interrogated having first withdrawn,) may suggest to the examiner any explanation of the interrogatories, or any questions to be put on any answers given, or any objection to the questions put by the commissioners, or to the answers given to such questions; and the opposite party or parties, or the counsel, attorney, or agent, of such party or parties, shall be heard in answer to such suggestions or objections; and the examiner shall, according to his discretion, adopt or reject such suggestions or objections.

No party interrogated shall be obliged to answer any question, or to produce any document, which shall have a tendency to prove any criminal charge or penalty, or to disclose the title to any estate in respect whereof there is no privity between the party to be interrogated, and the party interrogating, or to disclose the names of the witnesses by whom the party proposes to prove his case; and the court or judge may impose terms and conditions to prevent improper use being made of the examination.

If the party is out of the jurisdiction of the court, a *commission* may be issued for his examination. The commissioner to fix the time and place of examination. Persons swearing falsely to be indicted for perjury. On reading a party's examination against him he may require that the whole of such examination shall be read.

An appeal to be allowed from the examiner to a judge, and from the judge to the court, who shall do what *law and justice* requires; and the court may require further examination.

The court empowered, upon reading the examinations, to require the *plaintiff* to put in *bail* for the payment of the *costs* of the action, or to order judgment to be entered for the plaintiff, unless the *defendant* shall put in *bail* for the amount of the *debt* and £100 *costs*; or, if the action is for the recovery of lands, as a security for the costs of the action and the delivery of the lands. The orders of the judge to be subject to the review of the court.

Where the facts are admitted, and the case turns on a *question of law*, the court shall, after hearing the questions argued, give judgment for the plaintiff or defendant, but the party may require the court to put the facts on the record in the manner most convenient and least expensive; and the case may be removed into a court of error, and decided as if the judgment

had been given on a special verdict or demurrer. Execution on such judgments shall not be stayed, unless the party shall, within four days, justify bail to such amount as the court may require.

A particular of the plaintiff's claim, or land or goods demanded, to be given to the sheriff's officer, who shall deliver the same to the defendant, upon service, or execution of writs; and, if not delivered, the proceeding may be set aside, with costs to be paid by the attorney, or the sheriff's officer, as the default may be.

Defendants may, within ten days from the time of arrest, or being served with process, take out a summons to stay the proceedings on the payment of the debt, or delivering possession of the lands or goods for which the action is brought, at such time as the judge shall order; and such judge shall have authority, on the defendants, within four days justifying bail, for the payment of the debt, or giving such other security as shall be satisfactory to the judge for the payment of the debt and costs, or delivery of the possession of the property, and on such terms as he shall think reasonable, to give any time not exceeding three months for the payment of the debt and costs, or delivering up of the possession of the lands, goods, &c.

Judge empowered to stay execution on judgment against parties who have *bona fide* expended money in improvements, unless the plaintiff will give security to pay what is reasonable and just; the defendant also giving security to leave the property in as good a state as it was before such improvements.

## EMOLUMENTS OF ATTORNIES.

*To the Editor of the Legal Observer.*

——————— Audi,
Nulla unquam de morte hominis cunctatio longa est.
Juv. Sat. vi. l. 219.

Sir,—A strong prejudice prevails against the department of the legal profession to which I belong, regarding the amount of the profits of its members. It is assumed that they are the cause of the great expense of law proceedings. These erroneous notions are likely to gain strength, by the speech imputed to the Lord Chancellor, on introducing his Bill for the establishment of Local Courts. I have, therefore, taken the trouble to dissect several bills of costs, which have been taxed by the master, in actions in which I was the attorney, and I send the details of one of them for the information of yourself and the public, and "*ex uno disce omnes.*"

Out of £54 10 costs, allowed me in a hard-fought action, I actually paid out of my own pocket, £32 4 10, leaving me £22 5 2 only, after anxiously conducting the cause through all its stages for twelve months. I subjoin my analysis, and can furnish you, if required, with the names of the individuals who receive the fees, in order to show in what manner the law proceedings are burdened by payments to persons who take no share in the discharge of the duties, labours, and responsibilities of the legal practitioner. This is a subject in which every one who has any thing to do with the law, must be highly interested; and the following table will show where the real evil lies, and where reform may be most effectually and most beneficially applied, without the inconvenience and danger of altering the existing institutions of the country:

| | £ | s. | d. |
|---|---|---|---|
| Bill of Middlesex | 0 | 0 | 6 |
| Rule to Plead | 0 | 0 | 6 |
| Entering Issue | 0 | 9 | 2 |
| Docket | 0 | 3 | 0 |
| Passing Record and Sealer | 1 | 8 | 6 |
| Venire and Distringas | 0 | 1 | 2 |
| Returning | 0 | 4 | 6 |
| Setting down Cause | 0 | 11 | 8 |
| Resealing Jury Process | 0 | 1 | 10 |
| Repassing Record | 0 | 6 | 6 |
| Marshal on Remanet | 0 | 6 | 0 |
| Resealing Record, second sitting | 0 | 0 | 6 |
| Marshal | 0 | 4 | 0 |
| Resealing Record, third sitting | 0 | 0 | 6 |
| Marshal | 0 | 4 | 0 |
| Resealing Record, sitting after Term | 0 | 0 | 6 |
| Marshal | 0 | 4 | 0 |
| Signing two Subpœnas | 0 | 3 | 4 |
| Sealing Ditto | 0 | 1 | 2 |
| Conduct Money to Witnesses | 0 | 7 | 0 |
| Fee Senior Counsel £4 6 6 | | | |
| Consultation Ditto 2 9 6 | | | |
| Fee Junior Counsel 3 5 6 | | | |
| Consultation Ditto 2 4 6 | | | |
| | 12 | 6 | 0 |
| Court Fees, as follow: | | | |
| Marshal | 1 | 0 | 0 |
| Clerk of Nisi Prius | 0 | 18 | 0 |
| Crier | 0 | 17 | 0 |
| Jury, Hall-keeper, Tipstaff, Summoning Officer, Bar-keeper | 1 | 7 | 0 |
| Witnesses | 6 | 15 | 0 |
| Coffee-house Expenses | 3 | 2 | 6 |
| Rule for Judgment | 0 | 0 | 6 |
| Delivering the Record | 0 | 0 | 6 |
| Taxing | 0 | 5 | 0 |
| Stationery | 0 | 15 | 0 |
| | £32 | 4 | 10 |

From this it will seen, that the fees paid to counsel in this cause were £12 6, and to public officers, &c. £9 6 4; the greater part of which last sum was for business done by me, in my office, as the attorney, and for which I was allowed; so that the costs are swelled by the double payment before trial of £4 18 4, and, at the termination, of £9 6 4.

But it has been the fashion of late years to decry attornies—to attribute to them every mischief and evil arising from the mal-administration of the law.—Is the expense of law proceedings the subject of discourse? the extortion of attornies is pronounced to be the cause.—Is the delay of justice spoken of? it arises, say one and all, from the interested motives of lawyers.—Does a man lose an action which he has, against the advice of his attorney, carried to trial, and for the institution of which he had no earthly ground? again, it is the lawyer's fault. Thus manifold are the sins imputed to attornies. Every fresh conversation begets new subjects of complaint, and each day strengthens the unjust prejudice. What was at first doubted, is, by dint of continual repetition, looked upon as unquestion-

ably true; and the lawyer is considered by many as evil personified. This prejudice has been carefully fostered and disseminated by those whose duty it was to disabuse the public mind—and why? to keep in the background the real offenders. The consequence has been, that attornies have been considered as the *originators* of those very abuses, of which they, in common with their clients, have been the *victims*, and which they could neither prevent nor control.

Had the curse pronounced against the descendants of Ishmael extended to them, they could not be a more persecuted race. If they happen to complain of their grievances, they are met with scorn and derision; and the expression of honest indignation is denounced as hypocritical and groundless. Attornies are not placed in elevated and influential situations, where they may peculate with impunity, abuse their trust in the most perfect security, and complain, with a studied appearance of innocence, of well founded accusations, which they possess the power of voting frivolous and untrue. They have, however, the satisfaction ever attendant upon the discharge of their duty—the approbation of their own consciences, in spite of the vexations which meet them at every step. Unhappily for them, they are the only persons with whom the public has to do. They are the only persons consulted—the only persons on whom care, and anxiety, and responsibility devolve. The client knows nothing, and will not be informed, of the idlers who batten on the spoil to which accidental circumstances have entitled them—*who receive their money at all events*, for the attorney pays at the time, and runs the risk of being reimbursed. No! the client only knows his attorney in the matter: if the business in which he employs him should end successfully, it is only justice done—the services of the attorney are considered nothing;—if otherwise, the attorney is the cause of the failure.

The bill of costs is paid, if the parties be solvent, by his own client, or by the adverse party, as the case may be:—if by his own client, *he* looks at its gross amount, and remarks that it is "a good deal of money;" if the professional man attempt to explain how little of it comes into his own pocket, though he has had all the work to do,—how much is paid to indolence,—he is heard with incredulity, and his statement considered as an ingenious excuse for his own rapacity,—as an attempt to blind his client to the enormity of professional profits. On the other hand, if the costs are paid by the adverse party, the attorney is stigmatized as a trickster, and a perverter of justice. Thus he, who is often forced to conduct actions and defences against his decided conviction, and which he has expressed to his client, becomes, after the trial, the object upon which all the revengeful and bad passions are let loose. The hostility which existed between the parties to the suit is directed into a new channel, and the lawyer has to stand the brunt of the most false and malignant attacks. Add to this, that in the conduct of the business he has, as I have shewn, to advance considerable sums out of his own pocket, which, if both plaintiff and defendant happen to be insolvent, he irrecoverably loses. Nor is this all, for he is subjected to an action for negligence, if he commit any error. Consider these circumstances, and, I think, you will feel satisfied that his is not an enviable situation.

Again, let it be remembered, that when a young man is about to be articled, his friends have to pay to government a stamp duty of 120l., besides a premium never less than 150l. or 200l. to the gentleman with whom he is placed. Five years of unremitting and unremunerated labour and study succeed. At their expiration, before he can practise, 40l. more must be paid for his admission into the several courts. If he intend to practise in London, he is taxed for his certificate, 6l. per annum for the first three years, 12l. per annum ever afterwards: if in the country, 4l. and 8l. Thus then, from the very outset, an impressive example of extortion is presented to his view. Had it been intended that he should be a bird of prey, better means of instruction could not have been resorted to: he is nearly stripped of his feathers, before he has learned to fly.

Consider all this, and consider, too, the confidence which persons are obliged to place in attorneys, and the valuable property they feel it necessary to entrust to their care. Consider that all men are frail, and extremely liable to fall into temptation;—note the few instances of betrayal of confidence, abuse of trust, and fraudulent appropriation of their clients' property, which the utmost efforts of the most determined hostility can produce,—and then pronounce upon the moral character of attornies.

I am, sir,
Your most obedient servant,
An Attorney.

*December* 9th, 1830.

*** Our correspondent has also addressed us, in the letter from which the preceding extracts have been made, on the project of the *Local Courts*; but he has not entered into that question with sufficient fulness to render the quotation useful. He will observe, also, that our recent Numbers have somewhat anticipated his intentions.

## RECENT STATUTES.

*Analysis of Sir E. B. Sugden's Act, intituled "an Act for Consolidating and Amending the Laws relating to Property belonging to Infants, Feme Covert, Idiots, Lunatics, and Persons of unsound Mind."* Royal assent, July 23, 1830.

This Act is chiefly a consolidation Act: some new provisions are, however, inserted. Thus, by sec. 17, the court of Chancery may authorise leases to be made of lands belonging to infants, when it is for the benefit of the estate. By sec. 18, if persons bound to renew are out

of the jurisdiction of the court, the renewals may be made by a person appointed by the court of Chancery, in the name of the person who ought to have renewed. By sec. 27 committees of lunatics, by direction of the Lord Chancellor, may convey lands in performance of contracts. These are the principal alterations; some others, more minute, will be pointed out as we proceed.

Sec. 1 repeals all former Acts except as to proceedings which shall have been commenced before the passing of the Act, (23d July, 1830,) and which may be proceeded in according to this Act, or the repealed Acts, as shall be thought fit.

Sec. 2 provides rules for the interpretation of the Act; certain general words are used throughout the Act which are to be understood to apply to all matters and things of the same class, "those relating to land, to any manor, messuage, tenement, hereditament, or real property of whatsoever tenure, and to property of every description transferable otherwise than in books kept by any company or society, or any share thereof or charge thereon, or estate or interest therein; those relating to stock, to any fund, annuity, or security transferable in books kept by any company or society, or to any money payable for the discharge or redemption thereof, or any share or interest therein; those relating to dividends, to interest or other annual produce; those relating to the Bank of *England*, to the *East India* Company, *South Sea* Company, or any other company or society established or to be established; those relating to a conveyance, to any release, surrender, assignment, or other assurance, including all acts, deeds, and things necessary for making and perfecting the same; those relating to a transfer, to any assignment, payment, or other disposition; and those relating to a lunatic, to any idiot or person of unsound mind or incapable of managing his affairs; unless there be something in the subject or context repugnant to such construction; and whenever this Act, in describing or referring to any person, or any land, stock, conveyance, lease, recovery, matter, or thing, uses the word importing the singular number of the masculine gender only, the same shall be understood to include and shall be applied to several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, and several lands, stocks, conveyances, leases, recoveries, matters, or things, as well as one land, stock, conveyance, lease, recovery, matter, or thing respectively, unless there be something in the subject or context repugnant to such construction."

Sec. 3 enacts, that after the passing of this Act, where any person being under the age of twenty-one years, or being a feme covert or lunatic, shall be entitled to be admitted tenant of any copyhold lands, such person, in his own proper person, or being a feme covert by her attorney, or being an infant by his guardian or attorney, as the case may require, or being a lunatic by the committee of his estate, shall appear at one of the three next courts which shall be kept for the manor whereof such land shall be parcel, and shall there offer himself or herself to the lord, or his steward, to be admitted tenant to the said land. (See 9 Geo. I. c. 29, s. 1.)

Sec. 4 enacts, that it shall be lawful for any feme covert, and for any infant who shall have no guardian, by writing, to appoint an attorney for the purpose aforesaid.

Sec. 5 enacts, that in default of such appearance of any infant, feme covert, or lunatic, it shall be lawful for the lord of every such manor, or his steward, after such three several courts have been duly holden for such manor, and proclamations in such several courts been regularly made, to appoint, at any subsequent court to be holden for such manor, any fit person to be attorney for every such infant, feme covert, or lunatic, for that purpose only, and by such attorney to admit every such infant, feme covert, or lunatic to the said land, and upon every such admittance to impose such fine as might have been legally imposed if such infant had been of full age, or if such feme covert had been unmarried, and if such lunatic had been of sane mind (See 9 Geo. I. c. 29, s. 1.)

Sec. 6 enacts, that upon every such admittance of any infant, feme covert, or lunatic, the fine imposed shall be demanded by the bailiff or agent of the lord of such manor; and, if the fine so imposed be not paid to such lord within three months after such demand made, then it shall be lawful for the lord of such manor to enter into and upon the copyhold land to which any such infant, feme covert, or lunatic, shall be so admitted, and to hold and enjoy the same until such lord shall be fully paid and satisfied, such fine, together with all reasonable costs; but of all rents, issues, and profits, to be received by such lord, such lord shall yearly render a true account, and shall pay the surplus, if any, to such person as shall be entitled to the same. (See 9 Geo. I. c. 29, s. 2.)

Sec. 7 enacts, that as soon as such fine, and the costs shall be paid, then it shall be lawful for such infant, feme covert, lunatic, or other person entitled thereto, or the guardian of such infant, the husband of such feme covert, or the committee of such lunatic, to take possession of, and hold the said copyhold land, according to the estate or interest such infant, feme covert, or lunatic, shall be lawfully entitled to therein; and the lord of such manor shall be, and is hereby required, in any of the said cases, to deliver possession thereof accordingly. (See 9 Geo. I. c. 29, s. 3.)

Sec. 8 enacts, that where any infant, feme covert, or lunatic, shall be admitted to any copyhold land, if the guardian of such infant, or husband of such feme covert, or committee of such lunatic, shall pay to the lord of any manor the fine legally imposed upon such admittance, then it shall be lawful for every such guardian, husband, or committee, to enter into and enjoy the said land to which such infant, feme covert, or lunatic, shall have been so admitted, until thereby such guardian of such infant, or husband of such feme covert, or committee of such lunatic, shall be fully satisfied all such sums of money paid.

Sec. 9 enacts, that after the passing of this Act, no infant, feme covert, or lunatic, shall forfeit any copyhold land for his or her neglect, or refusal to come to any court, to be kept for any manor whereof such land is parcel.

Sec. 10 enacts, that if the fine imposed in any of the cases herein-before mentioned, shall not be warranted by the custom of the manor, then such infant, feme covert, or lunatic, shall be at liberty to controvert the legality of such fine.

Sec. 11 enacts, that it shall be lawful for any person, and for every feme covert, being solely and secretly examined, to appoint any person to be his or her attorney, for the purpose of surrendering the land, of which a common recovery shall be proposed to be suffered, to the use of any person, to make him tenant to the plaint, and to do all other lawful and necessary acts for the suffering of such common recovery. (See 47 Geo. III. c. 8, s. 12.)

Sec. 12 enacts, that in all cases where any person being an infant, or a feme covert, shall become entitled to any lease or leases, it shall be lawful for such infant, or for his guardian, and for such feme covert, or any person on her behalf, to apply to the court of Chancery in England, the courts of equity of the counties palatine of Chester, Lancaster, and Durham, or the courts of great session of the principality of Wales respectively, as to land within their respective jurisdiction, by petition or motion in a summary way; and by the order and direction of the said courts respectively such infant or feme covert, or his guardian, or any person appointed in the place of such infant or feme covert by the said courts respectively, shall be enabled from time to time, by deed or deeds, to surrender such lease or leases, and accept and take, in the place, and for the benefit of such infant, or feme covert, one or more new lease or leases of the premises comprised in such lease, for such number of lives, or for such term of years determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned, or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise as the said courts shall respectively direct. (See 29 Geo. II. c. 31, s. 1.)

Sec 13 enacts, that where any person, being lunatic, shall become entitled to any lease or leases, it shall be lawful for the committee of the estate of such person to apply to the Lord Chancellor of Great Britain, by petition, or motion in a summary way; and, by the order of the said Lord Chancellor, such committee shall and may be enabled, from time to time, by deed or deeds, in the place of such lunatic, to surrender such lease or leases, and accept and take, in the name and for the benefit of such lunatic, one or more new lease or leases of the premises comprised in such lease or leases, for such number of lives, or for such term of years, absolute or determinable as aforesaid, as was or were mentioned or contained in the lease or leases so surrendered at the making thereof respectively, or otherwise, as the said lord chancellor shall direct.

Sec. 14 enacts, that every sum of money paid by any guardian, trustee, or committee, as a fine for the renewal of any such lease, and all reasonable charges incident thereto, shall be paid out of the estate or effects of the infant or lunatic for whose benefit the lease shall be renewed, or shall be a charge upon the leasehold premises, together with interest for the same, as the said Lord Chancellor shall direct; and as to leases to be made upon surrenders by femes covert, unless the fine of such lease and the reasonable charges shall be otherwise paid the same, together with interest, shall be a charge upon such leasehold premises, for the benefit of the person who shall advance the same. (See 29 Geo. II. c. 31, s. 2.)

Sec. 15 enacts, that every lease to be renewed as aforesaid, shall be to the same uses and trusts as the lease to be from time to time surrendered, as aforesaid, would have been subject to, in case such surrender had not been made. (See 29 Geo. II. c. 31, s. 3.)

Sec. 16 enacts, that where any person, being an infant, or a feme covert, might, in pursuance of any covenant or agreement, if not under disability, be compelled to renew any lease, it shall be lawful to and for such infant, or his guardian in the name of such infant, or such feme covert, by the direction of the court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, or of such feme covert, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make a new lease of the premises comprised in such lease, for and during such number of lives, or for such term or terms determinable upon such number of lives, or for such term or terms of years absolute, as was or were mentioned in the lease so surrendered at the making thereof, or otherwise, as the court by such order shall direct. (See 11 Geo. III. c. 23, s. 1.)

Sec. 17 enacts, that where any person, being an infant, shall be seized or possessed of any land in fee or in tail, or any leasehold land for an absolute interest, and it shall appear to the court of Chancery to be for the benefit of such person that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines, or otherwise improving the same, or for farming or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the land of such persons respectively, according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years, and subject to such rents and covenants as the said court of Chancery shall direct; but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease; and the leases, and covenants and provisions therein, shall be settled and approved of by a master of the said court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the master's office until such infant shall attain twenty-one, but with liberty to proper parties to have the use thereof, if required, in the meantime, for the purpose of enforcing any of the covenants therein contained; provided that no lease be made of the capital mansion-house and the park and grounds respectively held therewith for any period exceeding the minority of any such infant.

Sec. 18 enacts, that where any person, who, in pursuance of any covenant or agreement in writing, might, if within the jurisdiction of the court of Chancery, be compelled to execute any lease by way of renewal, shall not be within the jurisdiction of the said court, it shall be lawful for the said court by an order to be made upon the petition of any person, or any of the persons entitled to such renewal, (whether such person be or be not under any disability,) to direct such person as the said court shall think proper to appoint for that purpose, to accept a surrender of the subsisting lease, and make a new lease in the name of the person who ought to have renewed the same; but, in every such case, it shall be in the discretion of the said court of Chancery to direct a bill to be filed to establish the right of the party seeking the renewal.

Sec. 19 enacts, that where any person, being lunatic, has a right, or in pursuance of any covenant or agreement, might, if not under disability, be compelled to renew any lease, it shall be lawful to and for the committee of the estate of such lunatic, in the name of such lunatic, by the direction of the Lord Chancellor, to be signified by an order, to be made in a summary way, upon the petition of such committee, or of any person entitled to such renewal, from time to time to accept of a surrender of such lease, and to make to any person a new lease of the premises comprised in such lease, to be surrendered by virtue of this Act, for and during such number of

lives, or for such term or terms of years determinable upon such number of lives, or for such term or terms of years absolute, as were mentioned or contained in such lease so surrendered at the making thereof, or otherwise, as the Lord Chancellor, intrusted as aforesaid, by such order shall direct; and this provision shall extend as well to cases where the lunatic shall not be compellable to renew, but it shall be for his benefit to do so, as to cases where a renewal might be effectually enforced against the lunatic if of sound mind.

Sec. 20 enacts, that no renewed lease shall be executed by virtue of this Act, in pursuance of any covenant or agreement, unless the fine be first paid, and the counterparts of every renewed lease to be executed by virtue of this Act shall be duly executed by the lessee.

Sec. 21 enacts, that all fines which shall be paid on account of the renewal of any lease, after a deduction of all necessary expenses, shall be paid, if such renewal shall be made by or in the name of an infant, to his guardian, and be applied and disposed of for the benefit of such infant, in such manner as the said court shall direct; if such renewal shall be made by a feme covert, to such person or in such manner as the court shall direct for her benefit; if such renewal shall be made in the name of any person out of jurisdiction as aforesaid, to such person or in such manner, or into the court of Chancery to such account, and to be applied as the said court shall direct; and if such renewal shall be made in the name of a lunatic, to the committee of the estate of such lunatic, and be applied and disposed of for the benefit of such lunatic, in such manner as the Lord Chancellor, intrusted as aforesaid, shall direct; but upon the death of such lunatic, all such fines shall, as between the representatives of the real and personal estate of such lunatic, be considered as real estate, unless such lunatic shall be tenant for life only, and then the same shall be considered as personal estate. (See 11 Geo. III. c. 20, s. 3.)

Sec. 22 continues the Irish Act, 11 Anne, c. 3, unaltered.

Sec. 23 enacts, that where any person, being lunatic, shall be seised or possessed of any land, with power of granting leases and taking fines, reserving small rents on such leases, for one, two, or three lives in possession or reversion, or for some number of years determinable upon lives, or for any term of years absolutely, such power of leasing may be executed by the committee of the estate of such person, under the direction and order of the lord chancellor. (See 43 Geo. III. c. 75, s. 3.)

Sec. 24 enacts, that where any person, being a lunatic, is or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the lord chancellor to be for the benefit of such person that a lease or under-lease should be made of such estates for terms of years, for encouraging the erection of buildings therein, or for repairing buildings actually being thereon, or otherwise improving the same, or for farming or other purposes, it shall be lawful for the lord chancellor to order and direct the committee of the estate of such lunatic to make such lease. (See 43 Geo. III. c. 75, s. 4.)

By sec. 25, so much of 1 Geo. I. c. 10, s. 9, as enacts that agreements of guardians shall bind infants, is repealed, and the next section substituted in its stead.

Sec. 26 enacts, that the guardian of any infant, with the approbation of the court of Chancery, to be signified by an order to be made on the petition of such guardian in a summary way, may enter into any agreement on behalf of such infant which such guardian might have entered into by virtue of the said last-recited Act, as if the same had not been repealed; and the committee of the estate of any lunatic, with the approbation of the lord chancellor, intrusted as aforesaid, to be signified by an order to be made on the petition of such committee in a summary way, may enter into any agreement for or on the behalf of such lunatic which the guardian of an infant might have entered into on the behalf of such infant by virtue of the said last-recited Act, if the same had not been repealed.

Sec. 27 enacts, that when any person who shall have contracted to sell, mortgage, let, exchange, or otherwise dispose of any land, shall afterwards become lunatic, and a specific performance of such contract shall have been decreed by the court of Chancery, either before or after such lunacy, it shall be lawful for the committee of the estate of such lunatic, in the place of such lunatic, by the direction of the lord chancellor, to be signified by an order to be made on the petition of the plaintiff or any of the plaintiffs in such suit, to convey such land, in pursuance of such decree, to such person and in such manner as the said lord chancellor, intrusted as aforesaid, shall direct; and the purchase money, or so much thereof as remains unpaid, shall be paid to the committee of such lunatic.

Sec. 28 enacts, that it shall be lawful for the lord chancellor to order any land, of which any lunatic shall be seised or possessed, to be sold or mortgaged for the purpose of raising money for payment of the debts of such lunatic, the discharge of any incumbrances on his estates, the costs of applying for and obtaining the commission of lunacy and in opposition thereto, and the costs of such sales and mortgages, or for any of such purposes as aforesaid, as such lord chancellor shall direct; and that the monies arising from any such sale or mortgage, may be applied in payment of the debts of such lunatic, the discharge of any incumbrances on his estates, the costs of applying for and obtaining the commission of lunacy and in opposition thereto, and the costs of such sales and mortgages, in such manner as the said lord chancellor shall direct; and to direct the committee of the estate of such person to execute, in the place of such person respectively, conveyances of the estates so to be sold, mortgaged, incumbered, or disposed of, and to do all such acts as shall be necessary to effectuate the same, in such manner as such lord chancellor, intrusted as aforesaid, shall direct. (See 43 Geo. III. c. 75, s. 1, and 9 Geo. IV. c. 78, s. 1.)

Sec. 29 enacts, that on any sale or mortgage, the person whose estate shall be sold or mortgaged, and his or her heirs, executors, administrators, and assigns, shall have the like interest in the surplus which shall remain, after answering the purposes aforesaid, of the money raised by such sale or mortgage, as he, she, or they would have had in the estate, if no such sale or mortgage had been made; and such monies shall be of the same nature and character as the estate so sold or mortgaged, and it shall be lawful for the said lord chancellor to make such orders, and to direct such acts and deeds to be done and executed, as shall be necessary for carrying the aforesaid objects into effect, and for the due application of such surplus monies. (See 9 Geo. IV. c. 78, s. 2, and 43 Geo. III. c. 75, s. 2.)

Sec. 30 enacts, that nothing in this Act contained shall extend to subject any part of the estates of any lunatic, to the debts or demands of his creditors, otherwise than as the same are now subject and liable by due course of law, but only to authorise the lord chancellor to make order in such cases

as are herein-before mentioned, when the same shall be deemed just and reasonable, or for the benefit or advantage of such lunatic. (See 43 Geo. III. c. 75, s. 6.)

Sec. 31 enacts, that every surrender and lease, agreement, conveyance, mortgage, or other disposition respectively, granted and accepted, executed and made, by virtue of this Act, shall be and be deemed as valid to all intents and purposes as if the person by whom, or in whose place, or on whose behalf, the same respectively shall be granted or accepted, executed and made, had been of full age, unmarried, or of sane mind, and had granted, accepted, made, and executed the same; and every such surrender and lease respectively made and accepted by or on the behalf of a feme covert shall be valid, without any fine being levied by her.

Sec. 32 enacts, that it shall be lawful for the court of Chancery, by an order to be made on the petition of the guardian of any infant in whose name any stock shall be standing, and who shall be beneficially entitled thereto, or if there shall be no guardian, by an order to be made in any cause depending in the said court, to direct all or any part of the dividends due or to become due in respect of such stock, or any such sum of money, to be paid to any guardian of such infant, or to any other person, according to the discretion of such court, for the maintenance and education of such infant, such guardian or other person to whom such payment shall be directed to be made being named in the order directing such payment. (See 6 Geo. IV. c. 74, s. 12.)

Sec. 33 enacts, that where any stock shall be standing in the name of any lunatic, who shall be beneficially entitled thereto, or shall be standing in the name of any committee of the estate of a lunatic, in trust for or as part of his property, and such committee shall have died intestate, or shall himself become lunatic, or shall be out of the jurisdiction of, or not amenable to the process of the court of Chancery, or it shall be uncertain whether such committee be living or dead, or such committee shall neglect or refuse to transfer such stock, and to receive and pay over the dividends thereof, to a new committee, or as he shall direct, for the space of fourteen days next after a request in writing for that purpose shall have been made by any new committee, it shall be lawful for the lord chancellor, upon the petition of the committee of the estates of the person being lunatic, or of the person reported by the master to whom the matter is referred as a proper person to be such committee, although such report shall not have been confirmed, to direct such person as such lord chancellor shall think proper to appoint for that purpose to transfer such stock to or into the name of any new committee or in the name of the accountant-general of the said court, or otherwise, and also to receive and pay over the dividends thereof, or such sum or sums of money, in such manner as such lord chancellor shall think proper. (See 6 Geo. IV. c. 74, s. 13.)

Sec. 34 enacts, that where any stock shall be standing in the name of any person residing out of England, it shall be lawful for the lord chancellor, upon petition, and proof being made to his or their satisfaction that such person has been declared lunatic, to direct any person whom such lord chancellor shall think proper to appoint for that purpose to transfer such stock, into the name of any curator or otherwise, and also to receive and pay over the dividends thereof, as such lord chancellor shall think fit. (See 6 Geo. IV. c. 74, s. 14.)

Sec. 35 enacts, that the court of Chancery may order the costs of the petitions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid out of the lands or stock or the rents or dividends in respect of which the same respectively shall be made. (See 6 Geo. IV. c. 74, s. 17.)

Sec. 36 enacts, that the powers given by this Act to the court of Chancery in England shall extend to all land and stock within any of the dominions, plantations, and colonies belonging to his majesty, except Scotland, and sec. 39 gives similar powers to the lord chancellor.

Sec. 37 gives the same powers as are given to the court of Chancery to the court of Exchequer.

Sec. 38 enacts, that the powers given by this Act to the courts of Chancery and Exchequer in England shall be exercised in like manner by the courts of Chancery and Exchequer in Ireland, with respect to land and stock in Ireland, and sec. 40 gives similar powers to the lord chancellor of Ireland.

Sec. 41 commissions under the great seal of Great Britain are to be transmitted and entered of record in Ireland, and acted on there, and vice versâ. (See 9 Geo. IV. c. 78.)

Sec. 42 gives the powers given to the lord chancellor to extend to the lord keeper and commissioners.

Sec. 43 enacts, that in all cases in which orders shall be made in pursuance of this Act for the transfer of stock, the person to be named in such order for making such transfer shall be some officer of such company or society in whose books such transfer shall be made; and where such transfer shall be directed to be made in books kept by the governor and company of the Bank of England, such officer shall be the secretary or deputy secretary, or accountant general or deputy accountant general, for the time being of the said governor and company. (See 6 Geo. IV. c. 74.)

Sec. 44 gives an indemnity to the Bank and other companies.

## LORD TENTERDEN'S JUDGMENT AND EXECUTION BILL.

*To the Editor of the Legal Observer.*

Mr. Editor,—Your correspondent, "A Practical Man," in your number of Saturday last, has made some judicious remarks on the bills lately introduced into parliament by Lord Tenterden, relating to "Arbitration," and the examination of "Witnesses,"(*a*) but I cannot at all coincide with the view he takes of the "Judgment and Execution Bill." If a question can be raised as to the comparative advantages to be derived from these Bills, I do not hesitate to say, that the latter (as it now stands, and without any modification,) will be most serviceable, since it will do away with the gross absurdity which exists under the present practice, that a plaintiff can sometimes enforce his execution in four days from the time he has obtained a verdict; while, should he have been unfortunate enough to have obtained that verdict in August, he will have to wait as many months before he can derive any benefit from it. Your correspondent says, "Where a defendant conscientiously believes he has a righteous defence, what will be his situation if a verdict *contrary*

(*a*) Page 89.

*to his expectation* be found against him?" and that "*not expecting* a verdict against him, a defendant will not, and cannot be prepared to pay the amount." In answer to this, I conceive it only necessary to observe, that the commencement of the action is, or ought to be, a sufficient intimation to a defendant, that a verdict *may*, (considering the proverbial uncertainty of the law,) however good his defence, be given against him, and that, therefore, he will always have a month or six weeks, and frequently three months, to prepare himself for that *possible* contingency.

The argument of your correspondent would lead us to believe, that the "distress and misery, and "dreadful consequences," apprehended by him, must have been frequently felt by defendants under the existing practice, and yet I think I may fearlessly aver that such has not been the case; the inconvenience and loss in consequence of the delay, has been felt (as stated in the preamble of the Bill,) by the unfortunate plaintiffs.

The proposed Bill, in its present form will, I verily believe, be the means of "bringing to book" many an unprincipled defendant, and cannot, by possibility, injure or inconvenience an honest one.

I am, sir,
Your obedient servant,
*Dec.* 13, 1830. A CITY PRACTITIONER.

## OLD LOCAL COURTS.

IN legislative innovations, it is important to ascertain with accuracy the state of things previously existing, so that either the new institutions may be adapted to co-operate with the old ones, or that the ground may be cleared for the former by the abolition of the latter. With reference to the proposed local courts, it should be recollected that the country is already covered with courts of local jurisdiction. *These must, of course, be abolished before the new ones come into operation.* There is no place for the latter until the former are cleared away. The number and variety of these courts, the antiquity of many of them, the important private as well as public interests connected with some of them—all conspire, *at the present time*, to elevate them into importance. It may be presumed, therefore, that a brief sketch of their history, nature, and authority, will not be uninteresting.

In former times, the great court for civil business was the COUNTY COURT, held once every four weeks. Here the sheriff presided; but the *suitors of the court*, as they were called—that is, the freemen or landholders of the county, were the judges, and the sheriff was to execute the judgment, assisted, if need were, by the bishop (*a*).

At this day the County court is still a court incident to the jurisdiction of the sheriff. It is *not a court of Record*, but may hold pleas of debt or damages, under the value of forty shillings. It may also hold plea of many real actions, and of all personal actions, to any amount, by virtue of a writ of *justicies*, which empowers the sheriff to do the same justice in his County court, as might otherwise be had at Westminster. The freeholders of the county are the jurors and real judges, and the sheriff is the presiding and ministerial officer. By 2 Edw. VI. c. 25, no County court shall be adjourned longer than *one month*, consisting of twenty-eight days. Mr. Reeves, in his History of the Common Law (*b*), observes that in the County court were holden pleas upon writs of *justicies*, as *de servitiis et consuetudinibus*, of debt, and an infinity of other causes; among which were suits *de verito namio*, and pleas *de nativis*, unless it became an issue, whether *free* or *not*, and then the inquiry stood over until the coming of the king's justices; the question of a man's liberty being thought of too high consideration to be intrusted to an inferior jurisdiction.

The HUNDRED COURT is held for the inhabitants of a particular hundred, or wapentake, as it is called in the northern counties, in the same manner as the County court is held for the inhabitants of the county. The freeholders are here also the judges, and the steward is the presiding officer or registrar. It is *not a court of Record*, but resembles the County court in all points, except that its jurisdiction cannot be enlarged by the special writ of *justicies*. This court is said, by Sir Edward *Coke* (*c*), to have been derived out of the County court, for the ease of the people, that they might have justice done to them at their own doors, without much charge or loss of time; but, says Blackstone (*d*), its institution was probably coeval with that of hundreds themselves, which were introduced, though not invented, by ALFRED THE GREAT, being derived from the polity of the ancient Germans; in describing whose manners, Tacitus says, each village is divided into hundreds, and are so called by their inhabitants; and that which first was a mere number, has now become both a name and an honour. Henry III. ordained, that the Hundred court should be held *once every three weeks*.

The COURT-BARON is a court incident to every manor in the kingdom, to be holden by the steward within the manor *once every three weeks*, according to clause 18 H. III. in dorso. M. 10. Courts-baron are of two kinds; one a customary court, appertaining entirely to copyholders: the other a court of Common Law, and according to Blackstone, it is *the court of the "barons,"* by which name the freeholders were sometimes anciently called, because it is held before the freeholders, who owe suit and service to the manor, the steward being the registrar rather than the judge. But Mr. Christian observes, that the more obvious explanation of the Court-baron is, that it was *the court of the baron, or lord of the manor*, to which his freeholders owed suit and service.

(*a*) 1 Reeves' Hist. of English Law, p. 7.

(*b*) Vol. i. p. 317. (*c*) 2 Inst. 71.
(*d*) 3 Comm. 34.

There cannot be a manor without a Court-baron. The court is composed of the lords' tenants, who are the *pares*, or equals of each other, and are bound by their feudal tenure to assist their lord in the dispensation of domestic justice. Its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold pleas of any personal actions, of debt on bond, detinue of goods, trespass on the case, trespass *without vi et armis*, or the like, where the debt or damages do not amount to forty shillings (*e*). If the court hold plea of common right above forty shillings, it is not properly a Court-baron, but a *court of Record* by prescription, which presumes a grant. It is believed there are many of these prescriptive courts, although most of them have fallen into disuse.

In 1 Reeves, 317, it is said, real actions might be commenced in the court of the lord of whom the demandant claimed to hold his land; from whence they might be transferred, upon failure of justice, to the Sheriff's court, and from thence to the superior one; but if such suit was not removed, it might be determined in the Court-baron.

It will hence be deduced, that these three descriptions of courts are founded upon the common or general law of the land. But there are at least three other species of local courts which have their origin in prescription, or immemorial usage, charters, or Acts of Parliament, and which are pretty numerously planted throughout the country.

FRANCHISE or Liberty Courts.—Liberty and franchise are synonymous terms: their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being, therefore, derived from the crown, they must arise from the king's grant, or may be held by prescription, which supposes a grant to have been made, but lost. The nature, extent, and jurisdiction of franchises are various. They may be vested in either natural persons, or in bodies politic; in one man, or in many. It is a franchise to have a court of one's own, or liberty of holding Pleas and trying causes—to have cognizance of Pleas, which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction—to have a bailiwick, or liberty exempt from the sheriff of the county, wherein the grantee, or lord of the franchise only, and his officer, are to execute legal process. (*f*) To give the superior courts jurisdiction within such liberties, and to authorise the sheriff to enter and execute process there, the writ of *non omittas* was devised.

The charters granting these liberty or franchise courts, emanated from the grace and favor of various sovereigns. The words *soc* and *sac*, were employed in early times by the Anglo-Saxon and Anglo-Norman jurists, to confer the privilege of holding pleas, and these terms are generally found in the ancient grants. Whenever they are used, the privilege of holding a court of Pleas is implied. No single modern words express the sense of *soc* and *sac*. "Soc" imported the power or liberty to minister justice and execute laws; also the precinct wherein such power was exercised. "Sac" signified a privilege which the grantee claimed to have in his court of Pleas in causes of trespass, of imposing fines and amercements. A numerous class of civil common law courts were thus established, and many of them exist at this day. The freeholders and *pares* within the liberty are the jurors, or rather judges in these courts, and the seneschal or steward is the registrar and presiding officer.

It is well known that almost every CITY, BOROUGH, and old town in England, possesses its court of civil judicature, either by express charter or immemorial usage. But these, as well as the courts we have just mentioned, have in a great measure been thrown into the shadow of darkness by the courts of Westminster Hall, which have for centuries had a concurrent jurisdiction with the local courts, and have gradually withdrawn the business from them.

Some of the courts we have mentioned are *courts of record*, and others *not*. A *court of record* is that court which has power to hold pleas according to the course of the common law of real, personal, and mixed actions, where the debt or damage is forty shillings, or above. A court, *not of record*, is one which cannot hold plea of debt or damage exceeding forty shillings, or where the proceedings are not according to the course of the common law, nor inrolled.

Another class of local courts has sprung up in modern times, called COURTS OF CONSCIENCE. They have been established by local Acts of Parliament, and amount to about 250 in number. *They are said to be exceedingly unpopular.* They do not, generally, try causes by jury, nor proceed according to the course of the common law, which circumstances are at variance with our national predilections.

We trust it will not be considered that we have dwelt too long upon this subject. It is of importance to examine existing institutions before new and untried ones are founded. A short history and description of the origin, constitution, practice, and efficiency, of all the local courts in England would be useful at the present moment, in connexion with the Bill before Parliament. It would also throw light upon the subject, to have returns made to the House of Commons, describing the nature and constitution of all the inferior local courts throughout England, with their jurisdiction, principles, practice, number of causes annually tried, names and rank of presiding officers, fees, &c. &c.

These courts, it will be observed, with the exception of one class, have almost universally fallen into disuse. The modern statutory courts, commonly called Courts of Conscience, indeed find business, and afford the poor an opportunity of inflicting upon each other, in many cases, petty annoyance—in some, serious suffering. But all business has forsaken the

(*e*) 3 Comm. 33, 34. (*f*) 2 Comm. 37, 8.

*ancient* local courts, and it is not unnatural to ask why? There is but one answer—*suitors have preferred that their claims should be decided in the superior courts.* Nor can we feel surprise that they should be anxious to have the judgment of men elevated to the bench, for their legal learning—men, whose high rank, and publicity of station, impose on them the necessity of patience, temperance, and impartiality, and whose experience at once qualifies them to determine aright, and commands that confidence which can never be felt in the decisions of an inferior functionary. Would the proposed new courts produce a change of public opinion upon this point? Is it reasonable to expect that the people in general will resort to them? Let us remember the old illustration: "One man can lead a horse to the water,—but how many does it require to make him drink?"

## GENERAL REGISTRY OF DEEDS.

"Batir est beau, mais detruire est sublime."

Mr. Editor.—Amongst the 164 conundrums lately addressed by the commissioners to all members of the profession, called "Questions on Registration," are the following:

The first is thus expressed:—"Is it possible, in the present state of the law, to be certain that a title is safe?" and upon the implied assumption of a negative answer, the whole hypothesis of registration is founded.

Now, these same learned Thebans, in the full career of their theory, never once adverted to the fact of their having themselves answered their first query by the terms of the forty-first, by which they ask "Are not *safe* titles often rendered unmarketable by the loss of deeds, or the inability to produce them?" thus recognizing the fact of some titles being safe.

It is to be lamented, that persons armed with the full power of a royal commission should, instead of a temperate suggestion of the correction of a few practical grievances, have wasted their time, and the public money, in the construction of an absurd and impracticable scheme of a public registry, the endeavour to establish which would, in the first instance, be attended with incalculable expense, hazard, and inconvenience to land owners, with the additional certainty of ultimate failure, arising from the infinite complications and subdivisions of interest in our artificial state of society.

Wedded, as these conveyancing gentlemen are, in their professional capacities, to precedent, they can find none for this plan of compulsory registration in any of the civilized states of the world, ancient or modern; not in the Greek or Roman codes, nor in those of France, Holland, or Italy; but they may have found it in the Archduchy of Austria, and in Norway, and possibly if they went thither in search of it, they might find it in Iceland. Thus the simple machinery of those primitive people, with whom hereditary succession and occasional partitions constitute the whole dealing in land, is to be adapted to all the varied circumstances of real property in England,—to lettings by the foot for building leases, to improved ground rents, to splitting freeholds for votes, and to all the capricious dispositions, by deed or will, which it has been at once our boast and our privilege to be enabled to make, without subjecting such dispositions to the tribunal of public curiosity at the expense of one shilling; for it is a fact, although not generally known, that *a will of land alone need not be either proved or registered.*

If the commissioners had not answered their own question as to the safety of existing titles, I could take upon myself to affirm, upon an extensive practice of upwards of thirty years, in communication with all parts of England and Wales, that I have never known one single instance of a *bona fide* holder or purchaser of land being evicted from his possession, or compelled to make a sacrifice to retain it. That frauds have been practised, and speculations made in doubtful titles, is a certain fact, although of rare occurrence, and limited operation, while no system can always protect against the consequences of fraud or forgery.

It behoves, therefore, the nobility and landed proprietors of England, to protect themselves against a measure which will render them either the slaves of form, or the victims of the want of it; and, in the former case, disclose every family arrangement, arising from the vice or imbecility of any member of it; or, in the latter, invalidate the suitable provision intended for such person.

To insist on the present general insecurity of title is quite as absurd as was the philosopher who denied motion, and was answered by his opponent rising and walking. The great bulk of landed property is honestly and securely held by all classes, from the peer to the yeoman; whose titles, in many large districts, are so perfectly well known to the resident lawyers, as frequently to pass current without the formality of an abstract.

The comparatively small amount of auction duties returned by reason of purchases abandoned for defect of title, proves the rare occurrence of such defect.

That some unnecessary trouble and expense attends the practice, particularly as applies to outstanding terms and limited administrations, is certainly the case, but might be readily obviated by a succession of short Acts, applicable to each grievance, which Sir E Sugden has to a certain extent effected, and his sound knowledge of the subject would enable him to pursue at little or no expense, instead of incurring the burden of £10,000 per annum, in salaries to the commissioners and their

secretaries, and at least as much more in printing their huge folio volumes of reports.

The common law commission partakes precisely of the same character, and might be beneficially superseded by adopting the same course of amendment in practice by rules of court, and short Acts of parliament.

I am, sir,

Your obedient servant,

MILITIA MEA MULTIPLEX.

*** From the same able correspondent we have other communications, but can find room at present only for the above.

## MINOR CORRESPONDENCE.

WE are prevented this week from introducing to the notice of our readers several letters on various subjects of importance, and must confine ourselves to

ACKNOWLEDGMENTS TO CORRESPONDENTS.

A contribution signed "Fiat Justitia," on the *Inferior Courts*, is entitled to an early insertion. We think the whole subject of the existing petty and district courts should be fully brought into public notice before any new establishments of this kind are introduced.

"An Articled Clerk," on the *Local Courts*, deserves the thanks of the profession, and we shall avail ourselves of his communication, either in form or substance, at the earliest period in our power.

WESTMONASTERIENSIS shall have insertion, though we cannot promise it immediately. His description of a Taxation of Costs is lively and true, and "pity 'tis, 'tis true."

HOMO has allowed us to alter his "Review" of Mr. Mewburn's pamphlet, and we regret that we have not been able to do so in time for this week's publication, the more especially as we have inserted a paper on the other side of the question, and are desirous *that each party should have equal audience*. It is remarkable also that we have received another communication, calling our attention to the same pamphlet, and pronouncing a judgment in its favor.

The contribution of PALUS, a friend from the Fens, is acceptable, and shall be inserted at the first opportunity.

The Book, comprising interesting matter regarding eminent legal characters, we must peruse before we can notice it. We shall be enabled, we hope, to give it our attention at an early period; at present we are not in possession of a copy, and know not the publisher.

The Hints of O. S. on the construction of the *Stamp Acts*, have been received, and will be adverted to in an early number.

The communication of "One, &c." on *remedies against the hundred*, is appropriate to the present unfortunate period, and we hope to find room for it in our next.

The cordiality of our brethren in approving our humble labours, and co-operating in extending their utility, is most gratifying and encouraging.

The letter of DELTA is quite in accordance with our expectation of his character, and in due season we shall remember the handsome manner in which he has come forward. We count not ingratitude amongst our sins,—when we do so, "our right hand shall forget its cunning." The Legal Observer will be transmitted as he directs, not occasionally, but regularly, and we hope for many years.

It is all very well for some of our correspondents to expect that their papers should be immediately inserted, and we experience the most acute pain in disappointing them. We know from our own feelings, in days gone by, when we wrote on subjects which appeared to us of "great pith and moment," that editors frequently seem to be governed by caprice, or to lack enlightenment. We think differently now, and believe, whilst they are most anxious to perform their duty, they are willing to pay the earliest respect to those who labor in their behalf. We trust our friends will bear with us a little while, and they will find we are not inattentive to their suggestions, or unmindful of the obligations we owe them.

We are asked where *Mr. Justice Heath's "Advice"* is to be met with? perhaps one of our readers may assist us in answering the question.

## RECENT DECISIONS IN THE SUPERIOR COURTS.

THE decision entitled "Statute of Limitation," confirms the determination of the court of King's Bench, in the case of Tanner *v.* Smart, 6 B. and C., 603. Previous to the latter case, there were two discordant *nisi prius* decisions on the subject. In Thomson *v.* Osborne, 2 Stark. 98, Lord Ellenborough is reported to have holden it unnecessary to prove the defendant's ability to pay, in order to take the case out of the statute. In Davies *v.* Smith, 4 Esp. 36, Lord Kenyon is reported to have holden that it was necessary.

An important case will be found under the title of "Statute of Frauds."

The cases entitled "Feme Covert," are in accordance with the decisions of the courts in Partridge *v.* Clarke, 5 T. R. 194, and in Luden *v.* Justice, 1 Bing, 344.

The decision in the Common Pleas, under the head of "Costs," is well worthy of perusal,

STATUTE OF LIMITATIONS—CONDITIONAL PROMISE.

Money had and received,—plea, statute of limitations,—replication, promise in writing. The promise was contained in a letter, by which the defendant

promised to pay the debt as soon as he was able. The plaintiff was nonsuited at the trial, on the ground that there was a conditional promise, and that the defendant's ability to pay should have been proved. The court on motion to set aside the nonsuit, held the promise to be conditional, and after argument discharged the rule. *Eden*, assignee, v. *Williams*, Com. Pl. M. T. 1830.

—

SLANDER—SPECIAL DAMAGE—VARIANCE.

Action for Slander. The words were, "he is a rogue and a swindler." The declaration alleged special damage, as occasioned by the uttering of these words by the defendant. Brier was called to prove that, in consequence of having heard these words, he refused to trust the plaintiff. Brier heard these words from Brice, in whose presence they had been spoken by the defendant. Brice gave up the name of the defendant.

Mr. Justice *Bosanquet*, who tried the cause, nonsuited the plaintiff, on the ground that, as the words were not actionable in themselves, but were alleged to have been uttered by the defendant, and thereby to have been the cause of special damage, the plaintiff should have shewn that they were spoken to Brier either by the defendant or by his authority. The repetition of them by Brice was the act of that person, and not of the defendant, and the latter could not therefore be answerable. A rule was obtained to set aside the nonsuit, and it was contended that if an action had been commenced against Brice, his proof that he had uttered the words on the credit of the defendant, would have been a sufficient answer to it, as he would thereby have given the plaintiff an action against the original slanderer. The resolution in Lord Northampton's case was cited in support of the argument.

The *Court*, however, discharged the rule. The special damage was not proved as laid, for the words which prevented Brier from trusting the plaintiff, were uttered by Brice of his own accord, and not by the authority of Brier. As to the resolution in Lord Northampton's case, it had often been doubted, but might now be considered as overruled by the decision in *M'Pherson* v. *Daniel*.—*Warde* v. *Weekes*, Com. Pl. M. T. 1830.

—

STATUTE OF FRAUDS.

Assumpsit on a promissory note made by the defendant, who was administratrix of her husband's effects. The note was in these terms. "Twelve months after date I promise to pay Mr. J. Rydout, or order, the sum of 100l. value, received by my late husband." A verdict was taken for the plaintiff, but leave was reserved by Mr. Baron *Bolland*, who tried the cause, to the defendant to move to have it set aside, and a nonsuit entered, if the court should be of opinion, that, as this was a promise to pay the debt of a third person, the consideration should have been more fully expressed on the face of the instrument.

The *Court*, under the circumstances of the case, thought the consideration sufficiently expressed. The defendant was an administratrix, and having on the face of the note expressed that it was given for value received, must be taken to have known that such was the fact. The consideration might have been forbearance to sue her husband in his lifetime, or perhaps even forbearance to sue her for a debt contracted by her husband.

Rule for nonsuit discharged. Exchequer, M. T. 1830.

FEME COVERT.

On shewing cause against rule, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on filing common bail, on the ground that the defendant had been arrested on a promissory note given by her when a married woman, the following facts appeared: The defendant had gone to the bankrupt, of whom the plaintiffs were assignees, and told them that she was a married woman, but that she was about to be divorced. She had sometime afterwards gone again, and producing a piece of parchment, which she declared to be an Act of Parliament divorcing her from her husband, and empowering her to marry a banker in Pall Mall, ordered some clothes for her wedding. A few days after she gave a promissory note for the amount, and on this instrument she was arrested. It was contended, that as she had represented herself at the time of getting credit to be unmarried, she must be left to her plea, and could not be relieved on motion.

In support of the rule it was submitted, that as it was not negatived by the bankrupt, that he knew she was a married woman at the time the note was given, the defendant was entitled to be discharged. If the arrest had been for the goods, and not on the note, it would have been different.

The *Court* was of opinion, that the defendant ought not to be discharged on motion, as she had clearly obtained credit by a fraudulent representation of her circumstances. Rule discharged, with costs. *Littledale, J. Simon and others*, assignees of *Rogers*, v. *Winnington*, M. T. 1830.

—

FEME COVERT.

On shewing cause against a rule, calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on filing common bail, the defendant being a married woman, it was sworn by the plaintiff that she never knew the defendant was a married woman at the time she contracted the debt for which she was arrested. On the contrary, as far as the representations of the defendant could lead her, she had every reason for believing that she was a widow. For being a schoolmistress, the defendant had come to her house, and expressed a wish to send her daughter to school at the establishment of the former, and in order to induce her to take the daughter on lower terms, she stated that she was a widow, and in great distress.

In support of the rule it was contended, that, as the plaintiff had not denied her knowledge of the defendant being a married woman at the time of the arrest, the latter was entitled to her discharge.

The *Court* was of opinion, that, as the defendant had held herself out as a widow, and by that means had obtained credit from the plaintiff, she was not entitled to relief in this summary way, but must be left to her plea of coverture.

Rule discharged.

—

DEBT PROVEABLE UNDER COMMISSION OF BANKRUPT.

COVENANT. By the deed declared upon, the defendant was to become the purchaser of an estate. Until payment of the purchase money, he was to be considered as a tenant to the plaintiff at an annual rent, to the same amount as the interest of the purchase money. The plaintiff was to have the same remedy in enforcing payment of the interest, as a landlord would have against his tenant by the ordinary remedy of distress, "to the intent that the plaintiff might be satisfied the interest." The de-

fendant afterwards became a bankrupt, and obtained his certificate. His assignees refused to fulfil the contract of purchase, and the defendant also refused to carry it any further. On being sued in covenant, the question to be decided was, whether the amount of principal and interest constituted a debt proveable under the commission, and therefore, whether the defendant was discharged by his certificate; or whether this was to be considered as a lease. If the latter, it was clear that the defendant had not complied with the requisites of the Bankrupt Act, 6 Geo. IV. c. 16, s. 75, so as to discharge himself of the lease.

The court, after argument, were of opinion that it was a debt proveable under the commission, and not a lease, and consequently the defendant's certificate was a good discharge in bar of the action. Lord Tenterden, C. J. K. B., *M. T.* 1830.

A WRONG WITHOUT A REMEDY.

Sir *C. Blount* being indebted to plaintiff in the sum of 300*l.* in 1800, gave him a warrant of attorney to enter up judgment against him for that sum. The property, in which Sir Charles had a contingent interest, depending on the appointment of his mother, was afterwards changed by her into a fee-simple, and then devised to trustees to sell and invest the proceeds, three parts out of four of the interest to be given into the hands of Sir Charles Blount for his maintenance. The plaintiff filed his bill now against Sir Charles and the trustees, to recover on the judgment entered upon the warrant. Sir C. Blount being resident abroad, and out of the jurisdiction of the court, the question arose whether the suit could proceed, and a decree be made against the trustees in the absence of the principal defendant.

The *Master of the Rolls* said, Sir C. Blount was the substantial defendant, and not a mere passive party. It was not the practice of the court to make a decree affecting the interests of such a party in his absence. The court could not acknowledge the plaintiff's right, nor even permit it to be proved until the defendant was brought before the court. If the plaintiff's right had been acknowledged or proved, then the court could appoint a receiver. His honour admitted that this was an unfortunate case: had Sir C. Blount gone abroad to take himself out of the jurisdiction of the court, proceedings might be instituted under the provisions of the Act of Parliament; but, in the present state of things, the plaintiff had no remedy, and justice was defeated. This would be a proper subject for the interference of the legislature: a provision could be made for leaving it to the discretion of the court to appoint a receiver, who, in case the defendant, out of the jurisdiction of the court, should not appear within a given time, might be ordered to proceed in his absence. Among so many contemplated changes, this would be a simple and proper one. Though he was much disposed in this case to assist the plaintiff, he was restrained by the settled principles of the court, to which it was his duty to adhere. *Brown* v. *Blount* and others. Rolls Court, M. T. 1830.

—

BANKRUPTCY.

An application was made to the Lord Chancellor for an amendment in the name of one of the commissioners in the direction of the commission. The commission was issued to commissioners in Yorkshire, and the name of one of them was misspelt Billington, instead of Billinton, the true name. The error in the spelling of the name was not discovered till after the adjudication of the bankruptcy. Three ways were pointed out for rectifying the error,—one, by ordering new docket papers and a new commission; a second, by ordering the four commissioners to proceed, leaving out that commissioner whose name was misspelt; and the third, by having the commission resealed, and a new adjudication ordered. The only case found to apply to this matter was in *re* Barber, 2 Glyn and Jameson, p. 80, in which Lord Eldon ordered the other commissioners to proceed and make a new adjudication.

The *Lord Chancellor* asked which course would be attended with least expence? This expence ought to be paid by the party by whose fault the mistake was committed. Was this the fault of the country solicitor?

*Counsel* could not say who was in fault. It was a mere accident.

The *Lord Chancellor*. In all probability it was the fault of the attorney, and he ought to be made to pay the expenses. In bespeaking a commission, the country solicitor sent up the names of the proposed commissioners to the office of bankrupts, where they were copied exactly. Let the commission be resealed, and let there be a new adjudication, but let the question of costs remain till it be seen who was in fault. M. T. 1830.

—

COSTS.

The court decided, after a rule had been obtained to review the taxation, that the prothonotary was right in allowing costs to a plaintiff under the following circumstances. The defendant was the lord of a manor, and the plaintiff a farmer. The defendant's steward insisted on a right of toll, which the plaintiff resisted: the steward distrained the plaintiff's sheep, and afterwards invited him to go and inspect some documents which the steward stated would fully make out the lord's right to the toll. The inspection took place. It was attended with some expense: the plaintiff, not satisfied of the right, still refused to pay the toll: his sheep were again distrained, and he brought this action: a verdict was given in his favour, and in taxing the costs, the master allowed the expenses of inspecting the documents. The court discharged the rule for reviewing the taxation, on the ground that these costs had been incurred after the first distress, when the right to make the distress was disputed, and had been incurred with the view, if possible, of avoiding the necessity of an action: they had been incurred, too, at the request of the defendant's agent; and, under all these circumstances, might fairly be considered as costs in the cause. Anonymous, C. P. M. T. 1830.

---

PRACTICE—COGNOVIT.

*Comyn* appeared against a rule, calling on the plaintiff to shew cause why the judgment signed against the defendant on his *cognovit* should not be set aside for irregularity, on the ground that it was invalid, from its having been given after a writ had been sued out. Holden, that it was no irregularity, as no declaration had been either delivered or filed. Rule discharged. M. T. 1830.

—

AFFIDAVIT OF DEBT.

On a rule calling on the plaintiff to shew cause why the bail-bond given by the defendant should not be delivered up to be cancelled on filing common bail, the objection was to the affidavit to hold the bail. It was for money paid by the

plaintiff to the use of the defendant's wife, without stating that she had any authority from her husband to procure its payment. Rule absolute, without costs. *Littledale*, M. T. 1830.

JOINT ACTION.

On bailable process against two persons, a declaration against one only was delivered: proceedings were set aside for irregularity, with costs. *Littledale*, M. T. 1830.

BAIL BOND.

Where a defendant had been arrested on the 19th on process returnable on the 21st, bail was put in on the 25th, exception entered on the 26th, and an assignment of the bail-bond taken on the same day; the court set aside the proceedings on the bail-bond as irregular. *Parke, J.*, M. T. 1830.

## NEW RULES IN THE EXCHEQUER OF PLEAS.

We are in possession of the new Rules of Court, to which our attention has been called by a correspondent, but we somewhat doubt the necessity of introducing them in our pages, inasmuch as copies of them may be readily obtained. We shall, however, consider the utility of doing so, and probably insert them prior to the ensuing Term.

## NOTES OF THE VACATION.

We have this week put our readers in possession of Lord Wynford's bill for preventing expense and delay in proceedings at law. The provisions of this bill are well worthy of consideration. Although some modifications perhaps may be suggested during its progress in parliament, we think it will be in many respects beneficial.

By one of Lord Tenterden's bills, it will be recollected, the courts are to be authorized to direct the examination of *witnesses* on interrogatories. Lord Wynford proposes to extend the power to the examination of the *parties*. This is an alteration in the law of such serious magnitude, that the reasons on which it is founded should be fully discussed. We shall contribute our share to the discussion by inserting, as early as possible, a paper written expressly on this subject. It was suggested by one of our correspondents, that the bill for expediting executions might be productive, in many instances, of great misery to individuals. In the present bill, although this evil is not provided for, there is a provision calculated to mitigate a similar hardship, by allowing, at the commencement of an action, a reasonable time for the payment of the amount, not exceeding three months. If the principle be adopted in the one case, we do not see any reason for withholding it in the other. Of course the indulgence could only be granted on giving sufficient security.

We think it is evident, that although Lord Wynford's bill would increase the expense of an action in its early stages, it would often prevent its further progress, and, at all events, diminish the expense of a trial at law. A large part of that expense is frequently occasioned by the necessity of having witnesses in attendance to authenticate documents. The plan proposed is certainly well adapted to save a considerable part of this expense.

These measures, when brought into operation, would seem to render totally unnecessary (even if otherwise unobjectionable) the establishment of the proposed Local Courts, and the improvements thus introduced by the learned judges being grafted upon our ancient system of jurisprudence, will become speedily adapted to the habits and feelings of the community; and it is important also to remark, that they may be carried into effect without any increase of expense to the country.

---

It is reported that Mr. Campbell has stated, in support of the measure for a *Metropolitan Registry of Deeds*, "That information will be obtained in a few minutes, and for ten shillings, which it now requires several weeks to discover, at an expense of perhaps 300l. or 400l." We presume this must be some extreme case, and it would have been satisfactory to know the circumstances under which it occurred. The ordinary expense, we believe, varies from 7s. 8d. to 21s.

It is not a little singular with reference to the presumed advantage to result from the change, that its proposer contemplates the "improvement" will be so gradual, that "he fears a great part of the existing generation will pass away before its beneficial effects will become strikingly apparent." We observe, also, that it was stated, that although the Lord Chancellor approved of the measure, the government had not determined whether to support or oppose it; and it was anticipated, that in case of their opposition it would not succeed.

This is an ill omen for "the mausoleum of parchments." It is not probable that government will sanction a measure of so sweeping a

nature, unless it be *perfectly clear* that it would be beneficial, and that it is *not so* is evident from the fact, that after so much has been said and written on the subject, the government is yet undecided. Nothing short of the general voice in its favour,—not of the great landed proprietors, nor of the large capitalists alone,—but of the people at large, will justify the adoption of the new system.

The learned gentleman, "whose ambition it is to improve the law rather than to seek promotion, or professional advancement," has taken a bolder course than any of his predecessors. The Local-Court advocates are humble and diffident, for they only propose with comparative caution, that we should make two experiments, and extend the plan if they should be successful. But here, with the examples of registry in Middlesex and Yorkshire, both of which are described as little better than nuisances, where several hundred pounds may be expended in making a search, we are required to believe, that by changing the system of management, that which is now an enormous evil, will become highly beneficial.

Practical men, we should submit, would first reform the existing Registry offices, and when they were brought into a state capable of convincing the public by actual experiment, that a registry is a blessing, it would then be time to extend it throughout the country. Until that experiment has been made, we question the wisdom of any enlargement of the system.

## MISCELLANEA.

### SIR WILLIAM BLACKSTONE.

In the Oxford collection of verses, on the birth of the prince of Wales, (George the Fourth,) there is the following elegant compliment to this learned commentator, on the Laws of England, in a copy of Latin verses, inscribed to the celebrated Dr. King, principal of St. Mary Hall, by the Hon. Thomas Fitzmaurice, brother to the marquis of Lansdowne, at that time a gentleman commoner at Oxford, and who was attending Sir William (then Dr.) Blackston's lectures:

——— Me spinosa morantur
Sed jucunda simul Juris documenta Britanni
Deflectuntque alio, nam quis salebrosa locorum
Respuat, atque *illo* comes ire *docente* recuset,
Cui Musa, eloquii grato moderamine, legum,
Enodare dedit laqueos, et pandere jussit
Perplexos æditus et cæca retexere fila?

*European Mag.* Sept. 1793.

Should the contemplated changes of the law take place, Blackstone's admirable work will fall into practical oblivion. It will cease to be useful as an initiatory work for the legal student, and will be consulted only by the curious, who desire to learn what the law once was, and by the general reader who wishes to peruse a fine specimen of didactic composition. Some lively observations on the effect produced on the law in his time, by tampering and botching, are to be found in the original letter of the learned commentator, published in the first number of the Legal Observer.

—

### LORD CHANCELLOR KING,

Who was a man of honesty and diligence, though not of very great parts, took for his motto, "*Labor ipse Voluptas.*" A friend thus paraphrased it in verse:

'Tis not the splendor of the place,
The gilded coach, the purse, the mace,
Not all the pompous train of state,
The crowds that at your levee wait,
That make you happy, make you great;
But, whilst mankind you strive to bless
With all the talents you possess;
Whilst the chief pleasure you receive
Comes from the pleasure which you give;
This takes the heart and conquers spite,
And makes the heavy burden light,
For pleasure rightly understood
Is only labour to be good.

*European Mag. August*, 1796.

—

### SIR WILLIAM JONES ON SPECIAL PLEADING.

I shall not easily be induced to wish for a change of our present forms, how intricate soever they may seem to those who are ignorant of their utility. Our science of special pleading is an excellent logic, it is admirably calculated for the purposes of analysing a cause, of extracting, like the roots of an equation, the true points in dispute, and referring them, with all imaginable simplicity, to the court or the jury: it is reducible to the strictest rules of pure dialectic, and if it were scientifically taught in our public seminaries of learning, would fix the attention, give a habit of reasoning closely, quicken the apprehension, and invigorate the understanding, as effectually as the famed Peripatetic system, which, how ingenious and subtle soever, is not so honourable, so laudable, or so profitable, as the science in which *Littleton* exhorts his sons to employ their *courage and care.* It may unquestionably be perverted to very bad purposes; but so may the noblest arts, and even eloquence itself, which many virtuous men have for that reason decried; there is no fear, however, that either the *contracted fist*, as Zeno used to call it, or the *expanded palm*, can do any real mischief, while their blows are directed and restrained by the superintending power of a court.—*Prefatory Discourse to the Speeches of Isæus, by Sir William Jones*, p. xxv.

The opinion of this able and accomplished man, on the science of special pleadings, seems to have differed widely from that of some modern authorities.

LONDON:
PRINTED BY J. AND C. ADLARD, BARTHOLOMEW CLOSE.

# The Legal Observer.

VOL. I. SATURDAY, JANUARY 1. 1831. No. IX.

———"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## SKETCHES OF THE BAR. No. 1.

### SIR JAMES SCARLETT.

ANY striking peculiarity, whether moral or physical, for which certain individuals belonging to a class are remarkable, not unfrequently becomes, in process of time, to be considered as the characteristic of the whole body. Thus fatness, as well corporeal as mental (*crassum ingenium*), is undoubtedly the very essence of the abstract idea of an alderman. On the other hand, people have been surprised to find their conception of a lawyer accurately embodied in an Egyptian mummy. It is extremely doubtful whether such an anomaly as a lean alderman ever existed; but if any old lady will take the trouble to attend the sittings of the Court of King's Bench, in Westminster Hall, she will have some of her preconceived notions with respect to lawyers very much shocked by the appearance of the late attorney-general. His clear and ruddy complexion, his good humoured face shining through the dingy atmosphere of the court, like the sun dimly seen through a London fog; the jolly fullness of his person, and the general repose of his manner, appear, at the first glance, to indicate but little of that restless and incessant working of the mind which is induced by the active exercise of the duties of his profession, and which usually betrays itself in the pallid cheek and the furrowed brow. On a more deliberate inspection, however, the spirit of the crafty legist is detected lurking in every feature. An expression of intelligence and acuteness is diffused throughout his entire physiognomy; but the eye is that which chiefly rescues him from the appearance of a well-fed citizen, who has occasional attacks of surfeit, together with a slight tendency to apoplexy: its insidious and penetrating glance, softened down to an expression of confidential candour when directed to the jury box, is *caviare* to the witness, who has the misfortune to fall under the learned gentleman's cross-examination.

The great abilities of Sir James Scarlett, as an advocate, are universally admitted. With slight pretensions to eloquence, he possesses, in a most remarkable degree, the faculty of ingratiating himself and his cause with "the twelve men in the box." He has evidently not impaired his constitution and his lungs by declamatory vehemence; but the colloquial style of oratory appears to be more adapted to the meridian of a jury than either the involved periods of the present Lord Chancellor, or the classic diction of Mr. Frederick Pollock, the two great rivals of Sir James on the northern circuit. A familiar conversational tone and manner are well calculated to arrest the attention and the sympathies of men of business accustomed to the language of ordinary life; and when united with a happy facility of expression, and a clear and lucid arrangement of matter, carry it hollow over all the graces of rhetoric. But it is questionable whether this tone of friendly communication, however appropriate to a statement of facts, does not become rather offensive when applied to the expression of opinions; and Sir James is in the habit of enunciating abstract propositions, as though he was about to produce witnesses who could prove them to demonstration. Unfortunately the tenets of the learned gentleman are of a somewhat unpopular character; and he is accused of not taking a very comprehensive view of the great moral and political questions, which occasionally present themselves to the notice of an advocate in the exercise of his professional duties. His genius appears to be essentially analytical: no one possesses more ingenuity and skill in grappling with tangible materials, however complicated; but, like the Grecian sailor, whose nautical knowledge is confined to the limited,

though difficult, navigation among the numerous islands of the Archipelago, he is lost when he gets into the open sea. Sir James is an admirable coaster; but he cannot steer by the compass or the stars.

Popular advocates are frequently not very successful in securing what is called the ear of the court; but the sun of judicial grace sheds its most benignant ray on the subject of the present sketch. This gentleman's great legal attainments and experience would of themselves be quite sufficient to account for the favour which he enjoys, if it did not sometimes happen that these same qualities in other individuals do not meet with equal good fortune. It is easy to perceive that the learned ex-attorney general knows the precise point, beyond which, opposition to the views and suggestions of their Lordships would be considered as factious. But his complaisance to the court is not accompanied with any undue servility, or with any injury to the interests of his client; for he possesses the happy knack of leaving no stone unturned to carry his point, whilst he appears at the same time to be deferring to the opinions of others.

The fame of Sir James Scarlett as a senator does not correspond with his great reputation at the bar. His unadorned style of speaking, so effective in Westminster Hall, is not appreciated in St. Stephen's Chapel. Neither are the laws which have been framed and enacted under his auspices, generally considered as favourable specimens of legislation. A perfect legislator, indeed, must above all things possess that power of generalisation, which, it has been already observed, does not by any means appear to be the distinguishing attribute of Sir James's mind. As a politician, his learned predecessor in office would probably called him *ambidextrous*. It is related of a certain eminent counsel, that he happened on one occasion to mistake the client by whom he was retained, and addressed the court on behalf of the wrong party; and that when he became aware of his error, he immediately made an admirable speech, in reply to his own arguments. Such readiness of wit is highly commendable in the advocate; but it does not appear in the same favourable light when applied to politics. It has been the fate of Sir James Scarlett that whenever he has diverged from opinions and principles that he once professed — which many have no doubt done from honest conviction — there has existed extrinsic matter peculiarly calculated to sway any but a sternly upright and honourable mind to the precise line of conduct which he has adopted. This may possibly arise from an unfortunate combination of circumstances; but the world is a censorious judge. Heaven forbid that we should attempt to add a single shade to this umbrageous side of his character (to recur again to the phraseology of his worthy predecessor). This is the mere reflection of an impression which has been already stamped on the public mind. We will add, from our own conviction, that no one is more perfect than Sir James Scarlett in all the qualifications of an able lawyer, or better calculated, from great zeal and ability, to do justice to his client, and to conduct to a successful issue the cause which is intrusted to his advocacy.

---

## SUMMARY OF RECENT STATUTES.

### 1 Gul. IV. c. 39. [Royal Assent, 16th July, 1830.]

*An Act for making better Provision for the Disposal of the undisposed Residues of the Effects of Testators.*

The appointment of an executor is, at common law, a disposition of the whole of the personal estate of a testator, Wheeler *v.* Sheer, Mos. 288., Lawson *v.* Lawson, 7 B. P. C. 511., and if any residue or surplus was undisposed of by the will, it belonged to the executor. Now this rule of the courts of common law would doubtless in many instances interfere with the intentions of the testator, and courts of equity therefore interfered, and declared, that if it appeared, in any way, on the face of the will, to be the testator's intention that the executor should not have the residue beneficially, he should be held to be a trustee for the next of kin of the testator in the shares mentioned in the *Statute of Distributions*, Southcot *v.* Watson, 3 Atk. 225.

But this interference of the courts of equity did not entirely remedy the evil; for in many instances nothing *did* appear on the face of the will which would enable the equitable rule to be called into operation: and in the next place, there were great differences in opinion as to what would amount to a sufficient manifestation of the intention of the testator, that the executor should not have the residue. The cases were very conflicting and unsatisfactory (see Roper on Legacies by White); so that, in many instances, a suit in equity alone could properly settle a disputed question as to this point. It is evident, therefore, that this state of the law demanded some legislative remedy, and this has been furnished to a certain extent by the present

act. It is to be observed that it was a very considerable time in the House of Commons, (three sessions, it is believed,) and that it underwent very considerable alterations before it passed; and it certainly might have been more satisfactory than it stands at present. It would, perhaps, have been better to have enacted that an executor shall be always a trustee for the next of kin, and not, as is done by the first section, that the executor shall be a trustee, "*unless it shall appear by the will*" that the executor was *intended* to take such residue beneficially, as this, in fact, raises a fresh doubt as to what will amount to a manifestation of the testator's intention. The act is as follows: —

It recites, That whereas testators by their wills frequently appoint executors, without making any express disposition of the residue of their personal estate; and whereas executors so appointed become by law entitled to the whole residue of such personal estate; and courts of equity have so far followed the law as to hold such executors to be entitled to retain such residue for their own use, unless it appears to have been their testator's intention to exclude them from the beneficial interest therein, in which case they are held to be trustees for the person or persons (if any) who would be entitled to such estate under the Statute of Distributions, if the testator has died intestate; and whereas it is desirable that the law should be extended in that respect: it is enacted, That when any person shall die, after the first day of *September* next after the passing of this Act, [*September*, 1830,] having by his or her will, or any codicil or codicils thereto, appointed any person or persons to be his or her executor or executors, such executor or executors shall be deemed by courts of equity to be a trustee or trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the will, or any codicil thereto, the person or persons so appointed executor or executors was or were intended to take such residue beneficially.

Sect. 2. enacts, That nothing therein contained shall affect or prejudice any right to which any executor, if the act had not been passed, would have been entitled, in cases where there is not any person who would be entitled to the testator's estate under the Statute of Distributions, in respect of any residue not expressly disposed of.

Sect. 3. enacts, That nothing herein contained shall extend to that part of the United Kingdom called *Scotland*.

## THE PROPER QUALIFICATIONS OF AN ATTORNEY.

It is, perhaps, impossible to find any profession that demands of its members, an assemblage of more sound or varied qualities, than that which is requisite to enable a solicitor in good practice, efficiently, satisfactorily, and with credit to himself, to discharge the duties of his station. Some professions, it is true, exact higher degrees of scholastic attainment, and a more intimate acquaintance with letters, than the attorney need aspire to; and others impose a more protracted and severe application, to the remote principles, and technical intricacies by which they are characterised, than that which the future solicitor is expected to afford to the deep things of the law. In him, in fact, it were unreasonable to look for profound legal science, *that* being the precarious purchase of the labours and vigils of a professional life, the *viginti studia annorum;* whilst the accomplished attorney is constituted, not by the possession, in an eminent degree, of any single quality, but rather by the union of many, and, in some respects, more genial properties. These seem to be, — knowledge of his profession, great moral probity, much prudence, and a gentlemanly deportment. It is a very vulgar error, into which some persons fall, to suppose that the solicitor ought to be, or is, the mere organ of communication, or conduit-pipe, between uninitiated laymen and the sages of the profession; that it is the duty of such an one to hear a detail of facts, from farmer A or merchant B, and forthwith to retail such statement to counsel C, learned in the law, for his interpretation. For, amid the loud and senseless clamour touching the uncertainty of the law, no lawyer need be told, that the great and leading principles of every part of our jurisprudence are plainly settled, and may be comprehended with ordinary labour; and that a knowledge of these, as they exist in text books and reports, and as they are every day exemplified in practice, is possessed by the great body of solicitors, and ought to be the portion of all. Without this attainment, indeed, what man of common shrewdness can be closeted with his lawyer sixty minutes, and not cease to respect him? A thousand questions of law, resulting from as many varied relations of mankind, hourly arise in every part of the country; points, many of them not quite of an A B C character, upon which no barrister receives a fee, and which never come to be mooted in the Hall. The trespass is being committed — shall it be repelled or submitted to? The contract is on the tapis, the matter is urgent — shall it be concluded, and how? The debtor has concocted fraud, and meditates deception, delay is perilous — what says the law? Such, and infinitely

diversified, are the points that it is necessary for the attorney to decide upon the spot; and he well knows that a skilful application of general principles, well understood, in nineteen cases out of twenty unties the knot, and especially teaches him when he may doubt with credit, and when in prudence he ought to suspend decision. To this degree of legal erudition, great moral probity must be superadded. So necessary is this property, that it may be termed the essential difference of the solicitor; that quality, the indispensable possession of which peculiarly distinguishes him, if he be what he ought to be. Let our advocate be fluent and erudite; our surgeon a diligent observer, of clear head and firm hand; our physician versed in the prognostics of distemper and the specifics of health; and we concern ourselves very little about the brightness of his honour or the firmness of his integrity. But our solicitor, who knows more of our property than we do ourselves; who suggests or modifies, upon the faith reposed in his honour and skill, our family arrangements; to whose keeping we confide those facts, to the dissemination of which we feel the greatest reluctance — at once our treasurer, our friend, our confidant, — shall *his* honesty be matter of indifference? *This,* at least, must be a quality above suspicion, from the very nature of that relation in which a client stands to his familiar adviser. But it is very possible that a man, though both learned and honourable, may, after all, be a very indifferent attorney; and that for want of prudence, common sense, or however that very useful quality may be called which enables its possessor to gather wisdom from the past, to divine the future, and thence give wise counsel for the regulation of conduct. When a gentleman confers with his attorney, assuming the law to be settled, he naturally asks which of two courses open to him in law he shall adopt, having regard to the motives and predilections by which he is actuated. To reply satisfactorily to enquiries of this nature, long experience, or, in its absence, considerable acquired or native discrimination of character, and acquaintance with the world, with the general series and succession of events, and the ordinary consequences of certain lines of action, are absolutely necessary, though not so easily attained. The remaining quality which has been considered requisite to complete the character sketched, that of a gentlemanly deportment, is essential to the solicitor, in common with all professional men whose avocations demand personal intercourse with various ranks of society. He who has, in the space of perhaps a single hour, to be closeted with a peer and his ploughman, and who is called upon to listen to each, and to reply so as to be understood by the one, and so as not to disgust the other; that man whose duty and interest dictate that he should make the transaction of business with him a pleasure, alike to the sensitive denizen of modish society, and the homespun tenant of twenty acres, *must* have the deportment of a gentleman. If he have not, he will, in all probability, cringe and look ridiculous in the presence of the well-bred, and exhibit himself to the more unpretending, in the shape of a man of strange gesture and unintelligible dialect. Such are the inducements which a solicitor has to cultivate a polite department, beyond the ordinary incentives that arise from his properly recognised rank, — that of a *gentleman;* and these seem to be the properties, involving in themselves many subordinate ones, which are essential to the constitution of an attorney, and which are exemplified in the characters of the bulk of the profession.

DELTA.

## THE LAW INSTITUTION.

IN a former number we gave an account of the *origin* of this Institution.* We proceed now to describe its *objects* and *advantages.*

It is the intention of the Committee to provide

A HALL, to be open at all hours of the day; but some particular hour to be fixed as the general time for assembling: to be furnished with desks, or enclosed tables, affording similar accommodations to those in *Lloyd's Coffee House;* and to be provided with newspapers and other publications calculated for general reference.

The utility of a place of general resort in the neighbourhood of the inns of court and public law offices will be obvious, when it is considered that almost every attorney has occasion to visit those places daily, and by means of the Institution he will be enabled at the same time to meet other attorneys, from distant parts of the town, with whom he may have business to transact, at the general hour of meeting, or by special appointment, instead of being obliged, as at present, to attend them at their own offices, often at a great distance from his own residence, and always at an uncertainty of finding them at home. Moreover, an attorney or solicitor, who

* P. 37.

may have occasion to attend the court of the Lord Chancellor or Vice Chancellor in Lincoln's Inn, or the Master of the Rolls, the sittings of the Court of King's Bench in Serjeant's Inn, of the Court of Exchequer in Gray's Inn, or upon Judges' summonses, Masters' warrants, appointments before the Masters of the Court of King's Bench or Exchequer, or the Prothonotaries of the Common Pleas, or consultations of Counsel, or other appointments in the neighbourhood, may here pass his time both usefully and agreeably, and without any inconvenience or expense, until his attendance shall become actually necessary, instead of waiting, as at present, in Court, at the Judges', Masters', or Counsel's chambers, or at a coffee-house, at great personal inconvenience and loss of time. In the case, too, of an attorney having any matter of business of an unusual or difficult nature to transact, the institution will afford him the ready means of obtaining information from members who may have had business of a similar description. And here it may be observed generally, that it will enable members to obtain information and assistance from others, who may, in any particular matter, be better informed or more experienced than themselves. As the institution will be composed of gentlemen connected with all parts of the kingdom, and also of country attorneys, great facilities will be afforded to the members for obtaining information on matters of a provincial or local nature; and country attorneys, who have occasion to come frequently to town, will find the institution much more convenient than a coffee-house for transacting their business, and it will supply them with every kind of information relating to the profession.

AN ANTE-ROOM, for clerks and others, in which will be kept an account of all public and private Parliamentary Business, in its various stages, Appeals in the House of Lords, the general and daily Cause Papers, Seal Papers, Lists of Petitions in Causes in the Courts of Equity, and in Lunacy and Bankruptcy; the Sittings Papers, Peremptory Papers, Special Papers, and Papers of New Trials in the Courts of Law; with a statement every evening of the business done by each Court during the day, and of that intended to be proceeded in on the following day, as far as may be practicable; with the earliest information of the arrangements made by the Judges of the different Courts, for the despatch of business, either in court or at chambers, and of all other matters connected with the profession.

This part of the institution will be found particularly convenient, as it will enable the members and their clerks to ascertain, in one place, and at all hours, what business is depending and about to be proceeded in before the different courts, without the trouble and inconvenience of obtaining the information at the different offices, where alone it can at present be had, and that only at particular hours.

A LIBRARY, to contain a complete collection of books in the law, and relating to those branches of literature which may be considered more particularly connected with the profession; Votes, Reports, Acts, Journals, and other proceedings of Parliament; county and local Histories; topographical, genealogical, and other matters of antiquarian research, &c. &c.

The expense of purchasing those books only which are necessary to an attorney for constant use, is considerable, and that of a tolerably good Law Library, more than the generality of practitioners can afford, whilst that of a comprehensive one, particularly if it include Parliamentary publications, county histories, antiquities, &c., and to which it is frequently necessary to refer, is within the reach of a very few.

AN OFFICE OF REGISTRY, in which will be kept accounts and printed particulars of property intended for sale, or sought to be purchased; of money ready to be lent or wanted to be borrowed, on mortgage or otherwise; of applications for partners, and for articled, managing, and other clerks; in short, of every matter that may be deemed generally useful to the profession.

The ordinary mode of advertising the different matters intended to be embraced by this branch of the Institution is not only very expensive, but also inadequate to the purpose; for as few persons see more than one or two newspapers daily, some from one cause and some from another, it is necessary, in order to ensure an advertisement being generally seen, to insert it in all, or at least in two of the principal daily papers; but there it is buried in such a mass of miscellaneous advertisements, that it passes unobserved, unless the paper is carefully examined, which is a task very tedious and troublesome; whereas, under the proposed arrangement, the information will be confined to subjects relating exclusively to the profession; and being concentrated in one office, and classed under different heads, may be easily referred to.

A CLUB-ROOM, which may afford members an opportunity of procuring dinners and refreshments, on the plan of the University, Athenæum, Verulam, and similar Clubs.

On the utility and convenience of this branch of the institution no observation is necessary.

A suite of Rooms for private meetings in bankruptcy, of arbitrators and creditors, and for all other meetings and purposes in any way connected with the profession.

This will obviate the inconvenience and diminish the expense to which the profession and their clients are at present subject, on occasion of being obliged to meet at a coffee-house, or some other place equally incompatible with other appointments.

FIRE-PROOF ROOMS, in the basement story, to be fitted up with closets, shelves, drawers, and partitions, for the deposit of deeds, &c. to be let to members of the profession, either for temporary or permanent purposes: each renter having a private key of his own room or division, to which no other person shall have access; and all the rooms being secured by a principal outer door, of which the librarian, or some other confidential person belonging to the institution, shall have the key.

Many attorneys, for want of an accommodation of this nature at their own offices, are obliged to run the risk of having title-deeds, securities, and other valuable property, destroyed by fire, or to deposit them, for safe custody, at a banker's, where they have neither easy access to them at all times, nor the absolute control over them, as they ought to have; both of these advantages are effectually provided for and secured by this part of the institution.

LECTURES on the different branches of the law, for the instruction of the junior members of the profession, are also contemplated.

These are described as among the principal objects and advantages of the institution as at present contemplated, but many others, it is anticipated, will hereafter necessarily flow from it; and, on the whole, we think it cannot fail to afford numerous advantages to each individual member, to confer signal and lasting benefit on the profession at large, and in an eminent degree to promote its honour and respectability.

---

## METROPOLITAN GENERAL REGISTRY.

MR. EDITOR,

FEW subjects of vital importance to the community have met with less opposition, than the proposals of the Commissioners for the establishment of a General Registry. There is hardly an instance of a member of the profession of any eminence raising his voice against the principle. Some have recommended different schemes, and others have opposed particular heads; but, on the whole, a degree of unanimity prevails, which must be highly satisfactory to the Commissioners, and the public at large. On the policy of the measure I had deemed that a single dissentient opinion could not now be found; but it appears that I was mistaken in the assumption, as an examination of a pamphlet on the subject, by Mr. Mewburn, a solicitor in the county of Durham, will abundantly testify. The author "is fully prepared to assert and maintain, that the establishment of a General Registry would produce an accumulation of evils far more considerable and extensive, than any that, by the greatest stretch of invention, can be said to have resulted from the want of one." He has fulfilled his promise of "assertion," but failed egregiously in the proof.

The investigation may be opened with an extract relating to the suppression of deeds, "which *clearly* evinces the impolicy of allowing a possible but very improbable occurrence to influence the resolves of the legislature, when the subject shall come under discussion!"

"It is very perceptible," says Mr. Mewburn, "from the document itself, and from the evidence attached to it, that an exaggerated importance has been assigned to *that*, which a general registry is more particularly intended to cure. The annual number of transactions concerning real property is estimated at 80,000; but the aggregate instances of the suppression of deeds, within the collective experience of the profession, in the course of twenty years' practice, do not, in all probability, exceed 1000."

The question here is not fairly met. That is assumed as an adverse argument, which the commissioners, in their report, have conceded. By contrasting this part of their report with a foregoing one, it will be seen that the author of the pamphlet has erred with his eyes open.

"A very inadequate estimate will be formed of the evils of the present system, from merely considering the cases in which a loss actually does arise to purchasers or mortgagees, from titles proving defective in consequence of the suppression of deeds; it is a consideration of the greatest importance, and one which presents the existing evil in the strongest light, that in all transactions respecting sales and mortgages of real property, suppression of title is treated as a risk to be apprehended, and against which it is the duty of the professional agent, to guard by every means in his power."—*Report.*

That this increase of vigilant exertion is not the sole objection to matters remaining as they are is afterwards shown. As the continuation of the remarks just quoted, displays the difficulties of making out a title to real property, under the present system, strongly, but succinctly, I shall frame no excuse for transferring it to your columns.

"In the process of investigation which is instituted as to the title, not only every document, the existence of which in any manner appears, and which by any possibility may affect the title, is called for, but various collateral sources of information, existing generally or in particular cases, are resorted to. Enquiries are made from

the occupiers of the lands, and from persons who have long dwelt in the neighbourhood; county and local histories are examined; searches are instituted for land-tax assessments, awards under inclosure bills, grants from the crown, grants of annuities, records of fines and recoveries, enrolments of deeds, judgments entered up in the several courts of record, securities given to the crown, probates of wills, and grants of administration, and various other species of documents."—*Report.*

The conveyancer cannot be prepared, with all his circumspection; and even if he possessed the supernatural activity requisite, the cost attending the enquiries is excessive. The consequence is, a general feeling is entertained of the present insecurity of title to real property, which, on that ground, necessarily becomes depreciated in value.

I shall now make some remarks on the subject of Terms. These, it is well known, according to our present regulation, constitute the chief protection of titles, and, further, occasion a considerable addition to the expense, delay, and difficulties attending alienation. This important branch of the question, Mr. Mewburn has prudently and discreetly kept out of view; for he knew full well, if he introduced it in all its bearings and aspects, to the notice of the "Gentry, Freeholders, and Merchants of the County of Durham," his pamphlet "would," to use his own words, "contain within itself elements that would speedily have insured the destruction" of his objections. As I have not the same reason for keeping back this piece of evidence, I shall lay before your readers the evils attendant on terms for years, and show how a registry will remove them. Here again I shall borrow from the report, not only as it contains abundant and excellent information on the point, but because it is the volume Mr. Mewburn professes to take into his consideration; to which, it must be assumed, he has directed a candid and impartial attention; and which he ought to have viewed fairly, as a whole, and not have taken isolated portions which favoured the principle he was anxious to establish.

"In every case in which there is an outstanding term, the title to the term must be shown in the same manner as the title to the freehold; and where there is more than one term, the title to each term must be shown; so that, in fact, as many titles must be shown as there are outstanding terms: this is one cause of the great length of abstracts;" and, it is almost needless to add, of their great expense.

"If a term be assigned by the deed by which the inheritance is conveyed to the purchaser, the deed is necessarily longer, and the expense is increased; and if the term be assigned by a separate deed, which is generally advisable, the expense is still greater." — *Report.*

In many cases a number of terms are required to be kept on foot, and these, too, increase the cost of the assignment.

"Expense, delay, and difficulty frequently arise in finding the trustees in whom the terms have been vested, or in tracing their representatives." — *Report.*

These are not imaginary or exaggerated evils, but are experienced in the daily practice of men of eminence. It follows, then, as a natural inference, that the risk is excessive, and the expense of assignments, &c. much greater than can possibly be incurred under a system of registration.

The enquiry now remains, how will a registry remove these evils? I answer, terms are kept on foot, as a protection to the inheritance, in consequence of *the general dread* of deeds being suppres ed and incumbrances kept back. But when these can be no longer suppressed (whether by fraud or accident), and retain any efficacy, this expensive method of supporting a title, is rendered unnecessary.

The commissioners are charged, in language of no little sound, with not having paid to the interest of owners of property in the country, and especially of those *in districts which are remote from the capital*, that attention to which they were entitled. Let the report defend itself.

"As to expense, it may be objected that the charges to be incurred for registration by persons at different distances from the office would be unequal. We think that provision might be made for equalising those charges. The post office might be made the medium of transmission directly to and from the register office; an average charge, which might be made very moderate, might be imposed on registration, out of which the expense of transmission might be defrayed by the register office." — *Report.*

The next complaint is, that the commissioners are "counsel eminent in their calling," as conveyancers, and that they have guarded against consequences, which, by reason of their great practice, they had found to be fraudulent and oppressive; but against which a person of more confined experience would not have provided. I shall leave this objection to depend on its own intrinsic merits.

The argument which, at first sight, appears most cogent, but which, like the rest, will not bear the test of examination, is the following; viz. "The report and the evidence in the appendix are applicable to the existing state of the law in other respects distinct from a registry: *it* has no reference to what *it* will become under the

revision of the commissioners." Now if the first "*it*" refer to "report and the evidence in the appendix, and if the second "*it*" have "law" as its antecedent, we may be able to answer this. One of the objects to be accomplished by a registry, is, the facilitating examinations of title, and although the inconveniences and mischiefs of present insecurity may be diminished, by amending the Statute of Limitations, and by simplifying the modes of assurance and evidences of title, yet what enactments can prevent fraudulent suppression of deeds, or the consequent apprehension; and these evils continuing, what can the commissioners substitute for terms as a protection? Besides, what have we to support and authenticate those titles depending solely on evidence of pedigree, (for it is a lamentable truth, that the present parish registers are ineffective,) which, even after a long possession, instead of being the best and safest, are, by conveyancers, considered the most dangerous and objectionable?

I come now to the "*solid objections*" to which a system of registration is liable. These are enumerated under the following heads; viz. "expense, delay, risk, uncertainty, and disclosure." As some of these necessarily include others, I shall take such as have been discussed more at length in the pamphlet; and having already occupied a considerable space in the preceding enquiries, I shall dismiss very shortly, but, I trust, very sufficiently, what remains.

With regard to the expense, it is impossible not to be struck, with the gratuitous rejection of the scale of charges for registration, suggested by the commissioners, and the substitution of another, seven times its amount. As the commissioners appear to have given the subject a full consideration, to have searched out every imaginable source of information, and to have been assisted by the talent of their professional brethren, and the new scale depends on the unsupported testimony of a single individual, we may be excused, I think, in preferring to continue our faith and trust, where evidence of the closest and deepest investigation is shown. And as to the remuneration proposed for an agent being inadequate, if the legislature provide officers, which it assuredly will, to act altogether in this capacity (who from practice would acquire great accuracy in searching), and limit their fees, who can complain?

"But," says Mr. Mewburn, "when it is recollected that the amount of the purchase money, in a very great proportion of sales of property, especially in manufacturing towns, does not exceed 50*l.*, the manifest conclusion, *maugre* the statement of the commissioners, is, that the *costs*, even now bearing heavily — too heavily, indeed — upon small proprietors, would be so greatly increased as to be not only fraught with oppression and injustice to those who have to defray them, but would be so *pregnant* with injury to the general interests of the public, by interposing a check to the progress of improvements, that on these grounds alone, it seems to me, the proposed measure ought to be regarded with the utmost jealousy by our legislators in both Houses of Parliament."

On this I will leave the report to speak for itself: —

"It is only in transactions of very small amount, that these expenses (of registration and search) would be at all felt. Such cases are at present attended with more than usual risk; because the ordinary modes of investigation and expedients for protection, which would often cost more than the value of the property, are usually omitted. We recommend that in these transactions the charges for registration, and for the transmission of the deeds to the office, be considerably reduced, or entirely relinquished."—*Report.*

From this it is manifestly the policy of the Commissioners, to protect small purchasers and mortgagees, by an *ad valorem* regulation.

On the objection on the score of disclosure, or "espionage," I can add nothing further to the answers to questions put by the commissioners, returned by a body of British merchants, who, from the variety and extent of their transactions, are unequalled by any on the globe, and who, one and all, see, instead of evil, nothing but advantage to result, should dealings with property be made public; which (*for the satisfaction of the fraudulent and the vain**) will not even be the case, as searches are to be obtained only under certain protecting restrictions.

If we are to have a system of registration established, argues Mr. Mewburn, district offices are to be preferred to "one huge *leviathan* in the metropolis." Only think of a leviathan in the metropolis! Fancy the mighty monster, "ocean bred," disporting himself in the vicinity of Temple Bar and Chancery Lane! What would become of your publisher? This would be a fish out of water in truth! But for the argument: the Commissioners propose to establish one general office, containing nine departments, for the purpose of registration in districts. "Now it is palpable that the same number of officers capable of doing the duties of one general metropolitan office would be sufficient for the management of nine provincial registers." It may be

* See Mr. Tyrrell's evidence given in the Appendix to the first Report, 223.

"palpable," but by no means demonstrable: for the fact is the reverse. One principal officer may superintend all the nine departments, placed under one roof; but when distributed over the country, nine superintending officers will be requisite. Besides, the division of labour, with the effects of which every one is familiar, may be introduced more minutely in a large establishment than a small one. Officers, by being constantly employed on a particular object, will acquire habits of accuracy and despatch. In a district registry either one officer would be obliged to perform several duties, and, of course, each inefficiently; or, by the engagement of a complement of men, the evil of increased expense is encountered.

A fair interest on the principal sum disbursed in erecting the required conveniences, may be styled the rent. This, added to the outlays for stationery and fuel, would not be, as it ought, in the case of a district registry, one ninth of the expenditure of the general office, but would be found nearly amounting to the full sum. If the districts be wide, the communication between distant parts and the office, is not much readier than with the metropolis.

The only valid argument afforded, although depending on premises by no means to be conceded, is, "that at present country attorneys hold a most respectable station in society: they are endeared to their neighbours, and enjoy the unlimited and well placed confidence of their employers." I am proud to acknowledge the truth of this statement. "But take away from them *the conveyancing business*, (which effect a metropolitan registry, Mr. Mewburn says, would produce,) and they would be degraded to the level *of miserable scribes, and contemptible pettifoggers.*" Now I deny that the system would induce this evil. First, let us consider, would conveyancing be removed? The experience of Scotland, according to our author, leads us to answer this affirmatively, as "the whole of the conveyancing of that country is done in Edinburgh." He provides us with information that explains this away, if even it be the fact. "In Scotland the purchases of land are generally of considerable extent, and the possession of property is in much fewer hands than in England." The principal landholders reside altogether, or the greater portion of the year, in their metropolis; it is reasonable, then, to conclude, that they employ a professional agent there, and that he should transact all matters and dealings relating to their estates wheresoever situated. It must be allowed, that this would be the case in Scotland, without the registry. Conveyancing can only be brought up to town as a convenience to the parties treating with their property, after the general utility of the measure is demonstrated; and the interest of a particular class, is not to outweigh the public benefit.

The emoluments of solicitors in the country, principally arise from the length of deeds and abstracts of titles: if the laws of real property be simplified, by whatever method, the abridgment of fees, for preparing these instruments, necessarily ensues. The above possible consequence appears, however, to have engaged the attention of the Commissioners. *

I cannot allow the expression, that the professional men in the country "will be degraded to the level of miserable scribes and contemptible pettifoggers," to pass unnoticed. Such is not the characteristic of the London law-agents, many of whom refuse conveyancing, and such need not be the case with their brethren remote from the metropolis.

There is only one thing more left to be noticed, "a something" dimly and obscurely hinted at: like the apparition of the Hartz mountains, huge, gigantic, and terrific, but partaking, at the same time, of its shadowy character. It is this:—

"When all the legal instruments in this great country should be collected together, what if other times were to come again? What if, at some future period, some northern, lusting after territory and ambitious of conquest, should, by the fortune of war and the dispensations of an all-wise Providence, be placed in the situation of the Norman, surrounded by the same temptations, and influenced by the same disposition to reward the services of his followers?"

What would become of the registered documents; or rather, what need should we have of them, for how would they avail us? I leave the discussion of these points to the visionist. † HOMO.

## MANAGEMENT OF A SOLICITOR'S OFFICE.

### HINTS TO PRINCIPALS.

[We select the following passages from a MS. collection of practical hints which has been placed in our hands by a solicitor of great activity and of extensive ex-

* Vide the Legal Observer, page 46.

† We have received a Paper on Mr. Mewburn's Pamphlet from another Correspondent, taking a different view of the subject, and for which we hope to find room in our next.

perience. They are designed for an office of large practice; but we conceive they will be useful in every professional establishment where there is more than one principal.]

---

1. EVERY business in an office, and its different stages, ought to be well known and understood by each principal, so that he may answer and advise any client who may apply for information. Thus also each principal will be able to proceed upon any business in the office, although it may not have been previously under his care; and if he perceive his partner to be overloaded, he may relieve him from a part of the burden.

Without keeping up constantly a knowledge of every business in an office and its different stages, none of the principals can be aware of, or relieve the burden of the others, and, consequently, an office may be thrown into confusion, and the interests of the clients may be injured by the illness or absence of a principal.

The more difficult a business may be, the more exertion is required to transact it, and the greater the pleasure will be when it is completed. No business should be avoided on account of its difficulty, or the protracted nature of the case.

2. Each principal should either personally transact or superintend the progress of every business in connection with any particular client who may generally consult him, whether in conveyancing, chancery, common law, or bankruptcy, because clients ought not to be sent from one department, or from one partner to another.

If clients prefer the senior or junior, the other principal should take all opportunities of acquiring a knowledge of the business on which he is consulted, and assist in conducting it, and endeavour to win the esteem of the client. He will thus gradually acquire his confidence; but, in advising with him, he should let him understand that what he is doing is under the direction, or with the sanction, of the partner on whom the client relies. If either of the partners should think that the client does not sufficiently confide in him, it will be judicious not to oppose the feeling, but imperceptibly overcome it. The more a man attempts to force his services upon another, the less likely is he to succeed. His object is only to be gained by the most methodical, zealous, and particular attention to the business and feelings of the party, by avoiding all procrastination and delay, and thus establishing a conviction in the mind of the client that his interest is warmly, ably, and industriously sustained.

Unless each partner adopts the mode pointed out, he never will be able to give any effectual assistance or relief to the other partners who may happen to possess a greater share than himself of the regard of clients. Let it always be remembered that despatch is the life and soul of business, and that without business be despatched, connections will not increase; for clients are better pleased when their business is quickly done, than even when it is well done.

3. The *clerks* of an office ought to be particularly attended to. It is incumbent on each principal, but particularly the junior, to superintend them, and see that they observe the rules and discipline of the office — that the business intrusted to their care is attended to — that their lists are properly kept and posted — that their memoranda and entries of business done are daily made — that they make out the bills for the business they have transacted — that they waste not their time — and that they are punctual, assiduous, and attentive. A constant and daily communication with the head of each department (whose duty it is to see that the clerks in his department conduct themselves properly) will greatly assist these objects.

4. No business can be well conducted unless the principal possesses *forethought*, and forms his plans either over night or the first thing in the morning, and arranges the business of each day whether to be done by himself or his clerks. If he trust to his memory, it will often fail him, and he will be constantly exposed to the charge of forgetfulness. If he wait to give personal directions to his clerks on each occasion as it occurs, he will not only be constantly harassed, but be sure to omit many instructions which he ought to give. If he have no settled plan he will find that one business or one engagement will interfere with another, and he will not know with which business to commence or with which to close. On the contrary, he will be throughout the day in perpetual bustle and confusion.

These observations will also apply to the arrangement of the details of the *business itself*. If the principal have no outline of proceeding, and if he have no methodical plan on which it should be done, and if he have no note of the points or difficulties connected with it, he will be taxing his recollection constantly, (often, he may be assured, in vain,) and he will never make any beneficial progress. When papers are perused or business commenced, it is essen-

tially necessary that some memoranda should be made, so that either of the principals may refer to it for guidance. It is the minute and accurate discrimination of facts and points by a solicitor, which tends to the successful issue of any business intrusted to his care.

5. The daily entries of business done by principals — keeping an account of all receipts and payments — posting the receipts and payments into the ledger — making out, carefully settling, and delivering bills — posting *them* into the ledger — collecting their amounts — ascertaining the state of the cash balances, and the state of each clerk's disbursement account — seeing that all the books are regularly kept up: — all these are matters of the utmost importance, and should never be lost sight of by principals, and particularly by the junior. The head of the department of accounts, will be able more effectually to discharge his duty, and keep the accounts in better order, if he is from time to time assisted and directed by the partners. The junior should especially attend to this duty.

## RIGHT OF ATTORNIES TO BE PRESENT AT JUDICIAL PROCEEDINGS BEFORE MAGISTRATES.

Our attention has been directed to this subject, by a respected subscriber in the country, whose remarks we shall be at all times glad to receive.

The most recent decision on the point is that of *Daubney*, Gent. against *Cooper*, which was tried at the Lent assizes for Lincoln in 1829. That was an action brought by the plaintiff, an attorney, against the magistrates, for turning him out of the room, on a summary hearing before them, upon a question under the game laws. The question was, Whether the defendant had a right to appear by attorney? The defendant was not himself present.

The Court of King's Bench, before which the case came in Michaelmas term, 1829, did not decide, whether as a matter of right or indulgence the attorney was entitled to be present. The question was determined on the ground, that the magistrates were exercising a judicial authority in proceeding to a summary conviction. They were acting as a court of justice, the proceedings of which are essentially public. If there be room, all persons have a right to be present, unless they interrupt the proceedings, or there be a sufficient reason for their removal.

In the case before the court, one of the three defendants, without any offence by the plaintiff, turned him out. He was there as the friend of the defendant. He was entitled to be there as one of the public. He might be desirous of knowing what evidence there was to support the case, and who were the witnesses. It might be of great importance to the defendant, if there should be any misconduct in the witnesses. If they stated other than the truth the defendant might thus have the means of calling them to account.

The court decided, that the magistrates in summarily convicting a party acted as a court, exercising a judicial function, and that the proceedings ought to be public, and therefore they were not warranted in removing the plaintiff. *

It was held in this case, which was an action against the three sitting magistrates, that as one of them only had interfered in turning the plaintiff out of the room, and the others took no part in the transaction, the verdict ought to be entered in favour of the two, and to stand against the one only. †

The older cases which relate to the question are the following: —

Gilman *v.* Wright, 2 *Keb.* 477.; Hastings' Case, 1 *Mod.* 23.; The King *v.* Simpson, 1 *Str.* 44., *Paley*, 107.; Hurst's Case, 1 *Lev.* 75.; Anon., *Marsh*, 141. pl. 214.; Cox *v.* Coleridge, 2 *D. & R.* 86.; Rex *v.* Justices of Staffordshire, 1 *Chit.* 217.; Rex *v.* Borron, 3 *Barn. & Ald.* 438.; Barclee's Case, 2 *Sid.* 101. See also Rex *v.* Paine, 1 *Salk.* 281.; 5 *Mod.* 163. S. C.; 2 *Hawk.* P. C. lib. 2. c. 46. s. 3—10.

## METROPOLITAN INFERIOR COURTS.

*To the Editor of the Legal Observer.*

Mr. Editor,

As a constant reader of your periodical, of which I highly approve, I beg to draw

* 10 Barn. & Cress. 237.

† *Quære*, Did not the other two concur, and the one in giving directions act by the authority of all? The facts proved at the trial were, that the party accused of an infringement of the Game Laws, requested the plaintiff to attend as his attorney. The plaintiff, on appearing in the justice room, was told by one of the magistrates that "the magistrates had resolved not to allow an attorney to appear," and desired him to leave the room. The plaintiff refused to do so, and the same magistrate ordered the constable to remove him, and this was done.

your attention to a legal monopoly of vital importance to the profession at large, and to the public in general. I mean, Mr. Editor, the monopoly of justice in the *inferior* courts, of which I think a few words will satisfy you.

The courts to which I more particularly allude, although there are many others of a local nature, are the *Marshalsea* Court, and the court of the palace of the King at Westminster, commonly called the *Palace* Court, the *Lord Mayor*'s and *Sheriffs'* Courts of the city of London, and the *Borough* Court of Record.

Now, sir, in the two first named courts there are only four counsel and six attorneys; in the Lord Mayor's Court, four counsel and four attorneys; in the Sheriffs' Court, four counsel and eight attorneys; and in the Borough Court, two counsel and three attorneys.

I believe, in the profession of the law, there are now about six thousand attorneys *, who annually take out their certificates as members of the *superior* courts at Westminster. These gentlemen have all had to pass through a regular service of five years, and have paid a heavy duty to government on their articles, admission, and certificate — and not one of them is allowed to practise in any of the inferior courts which I have named, *unless* he happen also to be *one of the chosen few*, conisting in all of twenty-one attornies although he may have clients desirous of suing for their small debts in such courts. Consequently many of the attorneys of the superior courts are not only deprived of the business in the particular cases alluded to, but frequently lose their clients altogether, who naturally prefer an attorney who has the good fortune to be allowed to practise in all the courts; thus in one sense reversing the order of things, and making the inferior of greater importance than the superior court.

Now, Mr. Editor, if such be the fact (and I am confident it cannot be disputed), am I not justified in calling such a practice "a monopoly" of justice, as connected with the inferior courts? Such a monopoly is not only an injustice to the profession at large, but a decided injury to the public in general; for I have no hesitation in saying, that were all the members of the superior courts allowed to practise in the inferior, it is probable that actions under 20*l.* would be almost exclusively confined to the latter courts.

* We understand the number of certificated attorneys is nearly eight thousand.

I am sorry some more able pen than mine has not been exercised upon this subject; but as I know your work to be "open to all parties, and influenced by none," I am satisfied you will not on that account refuse to insert this, from

FIAT JUSTITIA.

## ELECTIVE FRANCHISE.

*To the Editor of the Legal Observer.*

SIR,

I BEG to direct the attention of the profession to the leading article in The Times of the 20th instant, which contains a proposition that whole orders of men should be admitted to the privilege of voting, in the election of members of parliament, for the respective places in which they reside, without regard to property, and in respect only of that consideration in society to which they are entitled by their several professions. In particular, it is proposed that all barristers, clergymen, physicians, graduates of universities, and officers in the army and navy, should be entitled to vote. It is not my purpose to offer any opinion on this, as a general proposition; my object is to suggest to the profession, that, if the principle should be adopted by the legislature, practising attorneys and solicitors should be deemed as well entitled to a participation in the elective franchise as any of the classes above referred to. By specifying barristers without solicitors, and physicians without surgeons, it might be imagined that the theorist in The Times considered that, of the members of learned professions, the higher orders only possessed that intelligence and importance which would entitle them to be regarded in such a measure; but, to be consistent, he should also have distinguished dignitaries from the subordinate clergy. It was lately observed by a member in his place in parliament, that "Attorneys are more confidential and responsible persons than barristers;" but, waiving ungracious comparisons, I trust the former branch of the profession will, on no occasion, lose sight of their proper degree in the scale of society.

I am, Sir,

Yours, with respect,

P. L.

Staple Inn,
Dec. 22. 1830.

## INCENDIARIES. — Remedies against the Hundred.

[FROM A CORRESPONDENT.]

By the act of 9 Geo. I. c. 22. sects. 1. & 7. it is enacted, that where any person shall set fire to any house, barn, &c. the inhabitants of the hundred shall make satisfaction to the party suffering for the damage sustained, not exceeding 200*l.*, provided he or his servant give notice of the offence to some of the inhabitants of the hundred within two days, and give in his examination upon oath before a magistrate, within four days after the offence, whether or not he knows the person who committed the same. — Sect. 8. The hundred not to be liable if the offender be convicted within six months. — Sect. 9.

By the 3 Geo. IV. c. 33. a summary remedy is given to recover compensation for such damage, not exceeding *thirty pounds*, before a magistrate.

By one of Sir *Robert Peel*'s acts, 7 & 8 Geo. IV. c. 27., both the above statutes are repealed, and these provisions are not re-enacted by the concurrent statute passed in the same session, c. 31., consequently there is no summary remedy whatever against the hundred for persons suffering from incendiaries.

This subject more particularly deserves attention, as in 9 *Barn. & Cress.* 134. there is a decision as to the construction of the above-mentioned act of 9 Geo. I. (reported after such statute was repealed,) which might lead to a supposition that the remedy given by it against the hundred still exists.

It also deserves notice, that by the 7 & 8 Geo. IV. c. 31. sect. 2., no remedy is given against the hundred for the destruction, by rioters, of threshing or other machines used *in agriculture*, though by such section full compensation is directed to be made by the hundred where agricultural and manufacturing buildings and machinery used *in any manufacture* are so destroyed.

## RETURNS OF WRITS.

SIR,

I BEG to call your attention to a practice just commenced, relating to the return days of writs under the new act, 11 Geo. IV. and 1 W. IV. c. 70. s. 6.; which practice is clearly a deviation from the statute. The statute requires the return days to "be distinguished by the day of the term on which they fall." Now what is meant by the expression "day of the week," but the day by its name of Monday, Tuesday, and so on? and what is intended by "day of the month," but its ordinary denomination, of the 1st, 2d, or 3d day of January, February, &c.? and by analogy, the expression "day of the term" most naturally signifies the day according to the numerical series, beginning 1st day, and so on. The return day, therefore, should be described thus: on Monday the 3d, 4th, 5th day of Hilary Term. This description, it is true, would not apply to the first essoign day, which, by a curious solecism, is not a day of the term, but the fourth day *before* the term. That fact, however, does not warrant a departure from the statute, where its meaning is obvious; and as writs are made returnable before the term, such returns might be described as on the "3d," "2d," or "1st day" before the commencement of term.

W. T.

Inner Temple Lane.

## SUPERIOR COURTS.

THE LORD CHANCELLOR it is expected will hold his First Seal before Hilary Term on the 10th of January, 1831, in Lincoln's Inn Hall.

It was reported that the MASTER OF THE ROLLS would not sit till the usual period of the Old Term; but this determination has been altered, and his Honour will hear Petitions at the Rolls the 10th of January.

On a question from Mr. Pepys, the VICE CHANCELLOR mentioned that he should not resume his sittings until the first day of Hilary Term, the 11th of January.

### PRIVATE HEARINGS.

*Sugden* said that he had an application to make respecting a ward of the court, which his Lordship had allowed to be heard in private. *Knight* objected. He said a petition had been presented, the object of which was to commit his client. Before he consented to a private hearing he wished to consult the party for whom he appeared. *Sugden* said he did not want the consent of any party, since his Lordship was convinced that the case ought to be heard privately. *Knight* insisted that the court could not hear in private without consent of parties. *Sugden* said he asked no favour; he demanded a private hearing as a right. *The Lord Chancellor* said that in such cases it was not necessary that the court should have the consent of both parties,

because that would be giving either of them the power of extorting from the other concessions which ought not to be made.

*Sittings after M.* 1830.

---

PLEADINGS.

Appeal from the *Vice Chancellor*, who had refused to permit a co-plaintiff to be struck out of a bill, for the purpose of making him a defendant in the same suit. The practice of the court was relied on in favour of the application, and the principle was said to be that evidence might not be suppressed. It appeared, however, that the case which had been cited in support of this view was decided upon particular circumstances. Decision of the Vice Chancellor affirmed without costs.

*Ward* v. *Ward.* — *Sittings after M.* 1830.

---

SPECIFIC PERFORMANCE. — COSTS.

*Appeal from the Vice Chancellor.*

A bill had been filed to enforce the specific performance of an agreement for the sale of a reversion, which it appeared had been contracted for at an inadequate price. The bill was dismissed with costs, and the Lord Chancellor affirmed the decree of the Vice Chancellor. The purchaser, however, maintained that he ought to be reimbursed 25*l.* which he had advanced to the vender of the reversion in part of payment. The *Lord Chancellor* said, If the purchaser had brought an action he might have recovered, but he did not choose to resort to that remedy. It had been held to be a sound practice, that parties should not be allowed to thrust something into a corner of a bill on which they would have a right to succeed, but that the decision should be upon the main subject of the suit. His Lordship, therefore applied this rule to the present case, and was of opinion that the decree must be affirmed generally, and the plaintiff's bill dismissed with costs, as well as the costs of the appeal.

*Kendall* v. *Becket.* — *Sittings after M.* 1830.

---

PECULIAR COVENANT.

*Nayler* v. *Wetherall.* — In this cause the only point argued was as follows: — By an indenture bearing date the 2d of August, 1768, Thomas Blunt covenanted, that in consideration of a marriage then intended between himself and Mary Hoskyns (which was afterwards solemnised), he would, by his last will and testament in writing, duly executed, or otherwise in due form of law, well and effectually give, bequeath, settle, convey, and assure, all such messuages, lands, tenements, and hereditaments whatsoever, freehold, leasehold, copyhold, or customary, goods, chattels, and personal estate, of what nature or kind soever, as the said Thomas Blunt should at or immediately before the time of his death be seised, possessed, or entitled to, either at law or in equity (subject to the payment of his debts), to his intended wife, Mary Hoskyns, for life, and after her decease to all and every the child and children issue of the body of Mary Hoskyns by Thomas Blunt, and their heirs, executors, and administrators, in equal shares and proportions if more than one, or tenants in common, and if but one such child, then by such child, his or her heirs, executors, and administrators, with remainders over. Afterwards, in the year 1806, Thomas Blunt made his will, and devised and bequeathed his property upon certain uses and trusts altogether inconsistent with the way in which it would have gone if the covenant was to be considered binding. The testator afterwards died, having had six children, four of whom died in his lifetime, unmarried; and another of whom (Frances Nayler) died married, and leaving issue three sons; and another (Harriett Blunt) who survived him.

The bill was filed by one of the sons of Frances Nayler against the trustees of the will, Harriett Blunt, and his brothers, George Richard Nayler and Thomas Nayler, to have the rights of the parties ascertained, and to establish the covenant.

Mr. *Treslove* and Mr. *James Stewart* for the plaintiff contended, that as the covenant was entered into for a valuable consideration, it must bind all the property of whatever description of which the testator was seised or possessed at the time of his death; that each of the six children took a vested interest on his or her birth in the real and personal estate of the testator, and that four of the children having died in testator's lifetime, the father took their shares in the personalty as administrator, and that it was also bound by the covenant, and was unaffected by the will.

Mr. *Spence*, Mr. *Lovat*, and Mr. *Whitmarsh*, for defendants, agreed to this construction; Mr. *Walker* for another defendant, George R. Nayler, contended, that the covenant could not operate twice on the same property, and that the shares of the personalty which the father took as administrator of his children passed by the will; but the point was generally admitted to be a new one, and no case was cited by any of the learned counsel.

The *Vice Chancellor* decided that the covenant was a valid one, and was binding on all the property of which the testator was seised or possessed at the time of his death, except the shares in the personalty which he took as administrator; but as to this, he thought that the will was effectual, and that it would go according to the dispositions therein contained.

*V. C.* Dec. 22. 1830.

---

ATTORNEY. — ATTACHMENT.

A rule to show cause why an attachment against an attorney named Firth should not be set aside, and he be discharged out of custody, was obtained under these circumstances. A man named Binns was indebted to the prosecutors. He not paying his debt, instructions to sue him

were given to a Mr. Battye, and a *latitat* accordingly, in the year 1826, sent down to Firth, who resided near Binns. This he served on Binns, and advised him to send up the money before the return of the writ, which would be on the 6th November, 1826. Binns gave the money to a person named Johnson to transmit it. Instead of doing so, Johnson kept the money; and, though he had no knowledge of the defendant, wrote a letter to Battye, the prosecutor's attorney, signed "Johnson for Firth." In this he acknowledged, on the part of Firth, that he had received the money in question from Binns, and stated that he would send it in a few days. The money not being paid, Battye applied for an attachment against Firth for the non-payment of the client's money, which appeared to be in his possession. Firth showed cause, without taking office copies of the affidavits on which the attachment was moved for. Not knowing their contents, his answer was incomplete, and the rule for an attachment was made absolute. He was arrested on it in 1827, and had remained in custody in York Castle ever since. An application to discharge him under 48 Geo. III. c. 123. was made some time since; but as the case did not come within that statute the application was without avail.

On showing cause against the rule for discharging the defendant on the present occasion, it was contended that the only question was, whether the application was made in time.

The Court referred the matter to the Master. Littledale J.—*Rex* v. *Firth*, *M. T.* 1830.

---

CHANGING VENUE.

A rule to change the venue was granted on the usual affidavit, by the defendant's bailiff, his master being unacquainted with the circumstances. Littledale J.—*Adams* v. *Grosvenor*, *M. T.* 1830.

---

AFFIDAVIT OF BAIL.

*Andrews*, Serjt. showed cause against a rule for setting aside proceedings on the bail bond. He objected that the affidavit on which the rule was obtained did not state, according to the rules of the Court, that the motion was made by the bail "at their own expense, and for their only indemnity;" but the word *only*, which he submitted to be most material, was omitted.

The Court thought the objection valid, and refused to hear the bail on this affidavit; but gave them leave to amend.

*Mills* v. *Corfield*, *Com. Pl. M. T.* 1830.

[The rule on the authority of which this decision was pronounced is that of Michaelmas Term, 1818.]

---

# MISCELLANEA.

PUBLIC READINGS AT THE INNS OF COURT.

Roger North having recorded the appointment of his brother Francis, afterwards Lord Guilford, to the office of Solicitor General, thus adverts to his public reading at the Temple.

During his solicitorship his Lordship kept his public reading in the Temple Hall, in the autumnal vacation in the year. He took for his subject the Statute of Fines, and, under that, found means to exhaust all his learning upon that branch of the law which concerned titles and the transferring them; and the arguers against him did their parts also, who were the best lawyers of the society in that time. As for the feasting part it was sumptuous, and in three or four days' time cost one thousand pounds at least. The grandees of the court dined there, and of the quality (as they call it) enough; for his diffused relation, general acquaintance and station, as well as prospect of his advancing in the king's service, made a great rendezvous of all the better sort, then in town, at his feasts.

He sent out the officers with white staves (for so the way was), and a long list to invite; but he went himself to wait upon the Archbishop of Canterbury, Sheldon; for so also the ceremony required. The archbishop received him very honourably, and would not part with him at the stairs' head as usually had been done; but, telling him he was no ordinary reader, went down, and did not part until he saw him pass at his outward gate. I cannot much commend the extravagance of the feasting used at these readings; and that of his Lordship's was so terrible an expense, that I think none hath ventured since to read publicly; but the exercise is turned into a revenue, and a composition is paid into the treasury of the Society. Therefore one may say, as was said of Cleomenes, that, in this respect, his Lordship was *ultimus heroum*, the last of the heroes. And the profusion of the best provision and wine was to the worst of purposes,—debauchery, disorder, tumult, and waste. I will give but one instance:—Upon the grand day, as it was called, a banquet was provided to be set upon the table, composed of pyramids and smaller services in form. The first pyramid was at least four feet high, with stages one above another. The conveying this up to the table, through a crowd that were in full purpose to overturn it, was no small work: but with the friendly assistance of the gentlemen it was set whole upon the table. But, after it was looked upon a little, all went, hand over head, among the rout in the hall, and, for the more part, was trod under foot. The entertainment the nobility had out of this was, after they had tossed away the dishes, a view of the crowd in confusion, wallowing one over another, and contending for a dirty share of it.

It may be said, this was for want of order; but, in truth, it was for want of a regular and disciplined guard of soldiers; for nothing less would keep order there. I do not think it was

a just regulation when, for the abuse, they took away such a profitable exercise. *But, in England, it is a common way of reforming, even in state matters, instead of amending or paring away what is amiss, to kick down whole constitutions, all at once, however in themselves excellent.* Could not the whole proposition have been laid aside, and nothing but ordinary commons allowed? But as to the exercise, now it is gone, we can see the want of it; *and never more want than now, when statutes of broad influence upon the people's concerns are so frequently sent out from the parliament.* It was the design of these readers to explain to the students the constructions that were to be made upon new statutes, for clearing a way that counsel might advise safely upon them. And the method of their reading was to raise all imaginable scruples upon the design, penning, and sense of such new acts as they chose out to read upon, and then to give a careful resolution of them; as we may see done in those readings that are in print. But now there is scarce a lawyer so hardy to advise a client to try a point upon a new statute, whereof the event is at the peril of costs, and sometimes ruin of a poor man that pays for the experiment; for how can the counsel foresee the judge's sentiments? And how contrarient to his advice they may prove! As, for instance, upon the law of distress and sale for rent *, some have said it is to devest property, and, so far, in nature of a penal law, and ought to be construed strictly. Others have said that it is a remedial law, and ought to be enlarged by construction. And who doth not know the wide difference in the consequences of law in some points, upon these various grounds of constructions? Now, if a previous reading had been had upon this statute, saving better judgments, it had been declared a remedial law, and to be construed in favour of remedy. And probably a single judge at the assizes would not have opposed his sentiment against the learned determination of a reader, so solemnly and publicly held forth (as at these exercises in the Inns of Court is done), which counsel at the bar, in nice questions at law, are allowed to appeal to for authority. But, as the case is now, till some hardy client hath pushed his point, upon some new provisionary law, to a trial, and obtained a resolution on his side; or else, to his immense cost (which properly converts it into a penal law), finds that he is in the wrong, counsel care not to advise a law-suit, or give a clear or positive opinion in any questionable matter arising upon such a new law.

*Life of Lord Guilford*, ed. 1826. Vol. I.

---

CHEAP JUDGES.

I had a long and interesting conversation with a young lawyer, the Supreme Judge Hart, living in this town, but proscribed and suspended for sending a challenge to three agents of his estates in Kentucky, who, after injuring him, caricatured him, and then refused to fight.

The Supreme Judge Hart is a gay young man of twenty-five, full of wit and humorous eloquence, mixing with all companies at this tavern, where he seems neither above nor below any, dressed in an old white beaver hat, coarse threadbare coat and trowsers of the same cloth (domestic), and yellow striped waistcoat, with his coat out at the elbows.

* * *

Judge Waggoner, who is a notorious hog-stealer, was recently accused while sitting on the bench, by Major Hooker, the hunter, gouger, whipper, and nosebiter, of stealing many hogs, and being, although a judge, the greatest rogue in the United States. This was the Major's answer to the question of guilty or not guilty, on an indictment presented against him. The Court laughed, and the Judge raved, and bade Hooker go out, and he would fight him. The Major agreed, but said, "Judge, you shall go six miles into the woods, and the longest liver shall come back to tell his tale!" The Judge would not go. The Major was now in his turn much enraged, by the Judge ordering him into Court to pay a fine of ten dollars for some former offence, the present indictment being suffered to drop.

* * *

Judge Waggoner recently shook hands at a whisky-shop with a man coming before him that day to be tried for murder. He drank his health, and wished him well through.—*Faux's Memorable Days in America.*

---

## TO CORRESPONDENTS.

*To the suggestions of several of our subscribers, it will be observed we have paid attention; and we hope, in our next, to devote sufficient space for the insertion of the substance of various letters, which our plan will not permit us to publish at large.*

*The Case of an "Agent's Signed Bill" was received from a most respectable authority; but we shall certainly avail ourselves of our Correspondent's information.*

*We have the same remark to make regarding some points of practice, which shall be more fully explained.*

*A further communication on the "Old Local Courts" shall receive the earliest attention. The zeal of our Correspondent is entitled to many thanks.*

*We regret the necessity of postponing some further Queries.*

*The first of a Series of Letters to the* LORD CHANCELLOR *on his project for establishing Local Courts will appear in our next.*

---

* Stat. 2 Will. and Mary, Sess. 1. c. v. s. 2.

# The Legal Observer.

VOL. I. SATURDAY, JANUARY 8. 1831. No. X.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## TO THE LORD CHANCELLOR,

ON HIS PROJECT FOR ESTABLISHING LOCAL COURTS.

MY LORD,

I NEED make no apology for addressing your Lordship through the columns of this publication. You have been too long accustomed to censure and reproach the most bitter, unjust, and unsparing, to turn away from the calm and temperate discussion of the intended measures of the legislature, although you may stand in the relation of their political father. You have too long and too often maintained the rights of opposition, and led its legions with success, to object to it. You have for many years been the Receiver-General of grievances; the common vouchee of those who were to pass under the yoke of political subjection; you have held this proud eminence in the eyes of your country—an eminence as lofty as your present exalted situation; and I now address you with the perfect confidence that you will rather encourage, than spurn the humble remonstrance which I shall make, when I tell you that I represent the sentiments of the large majority of the profession of which your Lordship is a member.

And first, my Lord, before entering into the discussion of your measures, permit me to advert for a moment to a circumstance which has filled my mind with great surprise—surprise not entirely unmixed with alarm. When I take up the journals of your Lordship's House, and of the other House of Parliament, and find there recorded, motions and notices of motions, skeleton bills, and bills embodied in full-blown parliamentary maturity—measures, some hatching, others in a *chrysaloid* state, and others spreading forth their parchment wings, and beginning their butterfly existence; when I find that all these measures are intended to alter the present system of our laws; to injure its practitioners; and, in my mind, materially to affect the best interests of the country, I confess that I am not a little amazed, that no attempt is made to place the true state of the case before the public. I would ask the profession, is no opposition to be attempted? Are these measures of injury, if not of destruction, to be received with assent, or with a silence that signifies assent? Are the persons who openly profess to injure the practitioners of the law to be met with friendly cordiality; and the annihilation they seem to wish to be welcomed as a boon? No, my Lord, it appears to me that it is not the duty of the profession of which your Lordship is the head, either to themselves, or, what is even of more consequence, to the public, quietly to submit to be sacrificed, or to choose to be offered up as peace-offerings to the demon of revolution.

In parliament the battle must be fought by other hands. It is indeed an arduous one. A reform in the laws is a fit subject for legislation! The altering that which we do not understand is the easiest task in the world! The law and lawyers are enemies upon which every infant legislator is eager to "flesh his maiden sword!" But there are still some who will do their duty: my hopes are chiefly on your Lordship. You will not sanction any measure which will materially injure your own profession; certainly not, if injuring your own profession you at the same time injure the whole community.

But if the interests of the legal profession are ill attended to in Parliament, how are they attended to out of it? I would, my Lord, that I had your spirit-stirring voice to rouse the public, as well as the profession, to a proper sense of the measure which I now propose more particularly to consider. However well its evils may be known to those who are best entitled to form an opinion—whatever may be the private opinions on the subject, there has been

no public demonstration of them; and it appears to me the absolute duty of every practitioner, openly, steadfastly, and by all possible lawful means, to oppose the measure to which I now advert.

That measure is your Lordship's bill for establishing local jurisdictions throughout the country. It appears to me that the measure would be attended with disadvantages the most extensive and fatal. That it would entirely subvert the present system for the administration of justice must be admitted; but as, by some, this seems to be considered an advantage, I shall not dwell upon it, but proceed to point out my particular reasons for disagreeing with it.

It will be admitted by the most sanguine and sweeping reformers that it will be necessary in all local courts that there should be a judge, and practitioners who must sooner or later, form themselves into the present divisions of barristers or advocates, and attorneys. Now, then, we must take the world as it is, and let us enquire who would become the judges, the barristers, and the attorneys in these local courts.

And, first, as to the judges: the proposed remuneration for the judges of these courts is from 1500*l.* to 2000*l.* a-year. The difficulty, then, is simply this — Can your Lordship get a proper person to accept the office of judge of these local courts? It is true that many young gentlemen who have just come forth in all their powdered and flowing honours, might be satisfied to abandon their chances of the woolsack, and content themselves with the limited jurisdiction of a country town. These, however, you are willing to exclude. It is also true that many men who have either outlived their business, or have pursued their labours without having had their tranquillity disturbed by professional occupation — who have been spectators of the busy fight, but who have not been required to take part in it — it is perfectly true that these harmless and respectable individuals may be content to renounce engagements in which they have ceased to take part, or into which they have never entered — to abandon duties which they have ceased to perform, or have never performed at all, and to retire to the unambitious retreat provided for them by your Lordship's bill. Both these latter classes of persons, doubtless, will smother their ardent hopes, and stifle their eager desires, and withdraw with composure from an unjust world. But, my Lord, none knows better than your Lordship that this remuneration (and more you do not propose to offer) will never induce a proper person to accept the office. Your Lordship will surely recollect that, independent of ambitious hopes, and desires of self-advancement, no man in fair practice would, in common justice to himself, accept the situation offered by your Lordship's bill. You will remember, my Lord, your own declaration in the House of Commons, that you were too poor to be able to take the situation of a judge of a supreme court, — a situation then worth from 6000*l.* to 10,000*l.* a-year. No one denied your assertion; its truth and justice were instantly admitted by all who heard the statement. An advocate in leading practice has frequently refused the situation even of a Chief Justice, on this very account: this happened but the other day, as is known to all. And if you would refuse — if other barristers have refused, and will still refuse, the proud situation of a judge of the superior courts of the country, who does your Lordship expect will consent to fill the humble, not to say, paltry, situation which your bill offers? I say again, that no man at all known to the public, and who would be qualified to perform the important duties with which your Lordship would intrust him, would undertake them. He could not do so in justice to himself. He makes twice as much by his profession, and he has the hope and reasonable chance of rising higher.

Where, then, will your Lordship get your local judges? from what classes of the profession will you select them? You must necessarily be driven to the incompetent and inefficient. The honours must be divided among the two classes I have already mentioned; — men who have outlived their practice, or who have never had any; men who have been tried too long, or who being tried have failed. These are to be the village Solons! the "lights and landmarks" to direct the shipwrecked wretches who are tossed in the deep ocean of the law!

And what are the labours which your Lordship would intrust to them? They are not the comparatively limited duties of the judges, even of the superior courts. With the last learned persons the knowledge either of law or of equity is deemed sufficient, and abundant even to repletion. But a local judge, according to your Lordship's measure, must know infinitely more. The mysteries both of law and equity must be equally familiar. The whole field of legislation must be his own. He must be a provincial Janus. His sword of justice must have a double edge. He must deliver oracles in two languages. A compound of vinegar and oil — he must soften his own

acerbities, and control his own decrees; he must be "every thing by turns, and nothing long;" judge, advocate, attorney, arbitrator, referee, and pacificator; haranguing, adjudicating, arbitrating, conciliating, and reconciling: he will not only dazzle his unfortunate suitors by his ever-varying and multitudinous splendours; but will positively himself begin to doubt his own identity. The duties of a judge of the superior courts, important and extensive as they are, shrink into insignificance before the enormous powers intrusted to a local judge by your Lordship's bill. These are the duties which they will have to perform! and who the men will be to perform them I have already shown.

I have not attempted to hint that the large share of patronage which this bill would throw into your Lordship's hands would be improperly applied, if your Lordship could prevent it; I have merely shown that it *must*, from the nature of things, be improperly applied. I firmly believe that your Lordship's motives are most pure and honourable; that however subsequent chancellors may dispose of the patronage thus bestowed, your Lordship would consider yourself as holding it but as a trustee for the benefit of the public; but I may suggest, that there will be a fair opportunity for any future government, if induced to be corrupt, to appoint men to these situations from other motives than the simple benefit of the community. It is perfectly clear that wherever a situation is not sufficiently conspicuous and prominent to call public attention to the manner in which it is filled, *that* office may frequently be *jobbed;* and the fewer offices of this kind there are at the disposal of government, the better will the public service be attended to. Now it does appear to me, my Lord, that at some future time, when you will have no power to control the appointments, that these local judgeships will be considered very "*nice snug little things,*" to use the slang of the placemen; and that they may be as corruptly disposed of as all other "nice snug little things" notoriously are.

It is true, indeed, that in the whole ranks of the legal profession you may find two or three men who may unite the qualifications necessary for the office and the will to accept it. I cannot point them out or remember them, but they may perhaps exist. This, however, only proves the rule; that will be the exception. In one or two counties these courts may occasionally answer. By a sort of shifting good fortune, Yorkshire may at one period be fairly treated, and Kent at another. Your Lordship's measure may limit justice to Middlesex for life, remainder to Surrey in fee; but a tenth part of England cannot enjoy it. The measure may be beneficial to the hundredth portion, but the ninety-nine other parts will be miserably ill provided Cheap injustice will be abundantly plentiful. The game may be played with very little risk; but it is a game in which no party will win. The proper respect for the opinion of the judge will not exist. He will have his favourites and his aversions; he must be influenced by all sorts of local prejudices, and perhaps without wishing to do wrong; but being a man whose mind cannot be of the first class, and having to settle minor disputes and difficulties most interesting to the particular spot on which he resides, one of two things must happen: he will decide in favour of a particular party, or he will not; in either way, he incurs the displeasure of one half of his jurisdiction.

No one who knows the state of every provincial town will call this statement exaggerated. The most trifling occurrence is there important, and seized upon as matter for party discussion. The non-payment of a 10*l.* bill; the possession of a yard of land; or the disturbance of some petty privilege, frequently excites the hottest conflict of opinions. The great beauty of the present system is, that these matters are decided by a man who cannot possibly be influenced by local feelings, and who cannot, therefore, be visited by local censure: his motives cannot be impugned; he settles the question for ever, and the administration of justice receives universal respect and deference. No provincial judge can stand upon the same footing; for, although he were perfectly unprejudiced; although his capacity were transcendant, he could not possibly give the same satisfaction. How must it be, then, when the local judge must almost necessarily be both partial and incompetent?

This, then, is my first objection to your Lordship's bill. THE PROPER LOCAL JUDGES CANNOT BE APPOINTED. It is out of your Lordship's power to appoint them. This objection is not the interested clamour of the legal profession. The objection is made on the behalf of the public. Your Lordship's bill would DEGRADE THE ADMINISTRATION OF JUSTICE THROUGHOUT THE KINGDOM. This, God knows, is not your Lordship's object; but I trust I have shown this would be the effect. This is its immediate tendency; and if it will thus affect the judicial character, it will apply, with a tenfold power, to the other branches of the profession, and more particularly the bar.

This, my Lord, I shall endeavour to prove in a subsequent letter. My first objection is sufficient for the present, and I repeat, it is made on behalf of the public.

I have left untouched the other difficulties of the measure:—the great and lasting expense; the practical difficulties of adjusting the scale of fees; the right to restrict the appeal, and, if it be permitted, the inefficacy of the measure; the pensions for retiring judges, or the perpetuation of judicial imbecility in every province of England: all these, and the thousand others that rush into my mind, I shall hereafter discuss, and solicit your Lordship's particular attention to all of them.

I have the honour to be,
My Lord,
Your Lordship's most humble Servant,
A BARRISTER.

## LORD WYNFORD'S BILL.

*To prevent* DEBTORS *from* DEFRAUDING *their* CREDITORS *by lying in Prison, or absconding from England.*

THIS bill is intended to remove evils which have been long felt. It is notorious that a great number of debtors, having obtained the privilege of the *rules* of the King's Bench or Fleet Prison, set their creditors at defiance, and enjoy at their expense every luxury, together with no inconsiderable share of liberty. No action for escape can be maintained against the marshal of the King's Bench, or warden of the Fleet, unless actually commenced before the return of the prisoner to the rules. It is consequently not uncommon for the *rulers*, as they are familiarly called, to break their bounds after the law offices are closed in the evening, wander to every part of the metropolis where pleasure or inclination may lead them, and return, before the offices open, within the mystic circle intended to circumscribe their movements. The noble and learned lord who introduced the bill stated that while he was Chief Justice of the Common Pleas, an action was tried arising out of fraud committed by four persons, who took four houses in as many different parts of the town, and procured goods by giving references to each other. Each of the parties was at the time a prisoner within the rules of the King's Bench. In the reign of George II. an act passed to compel certain debtors in execution, to make discovery of their estates for their creditors' benefit. But this act, commonly known as the Lords' Act, was limited to cases where the debt did not exceed 100*l.* The present bill is to extend the powers of that act to debts of any amount.

But the bill also proposes to remedy another grievance to which creditors are subject,—that of debtors quitting the country, and enjoying in a foreign land, the property which should be applied to the payment of debts in their own. Should the bill pass into a law, it will destroy what Lord Wynford not unhappily calls the English colony on the other side of the Channel. Boulogne will be depopulated. The bill proposes to make the *real* property of debtors, during their lives, and in case of outlawry, available to the satisfaction of their debts, by requiring tenants to pay their rent into court, to be distributed among the creditors who shall have established their claims; and further, that writs of outlawry shall not be reversed on the ground of absence beyond sea, without security given for the debt and costs.

These are the principal objects of the bill, of which we subjoin an analysis.

The bill recites that many creditors are suffering great distress from being kept out of what is justly due to them, whilst their debtors are living idly and luxuriously, in prison or out of the kingdom, on property which should be applied in payment of their debts: it is therefore proposed to be enacted, that the powers of 32 G. II. c. 28. which authorise any court to compel debtors charged in execution, who continue in prison beyond a certain time, and for sums not exceeding a certain amount, to give an account on oath of their estate and effects, and to assign them for the benefit of their creditors, and to subject to punishment such debtors as refuse to assign, or make a fraudulent assignment, or give on oath a false account of their property, and which entitle debtors who fairly deliver up for the benefit of their creditors their estates and effects to their discharge from prison, and make the future effects of such debtors liable to the payment of their debts — shall be extended and applied to all debtors, whatever may be the amount for which they may be charged in execution.

That before judgment of outlawry in any civil action in which a defendant might have been held to bail shall be reversed, on account of the defendant's being beyond seas, the defendant shall put in a perfect bail for the debt and costs, and also the costs of proceeding to outlawry; which are to abide the event of the suit. But nothing in this section of the act is to apply to persons who are beyond seas in the service of his Majesty, or to any person who shall have gone beyond seas on account of health or business, and who shall establish such cause of absence to the satisfaction of the court in which the action shall be brought, and who shall not have been beyond seas more than one year from the commencement of the action in which the outlawry shall have been pronounced.

That upon judgment of outlawry or waiver in action, the judge may order the tenant of the person outlawed or waived, to pay rent of lands, &c. into court; and having ascertained what is due to the plaintiff, may order so much of what may then be in court, or may be afterwards paid into court, to be applied in payment of the debt and costs; and further, that any money that may remain in court, or may be afterwards paid in, shall be divided amongst such persons as shall have sued out process in any court of Westminster against the person outlawed or waived, and who shall prove their debts to the satisfaction of the officer of the first-mentioned court, rateably according to the amount of their respective debts; and the judge may impose such conditions as he shall think reasonable, on persons requiring money to be paid them out of court, under the authority of this act.

The act not to extend to Scotland.

---

SOME PASSAGES FROM

## THE LIFE OF WILLIAM BARNIVALE,

*A Tale of the Fifteenth Century.*

CONTINUED.

### CHAPTER II.

THE law had now become the favourite profession. Its excellence was originally owing to Edward I., who, from the improvements which he effected both in the theory and the practice, procured for himself the title of the English Justinian. The Justinian laws themselves had been introduced so far back as the reign of Stephen. They had been lately recovered in Italy, and became at once the fashionable study over all Europe. A copy of the Pandects, it is said (although the fact is very dubious), was found in the town of Amalfi, by Lotharius, the emperor, when he took that town, in the war he carried on against Rodger, king of Sicily and Naples. However this may be, certain it is, that the Pandects were first brought amongst us in the reign of Stephen; that the reading of them was much encouraged by archbishop Theobald, and that they were publicly read in England by Vacarius, within a short time after the famous Imerius had opened his school at Bologna. Vacarius continued to teach the civil law for some time, in the University of Oxford, to great numbers, whom first the novelty of the study, and then the fashion of the age, had drawn about him. The students of this great man were poor as well as rich, and the former, be it said to his honour, were by him as much regarded as the latter. For them, and at their suggestion, he composed a compendious treatise, in nine books, extracted from the Code and Pandects. At that period, books were commodities of a very high price, and it required an ample fortune to procure even a small library: the invention of printing had not rendered books common and cheap, by multiplying copies in an easy and rapid manner; nor could any considerable collection of manuscripts be formed without great expense, or great labour. A private scholar with a very slender income may now collect a library, of which an abbot, or even an archbishop, could not then hope to rival the extent. Vacarius must therefore have performed a very acceptable service by providing those students, who could not afford to purchase copies of the Code and Pandects, with a short view of the leading doctrines which they contain. The fame of the teacher was in consequence deservedly high, and the new science had made great progress, when on a sudden it received a severe check, and from a quarter whence one should not naturally expect it. In short, the king himself interdicted the study. As a reason for this, it has been supposed, that the canon law was first read by Vacarius, at the same time and under colour of the imperial, of which opinion, the account of John of Salisbury, who, in acquainting us with this edict, considers it as an offence against the church, and expressly calls the prohibition an impiety, has been adduced in corroboration. But there seems to be greater accuracy in the remark of Dr. Wenck*, who supposes Vacarius to have read no lectures on the canon law, but only to have borrowed from it some illustrations for his lectures on the civil law. Notwithstanding this check, it would appear that the academical study of the civil law commenced in England under auspices sufficiently favourable; and that it made some progress at this early period is sufficiently apparent from the treatise on the laws and customs of England, which is commonly ascribed to Ranulph Glanville, Chief Justice during the reign of Henry II. This treatise was at a very early period adopted in Scotland, with a few changes and modifications, and bears, in this new form, the title of *Regiam Majestatem*, from the initial words of the prologue. And it was to counteract the influence which the Roman law had on the law of England,

* P. 25.—Magister Vacarius, primus Juris Romani in Anglia Professor, ex Annalium Monumentis et Opere accurate descripto illustratus, Juris Romani in Bononiensis Scholæ Initiis Fortunam illustrans, Emendationem Interpretationem hodiernam juvans, studiis Caroli Friderici Christiani Wenck, Jur. Doct. et Prof. Lips. Lipsiæ, 1820.

and to take off the discredit which some civilians had endeavoured to throw on the English law, as well as to promote a more general acquaintanee with it among persons who did not study it professionally, that Sir John Fortescue principally directed his efforts in his work before mentioned, "*De Laudibus Legum Angliæ.*"

With Sir John Fortescue the father of William Barnivale was well acquainted. They were connected by locality of origin; they were born in the same place; had been boys together; and though separated by the different roads which they took in life, they still maintained a regular correspondence with each other. At the time when this work was written, the two friends were indeed distant: for Sir John had accompanied Queen Margaret, Prince Edward, and the principal adherents of the house of Lancaster, in their flight to Flanders, and passed many years upon the Continent in a state of exile, soliciting the interests of the royal family at different courts. At this period, Prince Edward, the son of Henry VI., engaged the especial attention of Fortescue. Observing that his young master applied himself wholly to military exercises, Sir John rightly considered that for a prince other notions were also fitting. Aware of his quick parts and excellent understanding, he hoped easily to impress his mind with proper ideas relative to the constitution of his country, and with due respect to its laws, that thereafter he might govern like a king, and not like a tyrant. For his instruction, therefore, he composed this celebrated production; which, though it failed of its primary intention, that hopeful prince being not long after cruelly murdered, yet remains an everlasting monument of the genius of its writer. It was received with great esteem by the learned of the profession to whom it was communicated.

The book, however, was not printed till the time of Henry VIII.; for although the art of printing was introduced into England by Caxton, at the close of this period, the press was rather employed in multiplying copies of "Reynard the Fox," "The Death of King Arthur," "The History of Charles the Great," and other popular fables, and histories worse than fables, than in propagating a knowledge of our laws and constitution. But to Sir William Barnivale the author contributed a friendly copy, on his return to England with the queen and prince, when he was taken prisoner at the battle of Tewksbury, in 1471. He was afterwards reconciled to the victorious monarch, having written an apology for his conduct, a tract which was seen by Selden.

It is not necessary now to account further for the access which our hero had to this celebrated treatise of Sir John Fortescue. It was among the books which his father permitted him to read, and was by him considered as a fitting production, to crown the course of historical knowledge, which he had excited him to pursue. The perusal of this work instantly decided the turn of his mind, which made an almost immediate election of the law for its profession.

The work was well calculated to produce such an effect upon such a mind. His previous course of reading had inclined it towards ideal representations; and the work of Fortescue, strange as it may appear to some that any standard legal work should be so, is altogether ideal. It is written in the way of dialogue, and the author supposes himself holding a conversation with the young prince whom he wishes to impress with proper ideas of the nature and excellence of the laws of England, compared with the civil law and the laws of other countries. In his zeal to show their superiority over the civil law, he proceeds to prove even that our inns of court and chancery are more convenient for legal study than foreign universities. In order to this he presents a description of these inns, which, to be rightly apprehended, must be taken as what such places should be at all times, rather than as what they probably were at any time.

"There are," says this ideal painter of legal excellence, "ten lesser houses or inns, and sometimes more, which are called Inns of Chancery, and to every one of them belongeth an hundred students at least, and to some of them a much greater number, though at one time they be not ever altogether the same. Those students, for the most part, are young men, studying the originals and the elements of the law, who profiting therein as they grow to ripeness, so are they admitted into the greater inns, called the Inns of Court; of which greater inns there are four in number. And to the least of them belongeth, in form above mentioned, two hundred students or thereabouts; for in these greater inns no student can be maintained for less expenses by the year than twenty marks. And if he have a servant to wait upon him, as most of them have, then so much the greater will his charges be. Now, by reason of this, the children only of noblemen study the laws in those inns; for the poorer and common sort of people are not able to bear so great charges for the exhibition of their children. And merchants can seldom find in their hearts to burden their trade with

so great yearly expenses. And thus it falleth out, that there is hardly any man found within the realm skilful in the laws, except he be a gentleman born, and one descended of a noble stock. Wherefore they more than any other kind of men have a special regard to their nobility and to the preservation of their honour and fame; and to speak with the strict regard to truth, there is in these greater inns, and even in the lesser too, beside the study of the laws, as it were an university or school for the acquisition of all commendable qualities requisite for noble men. There they learn to sing, and to exercise themselves in all kind of harmony. There also they practise dancing and the genteel accomplishments, as they are accustomed to do, which are brought up in the king's house. On working days most of them apply themselves to the study of the law, and on holidays to study Holy Scripture, and out of the time of divine service to reading of chronicles; for there indeed are virtues studied, and from them are vices exiled. So that for the acquisition of virtue, and eradicating of vice, knights and barons, with other estates, and noblemen of the realm, place their children in those inns, even though they desire not to have them learned in the laws, nor to live by the practice thereof, but only upon their father's allowance. Seldom, if at any time, is there heard amongst them any sedition or grudging, and yet the offenders are no otherwise punished than only by being removed from the company of their fellowship, which punishment they more fear than other offenders imprisonment and irons; for he that is once expelled is never received to be a fellow in any of the other fellowships; and by this means there is continual peace, and their demeanour is like the behaviour of such as dwell together in perfect amity. But there is one thing more which I would have you know, that neither Orleans, where both the common and civil laws are taught, and to which, for that reason, scholars resort from all the adjacent countries; nor at Anjou, nor at Caen, or any university in France, Paris only excepted, are there so many youths grown up employed in study as in these inns of court and chancery, though there are none that study there but what are English born."

To become a member of such a chosen body, so well constituted, so admirably regulated, so worthy of all commendation, was, it may readily be conceived, sufficient to excite the ambition of even a less gifted mind than Barnivale's. Fortescue's style of treating his subject, however, was only in accordance with the character of literature, and the state of its progress, at this period. The other law books of the same period were marked by the same spirit. Littleton himself quotes no authority for what he advances; nor were authorities accustomed to be vouched in court by the counsel of the time. A reason was then advanced instead of the authority which is now too frequently substituted. In the first dawn of our national literature, subjects were contemplated from more speculative points of prospect than they have since commanded. The earliest tendency of the literary mind was to the ideal; nor was this tendency without its peculiar uses. Scarcely any of the so lauded advantages of our laws were practically realised in the age in which Fortescue lived; but his book probably exerted an influence on the profession, as it did on the mind of young Barnivale, to which we doubtless owe many of the political blessings that we now enjoy. Indeed, the author followed up the impression which it was likely to make, in a subsequent reign, in his English work on "The Difference between an Absolute and Limited Monarchy, as it more particularly regards the English Constitution." This treatise was written under Edward IV., whom Fortescue, as a restored Lancastrian, would be anxious not to offend, and whom we have seen he took some pains to conciliate, both in this and other writings; a fact which renders it probable that the principles of limited monarchy were fully recognised in theory, notwithstanding the particular acts of violence which occurred in practice.

To qualify himself, however, for a profession of "such high mark and likelihood," William Barnivale's education was not considered sufficiently learned either by his father or himself. It was, therefore, determined that he should study for the regular period at the University of Oxford, where he was accordingly entered as a commoner both at Oriel College and at Merton; in compliance with a custom not unusual in former times, and probably intended to secure the privilege of aspiring to a fellowship at one or other of these Colleges.

The course of instruction which he was likely to meet with here was not such as was calculated to direct his mind into the paths of experience. The fifteenth century was one of the darkest periods in the history of English literature. Science was in no better a state than learning: the old alchemical delusion still prevailed, and a license is extant from Henry VI. to certain individuals, to authorise them in the search of "the mother and queen of me-

dicines, the inestimable glory, the quintessence, the elixir of life." Here and there, perhaps, fragments remained of the old scholastic philosophy; and there was something in it too congenial to a mind like Barnivale's, for it not to have occupied a considerable share of his attention. It was happy for him, in all probability, that it was not more in vogue at the time; for it most certainly would have entangled his ambitious intellect in these mazes of absurd speculation in which its doctors, irrefragable or angelic, delighted to wander.

What he did learn of this philosophy had much of its wonted influence on the mind of Barnivale. It contracted a habit of theorising without reference to facts, and of speculating upon the different modes and degrees of existence, without troubling him to acquire a knowledge of nature. His notions of things were accordingly very unsatisfactory and ill defined. He dwelt in an intellectual world: "in a world of empty forms," as Kant, the great German philosopher, expresses it, not in the world of the senses. He had not yet arrived at that perfection of the intellectual character, as it is also of art, which consists in the union of the ideal and the real, and which may be found exemplified in the works of Shakspeare, of whose genius it forms the characteristic and peculiar excellence, and by which he has attained such an immeasurable superiority over all other poets, ancient and modern, Homer himself not excepted.

When once in this manner set free from the truth of nature, there are no limits within which the mind can be controlled in its conceptions of possible existence, or restrained in the extravagance of expectation. This state of mind is not a little likely to affect individual happiness in a degree no less permanent than injurious. In Barnivale's case, however, for the time, it was not without a beneficial influence. It saved him from the trouble and the peril of falling in love. His conceptions of female beauty and accomplishments, not being referred to an actual standard in the external world, were so extravagantly high, that there was no fear lest he should find a lady of qualifications answerable to the idea which he had formed of womanly excellence, and so impair and retard his prospects in life by a premature marriage. For the time, this influence was certainly beneficial; but, had it continued through life, it would have deprived him of the greatest blessing which can be enjoyed by mortal man. In his search after an angel, he would have fatally passed by many an excellent woman; and, since what he sought never could have been found, what was within the compass of his attainment would to him have been lost for ever. What a loss this would have been can be best described in the words of the poet: —

"Who that would ask a heart to dulness wed,
The waveless calm, the slumber of the dead?
No; the wild bliss of nature needs alloy,
And fear and sorrow fan the fire of joy!
And say, without our hopes, without our fears,
Without the home that plighted love endears,
Without the smile from partial beauty won,
O! what were man?—a world without a sun!
Till Hymen brought his love — delighted hour, —
There dwelt no joy in Eden's rosy bower!
In vain the viewless seraph ling'ring there,
At starry midnight, charm'd the silent air.
In vain the wild-bird carol'd on the steep,
To hail the sun, slow-wheeling from the deep;
In vain, to soothe the solitary shade,
Aereal notes in mingling measure play'd;
The summer wind that shook the spangled tree,
The whispering wave, the murmur of the bee,
Still slowly pass'd the melancholy day,
And still the stranger wist not where to stray, —
The world was sad! — the garden was a wild!
And man, the hermit, sigh'd — till woman smil'd!"
CAMPBELL.

It were well if the evil rested here: but it does not. To one labouring under such a perversion of the intellectual faculty, the greatest evil would be that, in some "unblest hour," he should be induced to break down the barrier of his scruples, and dare to enter into the holy state of matrimony. Here he would still be haunted by these dreams of unimaginable perfection, and expect more than any state on earth could possibly realise. However high might be the happiness which it were capable of producing, it would still fall short of the elevation aimed at by the eagle-flight of undisciplined fancy. Like the wings of Icarus, the wax would melt in the sun; and he would fall, — oh, how fatally would he fall! — self-deceived, self-tormented!

But William Barnivale was destined to a better fortune.

(*To be continued.*)

## LORD BROUGHAM AND THE COURT OF CHANCERY.

*To the Editor of the Legal Observer.*

SIR,

WHEN Lord Brougham succeeded to the high office of Lord Chancellor, I confess that I was one of those who entertained an opinion, that the public, and the profession, would not be satisfied with the appointment of a judge who had never practised

in the Court of Chancery, and who was presumed to be a common law, and not an equity lawyer. But having, in the course of conversation with one of the most enlightened members of the profession, who has retired from the bar, and also with an able and experienced practising barrister, heard the opinions of those two gentlemen, I think it right that they should be made known to the profession; and this cannot be so well accomplished as through the medium of the Legal Observer. The individual first alluded to stated his belief, that both the public and the profession would soon be convinced that his Lordship's experience in Appeals to the House of Lords from Scotland, and in Appeals to the King in Council, (all which, more or less, involve equitable principles,) would enable him to grapple with the business of the Court of Chancery, and to decide the causes which would come before him in a proper manner; and that his Lordship's knowledge and experience in matters peculiar to courts of equity, were far superior to the knowledge and experience of any individual whose practice had been confined to a court of common law. The other gentleman to whom I have alluded, conceived that the great powers of mind which the Lord Chancellor is acknowledged to possess, added to his unceasing and indefatigable diligence and industry, (by which he masters the most lengthy pleadings, evidence, and documents, in a short space of time,) would enable him to dispose of the business of his court satisfactorily.

In making this communication, I feel that I am rendering but an act of justice to the Lord Chancellor; confessing as I do, that when he was practising *as an advocate*, I did conceive that his Lordship's boundless conceptions and knowledge far surpassed his discretion and judgment.

I am, Sir,

Your most obedient servant,

A Practitioner in the Court of Chancery.

## DEBTS UNDER FIVE POUNDS.

*To the Editor of the Legal Observer.*

Sir,

As the pages of the *Legal Observer* appear to be open to the suggestions of correspondents, perhaps you may not esteem the following on the subject of the recovery of small debts, altogether unworthy of your notice.

During the last term, an instance came under my own observation, of an action being brought in the Court of King's Bench, in which the debt did not amount to more than three pounds and a few shillings. The defendant not being able, at the time of the service of the writ, to pay the debt and two guineas costs, was shortly afterwards obliged to offer a cognovit for the same, and which (although there was nothing beyond the declaration and cognovit) amounted to the sum of thirteen pounds and upwards.

According to the present law, an action of assumpsit, debt on simple contract, and on speciality, may be maintained in any one of the superior common law courts at Westminster, when the debt is above two pounds, and if a verdict for that sum (or even for a less sum, and the judge do not certify under the 43 Eliz. c. 6.) be given for the plaintiff, he is entitled to full costs of suit. Now, what I suggest is, that there shall be a court in Middlesex, (for I think it is more necessary in this county than in any other, in consequence of the number of actions brought for such small sums,) similar to the Court of Requests in London, in which at least all debts not exceeding five pounds, due from persons residing or seeking a livelihood in Middlesex, shall be sued for, and that no action shall be brought in the superior courts against persons so residing or seeking a livelihood in such county, for the recovery of debts not exceeding that amount; *or* that all such actions as those above mentioned, when the debt shall not amount to more than five pounds, be brought in the Sheriff's Court in Middlesex.

If this course were adopted, much of the valuable time of the judges in the superior courts, now taken up in matters of such small moment, would be occupied in causes of far greater importance; the costs which fall so oppressively upon the defendant would not be a fourth of what they now are, since judgment may be obtained in the Sheriffs' Court for about eight or ten pounds; the practisers in the superior courts would, in my opinion, increase their respectability; the business of those courts would be more speedily got through; and delay, that great cause of complaint, would, I think, in some degree be done away with.

I feel satisfied that if there were a court of this nature in the above county, or that actions were obliged to be brought in the Sheriffs' court, many an industrious tradesman would obtain payment of debts which he would otherwise lose, from a fear of incurring costs, and of their eventually falling upon himself. It may be said that the Palace Court is open for the recovery of

small debts, and that the adoption of either of the above plans would injure those who have an interest in that court; but in answer, it may be observed, first, that there is no compulsion on the person bringing his action to bring it in that court, even admitting the proceedings were not too expensive, for the recovery of a debt not exceeding five pounds; and, secondly, that if any persons at present holding official situations therein sustain any loss, pensions may be granted them, or equivalents given, and the public will have no reason to complain, if it obtain speedy and cheap justice in exchange.

If the above suggestions shall be deemed unworthy of insertion, or the limits of your useful periodical preclude you from giving them publicity, they, perhaps, may notwithstanding be the means of inducing you to notice the subject at some future period.

I remain, Sir,

Your most obedient Servant,

AN ARTICLED CLERK.

Middle Temple,
7th Dec. 1830.

## DISABILITIES OF THE JEWS.

Mr. EDITOR,

SOME information as to the civil condition and disabilities of persons professing the Jewish faith in England, and a brief sketch of the origin and progress of their establishment in this country, may perhaps at the present time not be unacceptable to your readers.

The first appearance in England of the Jews as a body, and in any number, was at the period of the Norman invasion, although it is equally certain that individuals of that nation sojourned here under some of the Saxon monarchs; allusion to them being made in some ecclesiastical muniments in the year 740, and again in 833.

The early Chronicles, from the Conquest downwards, afford a frightful series of atrocious massacres and persecutions to which the Jews were from time to time subjected, according to the caprice or avarice of the sovereign, and the ignorance and bigotry of the people.

They were during this period considered the immediate property of the crown, and were specifically reserved as such in more than one royal charter*; in this character they were occasionally the objects of some special immunities and privileges, granted, it should seem, with the view of allowing scope to their commercial enterprize, for which they, by their foreign relations, had many facilities, and that they might thus by their habitual tendency to accumulate wealth afford a more valuable prey to their royal masters, who, in some cases, after extorting to the uttermost farthing from their unhappy victims, sold them to a subject; they were thus transferred by Henry III. to his brother Richard, duke of Cornwall, in order that, as the chronicler relates, whom the former had flayed the latter might eviscerate.

Traces are found in parliamentary, municipal, and fiscal records, of various alternations of persecution and protection, affording matter of interest to the antiquarian and historian; but for the present purpose it may suffice to state, that only one statute relating to this people, and which was passed during the first period of their settlement in England, remains specifically unrepealed: it is of uncertain date, although attributed to 3 Edward I., and having long been considered obsolete, remains in the original Law French, without any translation attached, and is only to be met with in the appendix to Ruffhead's Statutes.*

Within a very few years from the passing of that act, and after enduring every species of the most aggravated cruelty and oppression, the Jews were, in the year 1290, banished the kingdom by a royal proclamation, under the standing pretence of grinding the poor by their usurious dealings; and they departed accordingly, to the number, as is computed, of 16,500 persons.

So general and complete must have been the exile of the Jews, that no mention whatever of them occurs in our annals for the long interval of near 400 years, or until after 1656, when Cromwell, on the petition on their behalf of Manasseh Ben Israel, a physician in Holland, highly distinguished for his scientific knowledge, was induced, as is supposed, to agree to their re-establishment in England; but such consent, if given, does not appear to have been then acted on, as in 1663, the whole number of Jews in London did not exceed twelve; in the years immediately following, however, a great influx of them took place, although sanctioned by no special permission; and in consequence it was held, on an elaborate argument in the case of the East India Company v. Sand, that the Jews reside in England only by an implied license, which, on a proclamation of banishment, would operate like a determination of letters of safe conduct to an alien enemy.—(2 Show. 371.)

The Jews, on such their re-establishment, were spared the direct hardships and inflictions they had endured during their former settlement here, but, notwithstanding, had to encounter much illiberality and jealousy on the part of the principal merchants of London, who, in 1685, petitioned James II. to insist on the alien duty

* In Henry III.'s charter to the city of London, granted on the 26th March, in the 52d year of his reign, the exception runs thus: "But as touching our Jews and merchant strangers, and other things out of our foresaid grant, touching us or our said city, we and our heirs shall provide as to us shall seem expedient."

* This act is commented upon by Daines Barrington, in his Observations on the Statutes, and is by him considered obsolete; in point of fact, it may be doubted whether it was not virtually repealed by 37 Henry VIII. c. 9., which, in the most comprehensive words, repeals all previous acts relating to usury; the restraint of which was the chief, if not the only, object of the act of 3 Edward I. in question.

of customs being extorted from all Jews, notwithstanding their having obtained letters of denization; similar petitions were presented from the Hamburgh Company, the Eastland Company, and the merchants of the west and north of England; but the king, as his brother, Charles II. had before done, refused to comply with the prayer of such petitions. The merchants renewed their application, in 1690, to William III., when, after much discussion before the privy council, an order was issued, the effect of which was to render the Jews liable to the alien duty, and perhaps properly so, as from the then recent return of the Jews to England they were all foreigners, and of course so considered in the several acts of that period; and hence the vulgar error that all Jews are aliens.

Upon this the merchants drew up a most loyal address of thanks to the king; and no farther notice appears to have been taken of the Jews until the first year of Queen Anne, when, it being represented to both houses of Parliament that the severity of Jewish parents towards such of their children as were desirous of embracing the Christian faith was a great hinderance to their conversion, it was enacted (stat. 1 Anne, c. 30.), that "if the child of any Jewish parent is converted to the Christian religion, or is desirous of embracing it, upon application to the Lord Chancellor, he may compel any such parent to give his child a sufficient maintenance in proportion to his circumstances."

Early in the following reign a petition was presented to the Lord Mayor and Aldermen of London, praying that no Jew might be admitted a broker: no order or bye-law seems to have been made upon such petition, which comprised only the most futile allegations.

In a temporary act, passed 10 Geo. I. c. 4., providing for administering the oath of abjuration for the purposes contemplated by that statute, the following clause was introduced in favour of the Jews: "Whenever *any of his Majesty's subjects professing the Jewish religion* shall present himself to take the oath of abjuration, the words, 'upon the true faith of a Christian,' shall be omitted out of the said oath." This provision, from its very terms excluding the supposition that such Jews were aliens, is so far additionally valuable, as affording the first legislative recognition of the relation of sovereign and subject, as regards Jews born within the British dominions; and a more extensive boon was conferred by the act of 13 Geo. II. c. 7., which enacts, that every Jew who shall have resided seven years in any of his Majesty's colonies in America shall, upon taking the oath of abjuration, qualified as above, be entitled to all the privileges of a natural-born subject of Great Britain.

Following up the preceding provision, whereby naturalisation was thus effected without requiring that, in compliance with the act of 7 James I., the party applying to be naturalised should first receive the sacrament, the famous act for permitting persons professing the Jewish religion to be naturalised by Parliament was passed in 1753, 26 Geo. II. c. 26. The principal clauses of which were, that Jews, upon application to Parliament, might be naturalised without taking the sacrament; that they must have resided three years in England or Ireland (thus evidently implying that *foreign* Jews only were contemplated); and for disabling them, notwithstanding, from purchasing or inheriting any advowson or right of patronage in the church.

It would now be scarcely credible, were it not matter of authentic history, that this mere permission given by the legislature to naturalise such foreign Jews as might apply, being qualified as above mentioned, excited such a ferment throughout the country, as to accelerate a session of Parliament for the purpose of passing, as its first act (27 Geo. II. c. 1.), a repeal of the act in question, stating, by way of reason in preamble, "that occasion had been taken from the said act to raise discontents, and to disquiet the minds of many of his Majesty's subjects."

By the 26 Geo. II. c. 33., commonly called the Marriage Act, the Jews and Quakers are the only communities specially excepted out of the operation of it.

Much error and delusion having hitherto prevailed with reference to the supposed incapacity of Jews to hold land in England, it may be broadly asserted, without fear of legal contravention, — That Jews as such are not necessarily aliens, other than those who are foreigners in common with other foreigners, and that therefore English-born Jews, or as they are more properly designated in the act of 10 Geo. I. c. 4., and other subsequent statutes, "his Majesty's subjects professing the Jewish religion," are capable in the fullest extent of acquiring, inheriting, possessing, conveying, and transmitting, landed estate of every description, without the sanction of the Crown or Parliament, and without any hazard of forfeiture; and that, in point of fact, many professing English Jews have purchased and do hold freehold land in their own names, without the intervention of trustees, or have again sold the same without doubt or impeachment of their title, which has been recognised by the most eminent conveyancers of the present day.

In proof of this position may be quoted the authority of Mr. Serjeant Heywood, who, in his valuable book on County Elections, has the following words:—"Since their return (after being banished by Edward I.), Jews have been possessed of *real* estates, without molestation; and, notwithstanding the doubts thrown out in both Houses of Parliament in 1753, may, I conceive, vote at county elections, upon taking the oaths, according to the ceremonies of their religion, as they are always permitted to do, when sworn in courts of justice."

The result of the foregoing review of the public and legislative proceedings, with reference to the Jews in England, appears most distinctly to prove that, with the single exception of the act of Anne, as affecting parental control, and under which not more than two or three applications have ever been made in Chancery, there is no disabling statute whatsoever directly affecting the claim of his Majesty's subjects professing the Jewish religion to a full and equal participation with their Christian fellow-subjects in the reciprocal rights and privileges consequent upon the obligation and duty of allegiance as natural-born subjects of the imperial crown of the United Kingdom.

The only disabilities, therefore, of any importance now attaching to the profession of the Jewish religion in this country are those which, until lately, were shared by other dissenters, which apply to the qualification for holding certain official and municipal situations.

These disabilities are obviated by dissenters subscribing a declaration, *upon the true faith of a Christian*, that they will not exercise official power or influence to injure the Protestant church, or its bishops and clergy.

The words in italics also occur in the oath of abjuration, or oath in lieu thereof, which is prescribed to be taken by members of the House of Commons, by voters at elections for members, when required, and by serjeants at law and barristers, and in some few other cases.

The phrase, therefore, "*upon the true faith of a Christian*," is the cause of all the exclusions and disabilities under which the English Jews now labour, and the omission of those words, as well in the declaration as in the oath of abjuration, would place them in precisely the same situation as all other dissenters from the established religion of the land.

M. M. M.

## SUPERIOR COURTS.

### CONSTRUCTION OF A WILL.

THE question was, whether a bequest to the Fellows and Demies of Magdalen College, Oxford, was such a description of them as would enable them to take in their corporate capacity, or as individuals designated by the testator, Dr. Sibthorp. The *Lord Chancellor* said, that it would be perhaps impossible to find a more absurd and senseless collocation of words than occurred in this will; it was evidently drawn by a man labouring under the infirmities of age; and these circumstances relieved his Lordship's mind from that which would otherwise have embarrassed him in arriving at the conclusion which he had formed; because they were quite sufficient to bring into operation the principle upon which the Court always acted, of deciding in favour of the heir when the intentions of the testator towards legatees could not be distinctly ascertained. His Lordship adverted to the decision, "The Attorney-General v. Tancred," which, he found had been incorrectly reported in Lord Henley's edition of Lord Northington's Decisions; and the error had been adopted in Ambler's Reports by the omission of the words, "Such as should be living at the time of the testator's death." That case, therefore, would remain untouched by the present decision. Looking to the whole of the circumstances of the present case, it seemed to him that it would be straining too much in favour of the bequest, to say that the testator meant the legatees to enjoy the gift he gave them in perpetuity. His Lordship had calculated the amount, and found that if the testator had meant it as a memorial to his old friends and acquaintances, it might perhaps amount to 15*l.* or 20*l.* a piece; but if it were to be divided among the body of the college, it could not be more than 15*s.* or 18*s.* each. As far as it was possible to collect any rational intention from a will so irrational, he thought the testator meant that the bequest should vest, not in the college, but in the individuals, members of it, who should be living at his death. The decision in favour of the will was at variance with the principle of former decisions, according to which such a bequest could not be supported. — Decision of the Court below reversed.

*The Attorney-General* v. *Magdalen College, Oxford. Sittings after M.* 1830.

### PRISONERS IN CONTEMPT.

An application was made to the *Lord Chancellor*, under Sir E. Sugden's Act, for the discharge of a person who had been committed for seizing certain property, the subject of a suit in the Court, after a receiver had been appointed; and also for an order, that the costs of the contempt which the prisoner had incurred, should be paid out of the suitor's fund.

The *Lord Chancellor* held, that the case did not come within the provisions of the statute.

*Hodder* v. *Hine, Sittings after M.* 1830.

### BANKRUPTCY.

A petition was presented for the purpose of superseding a commission of bankruptcy that had been issued against Stephen Price, formerly lessee of Drury Lane Theatre. The question was, Whether Price had been a trader within the meaning of the bankrupt laws?

It appeared from a statement made by Price, that during the time that he was lessee, he was in the habit of buying theatrical publications, and selling them again to the public who frequented the theatre, and that he was also proprietor of the copyright of the farce called Simpson and Co.

The affidavit of William Dunn stated that Price had carried on the business of a bookseller, printer, and publisher; that he (Dunn) had been his treasurer, and had paid the expenses attending the same.

The affidavit of William Barrymore, who had been employed by Price in the purchase and sale of theatrical works; and that of Mary Chapman, who kept a fruit stand in the saloon of the theatre, went in corroboration.

The *Vice Chancellor* held, that the buying and selling were of such a nature as to constitute trading under the bankrupt act. Petition dismissed. — *Ex-parte Reay in re Price, M. T.* 1830.

### EXCEPTIONS. — PRACTICE.

*Evans* moved that the exceptions filed by the defendant to the plaintiff's bill might be taken off the file for irregularity. The ground of the application was, that the order had not been served in due time.

*Jacob* opposed the motion, and contended that the order only required the party excepting to obtain the order within six days, but did not limit the time for its service.

The *Lord Chancellor* held, that the service was regular; but as the exceptions were for scandal and impertinence, and as two of them were for impertinence only, the plaintiff should be at liberty to dispute the ground of the Mas-

ter's report, the plaintiff having obtained an order for time to answer previously to filing his exceptions.— *Mitford* v. *Mitford*, *Sittings after M.* 1830.

SUFFICIENCY OF A PLEA.

The *Lord Chancellor*, after recapitulating the facts of the case, said, "If it is intended to be made a matter of doubt whether a defendant in this court has a right to put a short answer on the file, or, in other words, to plead that he is a purchaser for a valuable consideration, without notice of an adverse title to a bill filed against him for a discovery of his title, and the modification of that title, I can only say, such a doubt is raised in vain; for that such a proceeding is regular—very proper no man can doubt, and the current of all the authorities prove it. So much then as to the point of substance, and now as to the ground of form.

It is laid down, that in a plea of a purchase for a valuable consideration, the defendant must in all cases swear that the person through whom he claimed believed, that at the time of his purchase the party who so sold to him had a title to the property he sold. Now, though in this case the defendant does not so swear, I think he goes fully up to that, coupling one averment with another in his plea; nay, more, he positively swears, that his vendor believed so and so. Now that would be very hazardous swearing, and such as, if untrue, perjury could be very easily assigned upon. I think, therefore, the plea should be allowed.—*Jackson* v. *Rowe*, *Sittings after M. T.* 1830.

CUSTOMARY FREEHOLD.—MORTGAGE.—ILLEGITIMACY.

The plaintiff's husband, who was the original plaintiff, being seised of a customary freehold estate of inheritance, situated in the manor of Taunton late Priory, in Somersetshire, mortgaged it to a person of the name of Ball, now deceased, and he being illegitimate, letters of administration of his personal estate and effects were granted, on behalf of the crown, to the defendant Maule, who claimed to be entitled to the principal and interest due upon the mortgage; the defendant Kinglake, however, as lord of the manor, issued his warrant of seizure, and brought his action of ejectment to recover the estate, as having escheated to him by reason of the illegitimacy of the mortgagee, and the mortgage money not having been paid to him in his lifetime; Weaver, therefore, filed his bill against the lord of the manor and the defendant Maule, praying a re-surrender on payment of the principal and interest to the latter or the lord of the manor, as the Court should direct, and for an injunction to stay the lord's proceedings. The suit having abated by the death of the original plaintiff, was revived by his widow as his administratrix and customary heir, and came on to be heard on the 2d instant, when the following cases were cited: *Howard* v. *Parllett*, Hob. 181.; Sir W. Blackstone, 763.; *Burgess* v. *Wheat*, 1 Ed. 232.; *Pawlet* v. *Attorney General*, Hard. 465.; *Henchman* v. *Attorney General*, Sim. and Stuart; *Attorney General* v. *Reeve*, Atkins; and the Master of the Rolls took time to look into them before he delivered his judgment.

This day his Honour gave judgment, declaring the plaintiff entitled to redeem the estate as against both defendants, and directed the defendant Kinglake to re-grant to or admit the original plaintiff and his heirs, according to the custom of the manor, on payment of the principal and interest and costs of suit to the defendant Maule, and of the fines to the lord; or if the plaintiff should not pay the lord, then to grant to or admit the defendant Maule, on payment of the usual fines upon the trusts of the mortgage deed to Ball; and in that case the plaintiff to be foreclosed on non-payment to the defendant Maule of the fines, principal interest, and costs of suit. And his Honour refused to give the defendant Kinglake his costs, and, on account of the novelty of the case, would not order him to pay costs. *At the Rolls.*—*Weaver* v. *Kinglake*, 18th Dec. 1830.

DELIVERY OF PAPERS.—ATTORNEY.

On a motion for a rule to show cause why a Mr. Andrewes, an attorney, should not deliver up to a Mr. Moxon, or his attorney, certain indentures of lease and release and settlement, and other papers relating to the property mentioned in the said indentures, the following facts were disclosed:—Mr. Andrewes, the attorney, against whom the application was made, in 1805 married one Mary Wasborough, since deceased. The marriage settlement was prepared by him, and lodged for safety in his hands. By it certain property was limited to the use of the wife, after her to the use of the children of the marriage, under certain restrictions; and in case of only one child being born or surviving, then to his or her sole use, &c. The wife died, and the only surviving son attained the age of twenty-one. The present applicant, Mr. Moxon, the surviving trustee under the above-mentioned marriage settlement, was anxious to discharge himself from the trusts thus confided to him, and therefore applied to Mr. Andrewes to deliver up the settlement. This he refused; and the present motion was accordingly made against him, on the ground of his having prepared the settlement in his professional character, and taken no interest under it.

The *Court* observed, that this was a very different application from that usually made against attorneys. Mr. Andrewes was a party named in the settlement; and after such a lapse of time the Court could not interpose.—Rule refused. —Littledale J. *Ex-parte Moxon*, *M. T.* 1830.

MANDAMUS.

A motion for a *mandamus* to the Mayor of Liverpool, commanding him to admit a person named Curson as a freeman of the borough of Liverpool, he having regularly served his apprenticeship, which, according to the custom, entitled him to his freedom, being made; and it appearing that the object of the application was, that the applicant might be enabled to vote at the ensuing election, which would take place in a week from the time of making the motion,

The *Court* granted a rule absolute in the first instance. — Littledale J. *Ex-parte Curson*, *M. T.* 1830.

ATTORNEY.—COURT OF CONSCIENCE ACT.—COSTS.

A rule was obtained by a defendant to show cause why the plaintiff should not be deprived of costs under the London court of conscience act, 39 & 40 Geo. III. c. 104. s. 12., on the grounds of the debt recovered not amounting to more than *5l.* Both the plaintiff and defendant were attorneys of the King's Bench. The debt arose within the jurisdiction of the London court of conscience act, and the sum recovered was *1l. 5s.*

On showing cause against the rule, it was contended, that as an attorney, the plaintiff was not compellable to sue in the court of conscience for a debt amounting to, or less than, *5l.** It was true, an attorney might waive his privileges and sue by other process, and then he must be regarded as suing as any other person.† But here, perhaps, it would be said, that the plaintiff in proceeding by bill, and not by attachment, had waived his privilege. But it could not be said that he had waived his privilege, since he was forced by law to proceed by bill, and could not proceed by attachment of privilege.‡ He, therefore, not having waived his privilege, must be regarded as in full possession of it, and, therefore, not within the court of conscience act. The present rule must consequently be discharged.

In support of the rule it was submitted, that it was of no importance whether the plaintiff waived his privilege of his own accord, or was obliged to do so by the rule of law. He was still in the situation of a common person, and, therefore, as the debt was within the jurisdiction of the London court of conscience act, and as less than *5l.* had been recovered, the plaintiff was not entitled to his costs.

The *Court* was of opinion, that, as it appeared by the cases, an attorney not suing by attachment of privilege sued as a common person, and was not entitled to the privileges of an attorney; and as here his privilege was, in consequence of the rule of law, lost, he must be considered as a private person. Then, as a private person, he was not entitled in such a case to have his costs. The rule must, therefore, be made absolute.— Rule absolute. Littledale J. — *Burn* v. *Pasmore*, *M. T.* 1830.

IMPARLANCES.

A rule had been obtained, calling on the plaintiff to show cause why the declaration, and all subsequent proceedings, should not be set aside for irregularity, and in the mean time all proceedings be stayed. The facts were these: — The defendant was arrested on a *latitat*, returnable on the third return of Easter term. On the 22d of May, which was two days before the end of that term, bail was perfected. No declaration was delivered in Easter term, or in Trinity term, but on the 2d of November, before the essoin day, it was delivered. On the 8th a demand of plea was served. The defendant did not plead, and judgment was accordingly signed.

On showing cause, it was observed, that the rule with respect to imparlances in such cases was, "where the process is returnable before the last return of the term, but the declaration is not delivered or filed, and notice thereof given four days, exclusive, before the end of the term, the defendant, if completely in court, is entitled to an imparlance, and must plead within the first four days of the next term, provided the declaration be delivered or filed, and notice thereof given before the essoin day of that term, otherwise the defendant will be entitled to imparl to thesu bsequent term."* There was, in fact, no rule where the whole of the term immediately subsequent to that in which the process was returnable was allowed to pass without declaring. But since, if the plaintiff did not declare before the last four days of Easter term, but did declare before the essoin day of Trinity term, the defendant must plead within the first four days of Trinity term; by analogy, if the plaintiff did not declare before the four last days of Trinity term, but did declare before the essoin day of Michaelmas term, the defendant must plead within the first four days of Michaelmas term. Now here the declaration had been delivered before the essoin day of Michaelmas term, it not having been delivered previous to the last four days of Trinity term, and therefore the defendant was not entitled to an imparlance to Hilary term. The proceedings were therefore regular.

In support of the rule it was contended, that the plaintiff having allowed the whole of Trinity term to slip by without taking any step, he ought to be placed in a worse situation than that in which he would have been if he had proceeded according to the usual course.

The *Court* observed, that the practice certainly always was, as stated, in opposition to his rule.

The *Master* confirmed the opinion of the Court.

Under the special circumstances of the case, the rule was made absolute for setting aside the judgment on terms. Littledale J. — *Smith* v. *Haddon*, *M. T.* 1830.

BANKRUPT.

Where a bankrupt's estate under a second commission had not paid *15s.* in the pound, and where, consequently, his future estate and effects vested, under the 6 Geo. IV. c. 16. s. 127., in his assignees, the *Court* refused to set aside a *fi. fa.* issued by a creditor against the bankrupt's effects, on application by the bankrupt. Littledale J. — *King* v. *Gaskell*, *M. T.* 1830.

OLD WARRANT OF ATTORNEY.

The *Court* allowed judgment to be entered up on an old warrant of attorney, on the appli-

* Board v. Parker, 7 East, 47.

† Hetherington v. Lowth, 2 Str. 837.; Parker, one, &c. v. Vaughan and others, 2 Bos. & Pul. 29.

‡ Ratcliffe, one, &c. v. Besley, 2 Str. 1141.; Barber, one, &c. v. Palmer, one, &c. 6 T. R. 524.

* Tid. Prac. v. i. p. 466. ed. 9.

cation of the executors of the party, to whom it was executed, the words of the warrant being "at the suit of the said Samuel Smith, his executors or administrators." Littledale J.—*M. T.* 1830.

SHERIFF'S INDEMNITY.

Where one of two persons living on the same premises had become bankrupt, and a judgment creditor had put in a *fi. fa.* against the goods of both, and notice, by the assignees of their title, was given to the sheriff who had seized, time was given for returning the writ, until an indemnity should be given, as it would be exceedingly difficult for the sheriff to distinguish between the goods of the defendant, who was a bankrupt, and those of him who was not. Littledale J.—*Solari* v. *Randall* and *Gray*. — *M. T.* 1830.

ATTORNEYS' SIGNED BILL OF COSTS.

In No. VII. p. 109., it was stated, that the plaintiffs who were attorneys, and acted as agents of the defendant (also an attorney), were bound to deliver in a signed bill. We received a note of this case from a very respectable solicitor, on whose authority we inserted it; but we fully intended to revert to the subject, and investigate the grounds of the decision; for we considered it questionable. We have now to insert a full report, which we believe will be found accurate; and we subjoin a reference to the cases previously decided.

The plaintiffs and the defendant were attorneys, and the action was brought, amongst other things, for the amount of a bill of costs, containing *proper* and not *agency* charges, and which had not been delivered signed previously to the commencement of the action. The defendant having objected to the plaintiff's right to recover, owing to this omission, they relied upon the exception contained in the act of 2 Geo. II. c. 23. s. 23. (subsequently made perpetual), whereby it was enacted in substance, that that act should not extend to any bill of fees, &c. due from any attorney or solicitor to any other attorney or solicitor or clerk in court; but any such attorney, solicitor, or clerk in court might use such remedies for the recovery of his fees, &c. against such other attorney or solicitor, *as he might have done before the making of such act.* The defendant in reply insisted that the plaintiff must still be nonsuited, because, before the passing of that act, viz. by the 3 Jac. I. c. 7. s. 1. it is enacted, that "all attorneys and solicitors shall give a true bill unto their masters or clients, or their assigns, of all charges concerning the suits which they have for them subscribed with their hands and names, before such time as they or any of them shall charge their clients with any the same fees or charges;" and Lord *Tenterden*, after some consideration, held the objection fatal; but the plaintiffs had a verdict on their money counts, on a ground altogether distinct from their bill of costs.—See *Jones* v. *Price*, 1 Selw. N. P. 160. Doug. 199. (note); *Bridell* v. *Francis*, Peake, N. P. 1, 2. 1 Esp. Rep. 221.

COSTS.

The defendant was the lessee or agent of the Earl of Pomfret, who claimed a toll for cattle. The plaintiff disputed the toll, and some sheep having been distrained, brought an action to try the right. Upon investigating the earl's title, the defendant was advised he could not maintain the distress, but must bring an action for the toll. A plea of general issue had been pleaded, but withdrawn, and a summons taken out to stay the proceedings. At the hearing of the summons it was arranged, that the defendant should pay the *costs of the action* as between attorney and client. On the taxation before the prothonotary, a considerable amount of costs was allowed *before* the commencement of the action.

The question before the Court was, Whether the whole of the costs payable by the plaintiff to his attorney ought to be allowed, or those only since the commencement of the action?

The *Court*, under all the circumstances, confirmed the taxation.

*Boswell* v. *Norman*, *C. P. M. T.* 1830.*

PREROGATIVE COURT.—REFORM.

Sir *J. Nicholl* suggested the propriety of making some alterations in the mode of giving in evidence in cases which came before the Court. Every member of the profession must be perfectly aware, that a large portion of the evidence adduced was, to say the least of it, entirely useless. If evidence taken upon the *condidit* were to be at once published, parties would be spared a great deal of expense and disappointment; and, generally speaking, the mass of evidence would be diminished. Reforms were in progress in the proceedings of other courts, and it was impossible to resist some alteration in that. It must be admitted that improvements in practice had been already effected there; but it would not do to stop short while such immense and voluminous masses of unnecessary evidence, were from time to time introduced. He invited the Bar to offer whatever suggestions they might think proper, with a view to the introduction of salutary reforms.

The *King's Advocate* reminded the Court of the improvement which had been adopted in taking depositions in the first person.

Sir *J. Nicholl* said that it was undoubtedly an improvement; but it was one which went only a short way. The Learned Judge added, that he had sat upon that bench for too long a period, not to feel a deep interest in what concerned the interest of the public, and related to the profession generally. *Dec. 6.* 1830.

## MISCELLANEA.

LAW AGAINST A MAN SPENDING MORE THAN HE HAS.

During the protectorate of Cromwell (1657) an act of parliament was passed, entitled "An

* This case was reported in No. VIII. p. 126., but the above point was not adverted to.

act for punishing of such persons as live at high rates, and have no visible estate, profession, or calling, answerable thereto." The preamble recites, that "divers lewd and dissolute persons in this commonwealth live at very high rates and great expenses, having no visible estate, &c. to maintain themselves in their licentious, loose, and ungodly practices, but make it their trade and livelihood to cheat, deboyst, cozen, and deceive the young gentry and other good people of this commonwealth." The authority given to magistrates under this act was curious. Every justice of the peace, mayor, or head officer, might issue his warrant to bring such persons before him, and require bail for their appearance at the next general sessions, and in default of such bail commit them to prison. They were then to be indicted at the said sessions "for living at high rates and great expenses, having no visible estate," &c.; and upon conviction they were committed to hard labour for three months. Upon a second conviction they were to be committed as aforesaid, and detained until discharged by the justices in open sessions. If this law were now in force, how crowded would be the House of Correction! How constantly would the treadmill be kept in motion! How would the company at our fashionable hotels, theatres, and promenades, be thinned! The revival of the law would excite as great a commotion in Bond Street and Brighton, as Lord Wynford's bill is likely to create "on the other side of the water."

*Literary Panorama, July*, 1819.

---

AN IRRITABLE LAWYER.

Talent and learning are insufficient of themselves to form either a good practitioner or a good judge. There is another qualification requisite—command of temper. Without this, the finest natural powers, and the most profound, accurate, and extensive knowledge, will frequently serve only to involve their possessors in difficulty. The instance of BARON WESTON, related by ROGER NORTH, is not without parallel.

He was (says North) a learned man, not only in the common law, wherein he had a refined and speculative skill, but in the civil and imperial law, as also in history and humanity in general. But being insupportably tortured with the gout, became of so touchy a temper, and susceptible of anger and passion, that any unreasonable opposition to his opinion would inflame him so, as to make him appear as if he were mad; but when treated reasonably no man was ever more a gentleman, obliging, condescensive, and communicative, than he was. Therefore, while a practiser, he was observed always to succeed better in arguing solemnly, than in managing of evidence; for the adversary knew how to touch his passions and make them disorder him, and then take advantage of it.—*Examen*, p. 566.

---

LEGAL CHRISTMAS BOXES.

In the Report of the Commissioners for enquiring into the duties, salaries, and emoluments of the judges, &c. of the courts of justice in England, it appears that the Lord Chief Justice of the Court of King's Bench, "according to ancient usage," receives annually at Christmas four yards of broad cloth from Blackwell Hall, and thirty-six loaves of sugar presented to him by particular officers on the plea side of the Court; and that each *Puisne* judge receives annually from the same officers a small silver plate and eighteen loaves of sugar.—*Literary Panorama, Dec.* 1818.

---

## TO CORRESPONDENTS.

*It had been intended to commence the First Number of the new year with a retrospective survey of our labours; but, besides the intervention of other circumstances, we prefer rather to publish the lucubrations of our Contributors and Correspondents than to indulge in any garrulity of our own. At the close, however, of the present month, which will complete the first quarter of a year, we hope to discharge all our arrears, and to meet the views of our Advisers, as well as pay due respect to the Correspondents whose Letters have yet remained unnoticed.*

*We cannot, however, neglect this opportunity of expressing our deep obligations to the many friends of the Legal Observer,—not only to those who have enriched its pages with articles both of literary merit and professional information, but to others who have made valuable suggestions for the completion of its plan. And "though last, not least in our affection," to those who have liberally bestowed their unqualified approbation and encouragement. Nor would we omit to own the advantage of some friendly censures, by which we trust we have in some degree profited.*

*The success of the work has been altogether* UNEXAMPLED *in legal publications. If this be but "faint praise," we may add, that within two months, we believe there are but few instances of periodical publications attaining a circulation so extensive as we have already reached. We are steadily "progressing" from week to week. In London our most sanguine expectations have been surpassed; and so soon as the means adopted to make the work known in the Country have had their effect, we shall have no other anxiety than that of continuing to deserve the approbation we have gained, and of striving more and more to benefit and interest the profession.*

*We thank both our Friend in* Gray's Inn *and J. W. for their Notice of the Report of a Decision in the Eighth Number. The subject had not escaped our notice: but we have not yet had an opportunity to obtain the Papers so as to give the requisite information.*

*We feel obliged by the Communication of some MS. Reports, but must be favoured with the names of the Solicitors on both sides, in order that the Statements may be authenticated.*

*The friendly remarks we have received on our "Judicial Characters" and "Sketches of the Bar" have been considered with the attention their importance demanded. We shall give our views on this subject at an early opportunity. In the mean time, we have to announce that the next of our Series of Sketches will be* SIR CHARLES WETHERELL.

# The Legal Observer.

VOL. I. SATURDAY, JANUARY 15. 1831. No. XI.

——"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## SKETCHES OF THE BAR. No. 2.

### SIR CHARLES WETHERELL.

AN English court of equity, is the most unfavourable arena for rhetorical display, that can well be conceived. In the courts of common law, where the jurisdiction is not confined to dry questions of property, but embraces every topic that is connected with the feelings, and the passions, as well as the interests of mankind, and where, instead of impassive paper testimony, witnesses of flesh and blood infuse some portion of humanity into the proceedings, these circumstances, together with the habit of addressing juries, have no inconsiderable tendency to promote a popular style of oratory. But a Chancery suit usually contains as little *pabulum* for eloquence, as the British constitution is represented by Lord Brougham to afford for the revolutionist, who must of course be carefully distinguished from the reformer. To whom, moreover, can a pathetic, an imaginative, or a humorous appeal be addressed by the Chancery advocate with the slightest prospect of producing any effect, unless, indeed, it be to some reporter in his novitiate, or to the junior and as yet unsophisticated articled clerk of a solicitor? The public in general cautiously avoid entering the court, probably on account of the proverbial difficulty of getting out of it again, and considering it as a kind of trap, which cannot be approached with any degree of safety; and as for his Lordship himself, one might as reasonably attempt to excite a sensation in the woolsack, as to influence him by any thing but the purest matter of fact, and the driest reasoning. The Chancellor in his official capacity does not possess any feeling whatever; for there is in his case, no occasional passing of sentences upon convicted criminals, to give a fillip to his human sympathies. He is the very impersonation of justice; only that he is not blind, but deaf; for he takes home the papers to read, but will not listen to the voice of eloquence, charm she never so wisely.

These adverse circumstances, however, have no effect at all, in subduing the mercurial spirit of the celebrated lawyer, whose name stands at the head of this article. Whenever he speaks, the grave, austere, and technical genius of the Court of Chancery is outraged by a profusion of tropes and metaphors: epithet is heaped upon epithet, like Pelion upon Ossa; or rather, the learned gentleman runs through an entire gamut of them, each pitched a note higher than the one preceding. In evolving any complex idea, he does not usually proceed sentence by sentence, after the fashion of ordinary men, but introduces each successive step by way of parenthesis to the former, until he has crammed matter sufficient for a moderately long speech into a single period, to the great perplexity of his auditors, who follow him with breathless amazement into so obscure and intricate a labyrinth. The dead languages are resuscitated, in order to furnish idioms and expressions, which the orator arrays in an English dress, and then passes them off for the vernacular; and the entire mass, is leavened by a strain of felicitous humour, and pointed sarcasm, which, though it may not be calculated to throw a very intense light upon the subject which he is discussing, certainly renders him one of the most amusing speakers of the day. Conscious, perhaps, that his matter is sometimes of rather too popular a character to be appreciated by "his Lordship," Sir Charles does not by any means speak exclusively to the court, but seems to consider all those "behind him, and on either side of him," equally entitled to his attention; and his address, is occasionally as sweeping as his late Majesty's bow, appearing to include every one present, except indeed the presiding judge himself, upon whom the orator

ever and anon, in the heat of declamation, most irreverently turns his back.

Sir Charles Wetherell is undoubtedly one of the most accomplished scholars at the bar; but he is not generally considered so sound a lawyer, or so judicious an advocate, as some of his contemporaries. This may be owing to his fondness for classical literature, (with which he evidently possesses an intimate acquaintance,) interfering with his legal avocations, and to a natural desire of bringing into action, upon every occasion those attainments which he so highly esteems, without duly considering, whether he thereby promotes the cause which he is advocating, or not. His speeches may be compared to a numerous, but disorderly army of many nations, speaking different languages, and armed after various fashions, scouring an hostile country in all directions, and sweeping every thing before it, but which is put to the rout by the tactics and discipline of a much less imposing force (represented by the close and logical argumentation of the late Solicitor-General) on the very first attack. On questions, however, which have not been of an exclusively technical nature, Sir Charles has made some very effective and admirable displays.

The singular physiognomy, and the whole outward man of the *ci-devant* Attorney-General, are in perfect keeping with his character. To be sure, the eyes are rather deficient in expression, as they appear to be continually and fixedly gazing at some object or other, without being conscious of seeing any thing; but the remaining features indicate a propensity to satire, combined with Listonic drollery,—a compound of Momus and Mephistopheles. Amongst other peculiarities relating to the person, the learned gentleman is not altogether exempt from a common failing of very erudite men. He has never been finical in matters of raiment, as the

> "calceus alter
> Ruptâ pelle patens,"

which used invariably to constitute a part of his equipments, and the chasm between the bottom of his waistcoat and the top of his inexpressibles, commonly designated in the courts for a long series of years as "darkness visible," sufficiently testify. These innocent eccentricities may be indulged in with impunity by the wealthy: it is only where similar results are known to be the offspring of hard necessity, that the ridicule which they provoke is accompanied with contempt. However, since Sir Charles entered into the connubial state, Hymen has repaired his shoes, braced up his nether integuments, and laved his linen.

Some analogy appears to exist, in the case of every lawyer, between his peculiar characteristics in court and his conduct as a politician, both having their common origin in the natural disposition of the man. Thus the subtle and acute special pleader, well versed in the turns, and shifts, and manœuvres, of his profession, usually carries his suppleness and his cunning into all his public relations; and, on the other hand, the manly and straightforward advocate, is also the honest and independent senator. Perhaps it is by some such test as this, that the friends of Sir Charles Wetherell have tried sundry little ambiguities of conduct in his early career, which they have been disposed to attribute to eccentricity and caprice, rather than to any unworthy motive. It is certain that whenever he has committed any act of what he would himself call outrageous honesty, his language has been that of one who is too apt to be guided by impulse. There is one principle, however, to which he has always steadfastly adhered, and which appears to form the polar star of his political course; namely, a devoted attachment to the existing institutions of his country, and an uncompromising resistance to every attempt at altering them, whether it be in the way of gradual change or of sweeping innovation. It will no doubt be considered by many, that his opposition to all measures of reform, of what nature or kind soever, is something too indiscriminate; but the above fact is adduced as an instance of his honesty, rather than of his discretion. On this score, at least, he may claim credit, for the most firm, and inveterate consistency.

## SUMMARY OF RECENT STATUTES.

### THE NEW FORGERY ACT.

[1 Wil. 4. c. 66. 23d July, 1830.]

One of the most important statutes passed in the last session, was the bill consolidating and amending the law of forgery. It is a practical proof that the legislature is now arriving at the conclusion, that the crime of forgery is not deserving, in all cases, of so severe a punishment as death. That punishment is still retained in several instances, but is abolished in an almost infinite number. After giving an analysis of the act, we shall point out the principal changes in the law which it has effected.

Sect. 1. No forgeries, or their connected offences, which, by the existing law, are punishable

with death, shall be any longer so punishable, unless made so by this act; but persons guilty of such offences, shall be liable to transportation for life, or for any term not less than seven years, or imprisonment for not more than four, nor less than two years. Nothing in this act to affect the law relating to coin.

Sect. 2. Forging, &c. the great seal of the United Kingdom, privy seal, privy signet, sign manual, Scotch Union seals, great or privy seal of Ireland,— treason, and capital; proceedings on this section, not to be affected by the statute of William III. "For regulating trials in cases of treason and misprision of treason," or by the statute of Anne "For improving the union of the two kingdoms."

Sect. 3. Forging, &c. Exchequer bill or *debenture*, East India bond, bank note, bank bill of exchange, bank post bill, bill of exchange, promissory note for payment of money, or any endorsement or assignment thereof, or any acceptance of any bill of exchange, will, testament, *codicil, or testamentary writing*, undertaking, warrant, or order for payment of money,— capital.

Sect. 4. Forging, &c. any writing, however designated, if capital by any act now in force, and if in law a will, codicil, bill of exchange, &c. within the true intent and meaning of this act, — capital.

Sect. 5. Making false entries in the books of account of the Bank of England, and *South Sea Company*, or falsifying the accounts of the owners of stock, &c. in those books; or transferring the said stocks, &c. in the names of persons not the true owners, — capital.

Sect. 6. Forging, &c. a transfer of any share or interest of or in any stock, &c. transferable at the Bank of England or South Sea House, *or of or in the capital stock of any body corporate, &c. now, or hereafter to be, established by charter or act of Parliament;* forging, &c. power of attorney or other authority to transfer such stock, &c. or to receive dividends in respect of the same, or demanding or endeavouring to have it transferred, or to receive any dividend on it, by virtue of such authority; or personating the owner of such stock, &c. thereby transferring his share in such stock, or receiving money in his stead, — capital.

Sect. 7. Personating the owner of any of the above stocks, and thereby endeavouring to transfer any share or interest in the same, or to receive any money due to such owner by such personation, — transportation for life or not less than seven years, or imprisonment for not more than four nor less than two years.

Sect. 8. Forging, &c. the name or hand-writing of a person purporting to be an attesting witness to the execution of any power of attorney mentioned in s. 6.,— transportation for seven years or *imprisonment not exceeding two years nor less than one.*

Sect. 9. Clerks in the Bank of England and *South Sea Company* knowingly making out a dividend warrant for more or less than the person in whose favour such warrant is made out is entitled to, — liable to transportation for seven years, or *imprisonment for not more than two years nor less than one.*

Sect. 10. Forging, &c. any deed, bond, or writing obligatory, court roll, *copy of court roll relating to any copyhold or customary estate*, acquittance, *or receipt* for money or goods, or accountable receipt *for money or goods, or* for any note, bill, or other security for payment of money, or any warrant, order, or *request* for the delivery *or transfer* of goods, *or for the delivery of any note, bill, or other security for payment of money*, — transportation for life or not less than seven years, or imprisonment for four and not less than two years.

Sect. 11. Fraudulently acknowledging any recognisance or bail in the name of another, *whether such recognisance or bail in either case be or be not filed;* acknowledging any fine, recovery, cognovit actionem, judgment, deed enrolled, — transportation for life or not less than seven years, or imprisonment for four and not less than two years.

Sect. 12. Knowingly purchasing, receiving, or having in possession any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, of the Bank of England, — transportation for fourteen years.

Sect. 13. Making, having, or using, without lawful excuse, any instrument for making paper, with the words "Bank of England" visible in the substance, with curved or waving bar lines, or with the laying wire lines in a waving or curved shape, or any number, sum, or amount, expressed in a word or words in Roman letters, visible in the substance; or manufacturing, using, selling, exposing to sale, uttering, or disposing of, or knowingly having such paper in possession; or by contrivance causing the words "Bank of England" to appear visible in the substance of any paper, or causing the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words *in Roman letters*, to appear visible in the substance thereof, — transportation for fourteen years.

Sect. 14. Nothing herein contained shall prevent any person from issuing any bill of exchange or promissory note, the amount expressed in guineas, or in a numerical figure or figures denoting the amount in pounds sterling, visible in the substance of the paper; nor from making, using, or selling paper having waving or curved lines, or other devices in the nature of watermarks, visible in the substance of the paper, not being bar lines or laying wire lines, if not so contrived as to form the texture of the paper, or to resemble the waving or curved laying wire lines or bar lines, or the water-marks of the paper used by the Bank of England.

Sect. 15. Engraving on any plate or material any promissory note or bill of exchange purporting to be a bank note, bank bill of exchange, or bank post bill, or part thereof, or blank bank note, &c. of the Bank of England, or using such device for making or printing any bank note, &c., or having in possession such device, or putting off *or having in possession* any paper on which any blank bank note, &c., or part of any bank note, &c. shall be impressed, — transportation for fourteen years.

Sect. 16. Engraving or making on any plate or other material any word, *number*, figure, character, *or ornament*, the impression taken from which resembles, or is apparently intended to resemble, any part of a bank note, &c. of the Bank of England, using such plate, &c., having in possession such plate, &c., putting off, &c. paper on which there is such an impression, having such paper in possession, — transportation for fourteen years.

Sect. 17. Making or using any instrument for the manufacture of paper, with the name or firm of any person or persons, body corporate, or company, carrying on the business of bankers (other than and except the Bank of England), appearing in the substance of the paper; *having such instrument in possession;* manufacturing, using, selling or exposing to sale, putting off, *having in possession* such paper, or causing such name of firm, &c. as above mentioned to appear in the substance of the paper, on which the same shall be written or printed, — transportation for fourteen years and not less than seven, or imprisonment for not more than three years nor less than one.

Sect. 18. Engraving or making on any plate, &c. any bill of exchange or promissory note, or any part thereof, purporting to be such bill of exchange, &c. as were mentioned in the last section; engraving, &c. any word or words resembling, or apparently intended to resemble, any subscription subjoined to any bill of exchange or promissory note issued as aforesaid; using or having any such plate, &c, or part thereof; offering or putting off, or having any such paper, on which is an impression of any part of such bill, &c., or of such subscription, — transportation for fourteen years and not less than seven years, or imprisonment for not more than three years nor less than one.

Sect. 19. Engraving or making upon any plate, &c., any bill of exchange, promissory note, undertaking, or order for payment of money, or any part thereof, in *whatever language or languages, being, or not, or intended to be, under seal,* purporting to be such instrument of any foreign prince or state, or any minister or officer in the service of any foreign prince or state, or any body corporate, or of the like nature, constituted *or recognised* by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of his Majesty; using or possessing any such plate, &c.; *offering or putting off,* or possessing paper, on which any part of such foreign bill, &c. is impressed, — transportation for fourteen years and not less than seven years, or imprisonment for not more than three years nor less than one.

Sect. 20. Inserting any false entry in any register of baptisms, marriages, or burials; *uttering as true any forged copy of an entry in such register;* uttering any forged entry as true; destroying, defacing, or injuring, or permitting to be destroyed, &c. any such register or part thereof; forging, altering, or uttering, knowing it to be forged or altered, any license of marriage, — transportation for life or for seven, years, or imprisonment for not more than four years nor less than two.

Sect. 21. Rector, vicar, curate, or officiating minister of any parish, allowed to correct errors in the before-mentioned registers.

Sect. 22. Inserting in any copy of any register transmitted to the registrar of the diocese any false entry of any matter relating to any baptism, marriage, or burial; or forging, or altering, or uttering, knowing it to be forged or altered, any copy thereof, or wilfully signing or verifying such copy, — transportation for seven years, or imprisonment for not more than two years nor less than one.

Sect. 23. The punishments provided by 5 Eliz. c. 14. repealed, and transportation for not more than fourteen years nor less than seven, or imprisonment for not more than three years nor less than one, substituted.

Sect. 24. All forgers and utterers may be dealt with in the county where they are apprehended or are in custody, as if their offence were committed there; accessories before and after the fact in felony, and persons aiding, abetting, or counselling the commission of any offence, if a misdemeanor, may be dealt with, and offence charged to have been committed, in any county in which the principal may be tried.

Sect. 25. Principals in the second degree, and accessories before the fact, in felonies punishable under this act, liable as principals in the first degree; accessories after the fact liable to imprisonment for any term not exceeding two years.

Sect. 26. The Court may superadd hard labour and solitary confinement to the punishments directed to be inflicted on offences against this act.

Sect. 27. The jurisdiction of the Admiralty saved.

Sect. 28. Where having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have such matter in his personal custody or possession, or knowingly and wilfully have it in any dwelling-house or other building, lodging, apartment, field, or place, open or enclosed, whether belonging to or occupied by himself or not, whether for his own use or the use of another, such person shall be deemed to have such matter in his custody or possession within the meaning of this act; where the committing any offence with intent to defraud any person whatsoever is made punishable by this act, in every such case the word "person" shall be deemed to include his Majesty, any foreign prince or state, body corporate, company or society of persons not incorporated, person or number of persons intended to be defrauded by such offence, whether residing or carrying on business in *England* or elsewhere, under the dominion of his Majesty or not; and it shall be sufficient in any indictment to name one person only of such company, society, or number of persons, and to allege the offence to have been committed with intent to defraud the person so named, and another or others, as the case may be.

Sect. 29. Act not to extend to Scotland and Ireland.

Sect. 30. Where the forging or uttering any writing or matter is in this act expressed to be an offence, if any person shall, in *England*, forge

or utter any such writing or matter, in whatsoever place or country out of *England*, under the dominion of his Majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language or languages the same or any part thereof may be expressed, every such person shall be deemed an offender within this act, and punishable as if the writing or matter had purported to be made or had been made in *England*; and if any person shall, in *England*, forge or utter any bill of exchange, promissory note for the payment of money, indorsement on, or assignment of, any bill of exchange or promissory note for the payment of money, acceptance of bill of exchange, undertaking, warrant, or order for the payment of money, deed, bond, or writing obligatory for the payment of money, (whether made only for the payment of money, or the payment of money with some other purpose,) in whatever place or country out of *England*, under the dominion of his Majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, deed, bond, or writing obligatory, may be or may purport to be payable, and in whatever language or languages the same or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, or order, be or be not under seal, every such person shall be deemed an offender within this act, and punishable in the same manner as if the money had been payable or had purported to be payable in *England*.

Sect. 31. After repealing several acts relating to forgery, after the 20th of July, in *England*, it directs, that offences committed before that day shall be punishable according to the then existing law; provided that if such offences are punishable with death by that law, but not so punishable by this act, they shall be liable to transportation for life, or not less than seven years, or imprisonment with or without hard labour for not more than four years or less than two.

Sect. 32. The act to commence operation on the 21st of July, in the year 1830.

With respect to the mode in which this act is drawn, it may be observed that the wording is more concise, than that of the repealed statutes relating to forgery. The intent in committing any of the offences mentioned in it, is stated in the various sections "with intent to defraud any person whatsoever." This is more general than the language of most of the former acts, and saves repetition. The 27th section points out the construction to be put on the word "person."

The necessity of showing authority to do certain acts, or have certain things in possession, where those acts or that possession would be lawful if authorised, is more explicitly than in former acts thrown on the party accused. As nothing is said throughout the act of this authority being in writing, it is presumed the authority may be proved to have been given in any other way.

Where new provisions are introduced into the act, they are marked in italics in the analysis.

The first section, providing for all forgeries made capital by other acts, would necessarily refer to forgeries connected with the pay of the navy. They are, however, also provided for, not inconsistently with this act, by 11 Geo. 4. c. 20., which amends and consolidates the laws relating to the pay of the royal navy. Some inconsistency will, however, be found on comparing this section and section 13. By the first section, where persons committing forgery are liable by any act in force to the punishment of death, and are not punishable with death by this act, they may be transported for life, &c. By 13 Geo. 3. c. 79. s. 1. several offences included under the general words of that section are capital; but by sect. 13. of the present act those offences are punishable not with death, but with transportation for fourteen years only. Two punishments, therefore, for the same offences are provided. Of course should any person be convicted of any of those offences, he would be punished under sect. 13., as that would be the more strict construction of this, which is a criminal act. A special provision having been made in the same act for the punishment of the offence, it must be taken that the legislature did not intend it to be punished, under the general words of the first section.

No change is effected by ss. 2, 3. 5, 6. Certain additions, however, are made, and are printed in italics.

The punishment provided in s. 7. is increased from seven years' transportation.

The offences mentioned in s. 10. were capital by 45 Geo. 3. c. 89. s. 1. The 5 Eliz. c. 14. s. 2. provided, that persons forging a court-roll, should be liable to pay the party grieved his double costs and damages, and to forfeit to the crown the whole issues of his lands and tenements during his life, and to suffer imprisonment for life.

The offences constituted by s. 11. were capital by 21 Jac. 1. c. 26. s. 2., extended by 4 W. & M. c. 4. s. 4., and 27 Geo. 3. c. 44. s. 4. In *Timberly*'s case (2 East's P. C. 1009. 2 Russ. Cr. 482. ed. 2.), which was on the construction of 21 Jac. 1., it was holden, that the personating bail before a judge at chambers, was no felony unless the bail was filed. The provision in italics in the analysis was therefore necessary.

Most of the offences mentioned in s. 13. were capital by 13 Geo. 3. c. 79. s. 1. The provision as to having in possession the paper mentioned in the section is new.

By the 45 Geo. 3. c. 89. s. 7., and 52 Geo. 3. c. 138. s. 5., the authority of the

Bank of England necessary to exculpate the supposed offenders from the acts mentioned in s. 16. must have been in writing.

The 41 Geo. 3. c. 57. s. 1. provided, as a punishment for the first offence in the case set forth in s. 17., imprisonment for any time not exceeding two years, nor less than six months, and for the second offence seven years' transportation.

The punishment by s. 2. of the last-mentioned statute, for the offences stated in s. 18., except those with respect to "any subscription subjoined," &c. was the same as that provided by s. 1. The punishment for the latter offences, was (by s. 3.) imprisonment for any time not exceeding three years, nor less than twelve months; second offence, seven years' transportation. The provisions as to using any plate on which "such subscription," &c., or uttering, or having in possession paper on which "any such subscription," &c., are new.

The 43 Geo. 3. c. 139. s. 2. made the offence mentioned in s. 19. a misdemeanor, punishable for the first offence with imprisonment not exceeding six months, fine, and private whipping, or one or more of these punishments; second offence, fourteen years' transportation. The authority to do the acts stated in that statute, must have been in writing.

As to offences under s. 20. it is to be observed, that by the 4 Geo. 4. c. 76. s. 29. (the marriage act) the forging or altering the register of marriage, must have been "with intent to elude the force of that act." The destroying, or defacing of the register must have been "with intent to avoid any marriage, or to subject any person to any penalties of the act." By 52 Geo. 3. c. 146. s. 14. the words were "knowingly and wilfully," and "wilfully." By this latter statute, those offences were punishable with transportation for fourteen years. By the 4 Geo. 4. c. 76. s. 29. the offences relating to marriage registers, were punishable with transportation for life.

In s. 22. the enactment against "uttering," except as to marriage registers, is new. In all the cases mentioned in the section, except that of uttering, the punishment was by 52 Geo. 3. c. 146. s. 14. transportation for fourteen years. By 4 Geo. 4. c. 76. s. 29. uttering a forged copy of a register of marriage, was punishable by transportation for life.

The provisions of s. 24. are new. A similar enactment is contained in 9 Geo. 4. c. 31. s. 22., in the case of bigamy. Previously the party could only have been tried, in the place where the offence was committed. The next provision as to the place of trial of accessories is unnecessary, since the provision 7 Geo. 4. c. 64. ss. 9, 10. would here apply and enable prosecutors to proceed against accessories, in any county wherein the principals might have been tried. The provision concerning misdemeanors appears very absurd, since the words "aiding, abetting, or counselling," the two first of which are expressive of a principal in the second degree, and the last of an accessory before the fact, would seem to intimate that there were accessories in misdemeanor. Now it is hardly necessary to observe, that in crimes below the degree of felony, there are no accessories, but all concerned are principals, and therefore the provision is surplusage. But if the intention of the legislature, was to create accessories in misdemeanor, then the section does not go far enough, for it says nothing of accessories after the fact. We presume the sole object of the section, was to remove doubts arising in the minds of persons unacquainted with law. But surely that ought to be no reason, for creating doubts in the minds of those, who do not labour under that deficiency. All that the section need to have stated, was, that misdemeanors punishable under this act, might be dealt with in the same manner as felonies. A similar inconsistency is to be found in the 7 & 8 Geo. 4. c. 29. s. 61., and 9 Geo. 4. c. 31. s. 31.

The provision (s. 25.) for the punishment of principals in the second degree, and of accessories, is new. Before this, they were either punishable by the particular provisions of each act of parliament, or at common law. The power to superadd hard labour or solitary confinement, (s. 26.) is also new.

Section 28. extends the provisions of 45 Geo. 3. c. 89. s. 6., as to what shall be considered possession. It is new as to the meaning of the word "person" throughout the act. This was rendered necessary as to foreigners by repealing 43 G. 3. c. 139. s. 1. The provision for the mode of alleging the persons intended to be defrauded, is unnecessary. The 7 Geo. 4. c. 64. s. 14. sufficiently provided for such cases.

The enactments contained in s. 30. are new, and appear necessary since the repeal of 43 Geo. 3. c. 139. s. 1.

Although the language of this statute is throughout concise, yet we conceive there are obscurities in it, perhaps arising from excessive conciseness, which will cause considerable difficulty in its operation. In this opinion we believe we are joined by several professional gentlemen, of considerable practical experience.

## METROPOLITAN GENERAL REGISTRY.

*To the Editor of the Legal Observer.*

SIR,

A PAMPHLET has recently appeared on the subject of the Metropolitan General Registry Bill, written by Mr. Mewburn, a solicitor of great respectability and considerable practice, at Darlington, in Durham, *on the borders of a register county.* As the publication has not yet been noticed in the reviewing department of the Legal Observer, I venture to call your attention to it.

Mr. M. is alive to the importance of the question, and discusses it in all its bearings. The result of his discussion is unfavourable to the proposal of the Commissioners; and he maintains, that while it would fail to remedy the evils at present existing, it would plunge us into others, to which we are at present strangers. If this be so, the rejection of the measure is of course the only step consistent with reason and prudence. All change is an evil. An important change in laws long established is a great evil; and before incurring it, we ought to be quite sure that the change will not only remove old grievances, but that it will effect this desirable object without introducing others more intolerable.

Mr. M. contends that the evil which the registry is to remedy, is greatly exaggerated. "The annual number," says he, "of transactions concerning real property is estimated at 80,000; but the aggregate instances of the suppression of deeds within the collective experience of the profession, do not in all probability exceed 1000." He adds in a note, "the probability is that the number of instances is far more limited, as few attorneys, even in extensive practice, have had any circumstances of the kind brought before them." It cannot indeed be doubted, that the proportion of fraudulent cases is much below the calculation in the pamphlet. What an insufficient reason then do they afford for a measure, which is to up-root the ancient land-marks of the law, to effect a complete revolution in the profession, and to brand every landholder in the kingdom with a charge of either dishonesty or imbecility, by declaring him unfit to retain the custody of his own title deeds! How could eight men of common sense, not to say of professional eminence, be brought to propose so monstrous a remedy for so insignificant an evil? Mr. M. suggests that it arises from six of the eight Commissioners being eminent conveyancers, and possibly this may account for it. Police magistrates are said, not usually to entertain the most charitable opinion of human nature; and this arises from their experience lying so much among the depraved part of society. Something like this may be the case with men who have devoted their lives to the mysteries of conveyancing. Like the magistrate, it is their business "to spy out abuses," and the constant practice of doing so, may in time aggravate habit into infirmity. "To such men, every case of fraud or difficulty is sent, for their opinion and advice." No instance of dishonesty is discovered, but they hear of it, and the consequence is that they acquire "a morbid apprehension of fraud," and conclude that their experience is the type of that of all other men. After all, however, there is some portion of honest principle among mankind; and if not much, there is at least some common prudence, which shows men that "honesty is the best policy." Fraud is the exception, not the rule of men's actions; even if the disposition to cheat be universal, the disposition *to be cheated* is certainly not so; and the law ought not to interpose, to relieve men from the necessity of using ordinary care and diligence. Such petty interference to regulate matters which should be left to individual prudence — such minute legislation to reduce men to the condition of children, by taking from them the superintendence of their own affairs, under pretence of managing them better, is accordant enough with the genius of despotism, but is perfectly at variance with the institutions of a free country. It is, moreover, calculated to have a bad effect upon public morality, by declaring that integrity is a phantom; that no man acts honestly, unless it is rendered impossible for him to act otherwise; and that no property is safe, unless the assurances are secured by the bolts and bars of the law. We are bad enough, but happily not quite so bad as this.

We are guarding them against an evil, which is in a great degree visionary. And how? By a plan inefficient, onerous, and expensive; a plan which by its prying scrutiny into the transactions of individuals, is abhorrent to the feelings and habits of Englishmen, and at once morally, commercially, and politically reprehensible.

All the deeds relating to all the land in the kingdom, are to be deposited in one office: in truth, it must be a tolerably capacious one. But when this is done; when every scrap of parchment belonging to every family and every individual, slumbers in safety within four stone walls, then will be the commencement of difficulty and

confusion. The deeds are all safe; but it is not enough to know this — it will be necessary sometimes to consult them — and how is this to be done?

On this subject I will not trouble you with any thing of my own, but refer to the observations of an eminent conveyancer, Mr. Park, quoted by Mr. Mewburn. Mr. Park says,—

"The difficulty which still continues to oppress my mind, and from which I cannot wholly relieve it, is the question whether the *aggregate* of inconvenience and expense which would be produced, from the necessity of searching the register, and enrolling a memorial, or perhaps duplicate, in every transaction relative to real property, would not be of that amount which ought to be considered, on the principles of legislation, as overbalancing the mischief of the *occasional* loss or ruin of individuals by fraud. For I apprehend it to be clear, that if the number of cases in which mischief actually ensues from the want of a public registry be small, in proportion to the whole number of transactions concerning real property, while the inconveniences and burden of the remedy proposed would be considerable, at the same time that they would be *universal*, the soundest principles of legislation would be those which should decline to be moved, by compassion for individuals, to the imposition of a serious and burdensome inconvenience in the universal transaction of business between the community at large. There are many evils to which individuals are still exposed, in the minor dealings of mankind, and which are serious enough in themselves, but for which no one would attempt to propose a legislative remedy, because it could only be effected by a machinery of universal comprehension, too cumbrous or inconvenient to be submitted to in matters of hourly occurrence. The evils of over-legislation have, I believe, been sensibly felt by the community of this country of late years; enough so, at least, to open the eyes of all men to the necessity of cautiously weighing the inconveniences of a remedy, necessarily universal, against the evils to be remedied, which are only occasional or individual. It must never be forgotten, that all legislation is a choice of evils, and that *preventive legislation*, by machinery, as it must necessarily be, universally comprehensive, must, in almost all cases, be enormously out of proportion to the matters to be prevented. If the machinery be so simple, and of so little burden, as to render this disproportionateness immaterial, it is certainly no objection; and again, if the acts to be prevented involve that degree of public mischief as to make them unbearable, the machinery, however disproportionate or inconvenient, must be submitted to.

"As a general principle, I apprehend it to be extremely desirable that transactions relative to property should be as little as possible conditional for their validity on the after-acts of agents, and that men should not go home, after having met to execute deeds, with the feeling that it still depends on the fidelity and attention of a professional agent whether those deeds shall, or shall not, secure their purpose. And if, indeed, as seems to be the prevalent opinion, the doctrine of *notice* is to be abrogated, it may be feared that many cases would occur, in which both the temptation and the power would be in the hands of the agent to give fraudulent priorities, and to invalidate *bonâ fide* transactions. I should tremble much at the consequences to the character of English justice, if it afforded no remedy against such acts as these.

"It appears to me, also, that another question to be attentively investigated is this, — How far a register does really effect that inviolable security which it promises. For if the argument in its favour *assumes* that the security *is* accomplished by it, as an universal proposition, and upon examination it appears that the security is problematical, then, certainly, the argument has not really the whole value which it appears to have.

"Of the Middlesex registry, as at present mechanised, I happen to know enough, practically, to have no hesitation in saying that it does not, and cannot, insure the purposes for which it was created. During six months that I was in the office of a very eminent solicitor, preparatory to my going into the chambers of a conveyancer, it was occasionally my business to 'search on an abstract' through the Middlesex registry, and I therefore know something personally of the nature of that operation. And I here wish to observe, in the first instance, that it is all a chance whether the clerk or other person employed in making the search understands sufficiently the devolution of title disclosed by the abstract, or the principles upon which the search should be made in reference to that title, to make his search exhaustive of the risks. The professional friend with whom I was placed, and who was a man of great method, and of unwearied assiduity, in the business of the office, had made me laboriously familiar with the habit of analysing abstracts on paper, before I was intrusted with the duty of *searching*. But I am not aware that this habit is frequently made a part of professional education; and I have several times been applied to, since I have been in practice, by articled clerks and others, to point out the names and dates to which the search was to be directed, on abstracts on which I had directed the customary searches in the register—an employment which, of course, a conveyancing counsel cannot take upon himself, and which I have, therefore, been obliged to decline, by referring the applicant for information to some office where regular conveyancing clerks are kept. But we will suppose the clerk to whom the search is intrusted so have succeeded, as well as he can, in analysing his abstract, or to follow it on the pages of the abstract, without an analysis. The title, we will suppose, is to a house or houses in the parish of Mary-le-Bone, and to have been forty or fifty years in a family of the name of Taylor (I will not push the *reductio ad absurdum* as high as Jones): he has then to search in the calendar of each year during which a Taylor has been the proprietor on the abstract; and every conveyance which he finds by a Taylor of that Christian name, and in the parish of Mary-le-Bone, in each of those years, he must bring to the test by ex-

amination of the memorial; and to do this he must, each and every time, find the book in the presses of the office referred to by the calendar *, and he must remove that book (a ponderous atlas folio) to the table or counter in the centre of the office, find the page referred to, and there inspect the memorial recorded. It is unnecessary to say, that he may be for whole days, and even whole weeks, employed in this manner, without any materiality to the business on which he is engaged, and until he gets slovenly and listless by the incessant abortiveness of his labour. But perhaps he finds a settlement, or a trust deed, or a will, which, though not specifically describing the property on the abstract, contains a description suspiciously analogous, or a sweeping clause, or a general description. He is then to take upon himself the critical functions of a conveyancing counsel, and to decide whether that instrument does or does not affect the property, and whether he is to *report* it. Now, I ask, how many of the clerks daily employed in making searches in the Middlesex registry are really competent to the exercise of this function, or have made themselves sufficiently acquainted with the abstract to form any judgment at all? I believe, also, that the prevailing practice is to search only down to the termination of apparent ownership on the abstract, viz. down to the date of the next conveyance; whereas it is obvious that the search should be extended down to the date of the registration of that conveyance, as a subsequent conveyance, previously registered, would have the priority.

"I venture to say, also, that in three abstracts out of five, it would require all the acumen and the knowledge of the conveyancer to find out, under a complicated series of facts and transactions, *who are* the persons whose registered acts might affect the title; and that, therefore, in all such cases, the search, as executed in the Middlesex registry, does not secure the safety of the purchaser, so far as is dependent on the registry.

"It must be very familiar to your Honours, that titles often depend upon facts, such as descents to numerous coparceners, &c., which are briefly stated in the abstract, and on which the utmost vigilance of mind, as well as much information, is necessary to trace the devolution of undivided shares, and follow them through their owners for the time being; and that, in such cases, unless the search were made by the conveyancer himself, and *that* while the analysis of the title is fresh in his recollection, it would be impossible to say that the search had exhausted the risks.

"Now, as these circumstances would continue, notwithstanding any alteration in the mechanism of the register, we are, I am afraid, compelled to say that the security afforded by a register is *not* universal."

To the testimony of Mr. Park may be added the opinion of Mr. Bell. "I fear," says that profound lawyer — "I fear that the costs of search, the chance of something being overlooked, and the carelessness of persons making the search, *are likely to occasion greater evils than those we are at present subject to.*" Undoubtedly they are, as all men, except the Commissioners and their immediate friends and connections, can see.

Mr. Park's observations on the difficulty, the almost impossibility, in many cases, of obtaining information from a register, are convincing. But supposing that with half a year's search the requisite information could be fished out, and a title authenticated,—what professional man could spare the time to wade through the endless calendars, which are to contain "the abstract and brief chronicle" of all the titles in the kingdom? None: this difficult and delicate duty must be left generally in the hands of youth and inexperience. Or if a competent person could be found to take up his abode in the mighty tomb of parchments, and contend with the worms and the mice for their possession, how is his perseverance and self-devotion to be rewarded? And this brings me to observe, that the clumsy machinery recommended to us will not only prove burdensome and ineffective, but intolerably expensive. The Commissioners indeed calculate that the expense of registration will be 1*l.* 5*s.* for each deed, and 10*s.* for each search. Alas, for calculation! Did you ever hear, Mr. Editor, the estimate made for building a bridge, constructing a dock, or any similar work, and did you ever compare the *actual cost* with the estimate? This operation would have shown you, that the makers of estimates are very modest people, and do not like to exaggerate. But *this* estimate is modesty itself. Ten shillings for a search! Would ten pounds—in some cases would ten times ten pounds—be an adequate remuneration? Be it observed, that the Commissioners admit that in the registers already established, the cost of search is enormous; but theirs is to be so construct-

"* Mr. Park, in a note attached to his remarks, says, — 'I do not now recollect the condition which the calendars are in at the Register Office; but I recollect well that, at the Prerogative Office, the calendars of many years, although engrossed on vellum, had three, four, or more, of the names at the bottom of every page erased by the constant friction of the hands of persons searching in them — a fact which, considering the enormous sums received by that office for business done in it, always struck me as a glaring instance of that indifference (to give it no harsher name) which is the peculiar characteristic of some of our public offices. The office was, if I recollect right, open only from ten till three, to say nothing of holidays; so that the calendars might have been renewed with the greatest ease, during the daily absence of the public.' "

ed, that a solicitor shall be able to find what he wants, as readily as he can find the way to his chambers. Will any one familiar with the magnificent promises of projectors give credit to this? With regard to the cost of registration, Mr. Mewburn averages the increased expense not at *1l. 5s.* but at six or eight pounds, and with far greater plausibility, than attends the estimate of the commissioners. He shows also, with great clearness, how oppressively the proposed measure would operate, upon transfers and charges of small amount.

On the disclosure of private affairs, I shall not dwell. It is so repugnant to our feelings both as men and Britons, that no management or modification can render it palatable. We all recollect that, not many years since, a tax, the fairest in its principle that could be devised, and the most certainly productive in its operation, was put down by the unanimous voice of the people, SOLELY ON ACCOUNT OF ITS INQUISITORIAL NATURE. May the voice of the people be equally effective in defeating the Metropolitan General Registry Bill!

One possible consequence of the measure is so tremendously appalling, that I cannot refrain from adverting to it. What if accident, or the act of an incendiary should envelope the proposed building, and all its records, in flames! Such a calamity befalling a single family is fearful enough; but here would be universal ruin. At "one fell swoop" all the titles in the kingdom would be destroyed. Can any one bear coolly to think on this? Can any one calmly contemplate the interminable litigation, the overwhelming distress and despair, that must follow such an event? Let us not then madly risk it. Let us leave the assurances of property where they have hitherto been left, and where they ought to be left, in the hands of those, who have the greatest interest in taking care of them.

I have exceeded the limits which I had assigned to myself, and must conclude by recommending Mr. Mewburn's publication to the notice of your readers. It is from him that I have drawn my materials. He points out the difficulty of framing a complete and comprehensive act of parliament, and adverts with force and humour, to some of the bungling attempts at legislation, which have disgraced our own times. The law of property is too serious a thing to be tampered with. An ill-considered, or ill-drawn clause in an act, might shake half the titles in the kingdom; and this is certainly *not* the age of good acts of parliament.

In concluding, may I suggest that a complete list of works on Registry would be a useful article in the Legal Observer.

X. Y. Z.

## LOCAL COURTS.

MR. EDITOR,

IN the Edinburgh Review, vol. xliii., is an article (commencing at p. 461.), with the running title "Civil Affairs of Ireland," which furnishes some strong reasons, against the new local courts, proposed to be established in this country. The facts and arguments contained in this paper, are the more valuable, from having been published in February, 1826, long before the local court bill was thought of. Your readers are probably aware, that in Ireland, the Lord Lieutenant is enabled to appoint a barrister in each county, to assist the magistrates, and act as their chairman; and the same act of the Irish Parliament which gave this power, created in each county a civil bill court, to have its sittings at the time of the quarter sessions, in which the barrister is the sole judge. The powers of the civil bill courts go to all actions upon bonds, upon promissory notes, and upon bills of exchange, to the amount of *20l.*; to all actions for goods sold and delivered, and what are generally called actions of *indebitatus assumpsit*, to the amount of *10l.*; in trover to *10l.*; and in actions on the case to *5l.* These courts are not *precisely* similar to those proposed to be established here, but they are sufficiently so, to show us what we may expect, should the mischievous bill now in the House of Lords ever be permitted to pass into a law. Some of these effects are ably pointed out by the reviewer. First, as to patronage:—

"We find," says the reviewer, "from the evidence of Mr. Dogherty, that the power of appointing barristers, was soon *as a matter of course*, turned into a job." This witness says, "Down to the administration of Lord Wellesley, I have always understood it to be the practice, and I am sure that an observation of the persons appointed, would lead one to think so, that what is called the predominant county interest, operated in the nomination of the assistant barrister, and he was invariably found connected with the county."

Secondly, as to the order and decency of the proceedings:—

Mr. O'Connell says, "The number of cases is, in itself, a great evil. * * * As to the mode of proceeding in the civil bill court, the hurry is excessive; it is impossible to have any thing more undignified, or unlike a court of justice in general than the civil bill court; there are two or

three attorneys talking to their clients on every side; they are taking their instructions and examining their witnesses for the next cause, while the cause is going on. There is a great deal of vehemence of character about the Irish; the plaintiff and defendant, and their wives and their witnesses, are all bawling at the same time the attorney is screaming. There is no poetry in saying, that justice is frightened away."

Thirdly, as to the measure of justice obtained, and the effects of these courts upon public morals. Mr. O'Connell continues: —

"*Six thousand cases have been decided in a week.* * * * My own abstract opinion is, that *the evil of serving process for the recovery of small debts, and the necessary increase of oaths, is much greater than any that would occur if they were irrecoverable.* I believe few small debts would be unpaid if there were no legal process; for no one would get credit but a man who had a character for punctuality. * * * The practice of the civil bill court has introduced a most frightful extent of perjury, and tends, extremely, to demoralise the Irish people."

This is a view of cheap justice in Ireland. It may be said that in this country, the state of things would not be quite so bad. It possibly would not, with regard at least to the confusion attending the proceedings; though in Basinghall-street, we may find something very like that which Mr. O'Connell ascribes to the "vehemence of the Irish character." But the patronage would surely be found as convenient in England, as in Ireland. Nor could we reasonably expect much greater care and labour in the English, than in the Irish courts. In the latter, six thousand cases have been decided *in a week.* This is not only cheap but *rapid* justice. How carefully must those cases have been heard, how justly decided! would it not have been quite as well for the interests of justice, that they had never been decided at all? But what a disgusting picture is exhibited of the litigation and perjury produced and fostered by these courts! Six thousand cases in a week! Who can calculate the amount of evil passion, of fraud, of perjury, of oppression, of bitter suffering, connected with this frightful mass of litigation? Who is not ready to agree with Mr. O'Connell, that it would be better even that small debts should be irrecoverable by legal process? The state of society produced by these Courts, is disgraceful to a country professing civilisation or Christianity. It seems, by the way, to be assumed by all the cheap law advocates, that no one will pay his debts unless compelled by law. The higher moral impulses of man seem to be accounted nothing. This view of human nature is as false and mischievous as it is unamiable.

It is gratifying to be able to adduce so high an authority as that of the Edinburgh Review, in opposition to the ridiculous assertion, that law cannot be rendered too cheap. Who was the author of the article to which I have referred, I know not. It is understood that the Edinburgh Review was assisted not only by some distinguished *Scottish* advocates, but by *a very eminent English barrister, since raised to a more exalted station.* I have no authority to warrant my ascribing the article in question to him; but from the influence which he is believed to have exercised over the work, it may fairly be presumed to have expressed his opinions. The reviewer (whoever he might be) says, —

"The number of cases may, and ought to be diminished. They have grown up, in truth, from the EXCESS TO WHICH IRISH LEGISLATION HAS CARRIED THE PRINCIPLE OF HAVING CHEAP LAW. BY REGULATING THE FEES, SO THAT AN ACTION MAY BE TRIED FOR A FEW SHILLINGS, A BOUNTY HAS, IN EFFECT, BEEN HELD OUT FOR THE ENCOURAGEMENT OF FRIVOLOUS AND VICIOUS LITIGATION. But the measure that would most relieve the civil bill courts, from the number of cases they now have, would be the decisive one, of ABOLISHING ALL ACTIONS FOR SMALL DEBTS. For when we refer to the evidence, and see what an opening each action presents, for acts of injustice in serving process, for perjury on the trial, and for oppression in executing decrees, WE CANNOT BUT AGREE WITH MR. O'CONNELL, THAT THE LOWER ORDERS WOULD BE GREAT GAINERS, BY DEPRIVING THEM OF THE POWER OF LITIGATING SMALL DEBTS."

Such, Sir, is the deliberate sentence of the Edinburgh Review, only four years since. It is decisive; and I am inclined to believe, that what was sense and reason in 1826, is still sense and reason in 1830.

I do not recollect to have seen in your pages, the admirable letter on the local court bill, addressed to Mr. Brougham (now Lord Brougham) by an eminent solicitor, Mr. Tooke. I am sure that both yourself and your readers, will pardon my claiming a little farther space, for the purpose of introducing some extracts from it. Mr. Tooke, it appears, had been requested by the framer of the bill, to draw the table of fees, which at present offers a miserable blank. The impossibility of performing this task satisfactorily, gave occasion for writing the letter, which ably and eloquently points out the mischievous effects of the proposed measure, in encouraging petty litigation, and multiplying the number of low and disreputable practitioners, as well as its inconsistency with the new arrangements in Westminster Hall; nor does Mr. Tooke

**forget the imprudent tirade against attorneys.**

"I have carefully read and re-read your local jurisdiction bill and abstract, with a view to draw the account of fees by way of schedule, as desired; but have been unable to do so on a scale of any, in the least degree, adequate remuneration for any practitioner of liberal education, and desirous of holding a decent situation and honest character in society.

"Under this aspect, I cannot but consider your measure as calculated to become the greatest civil scourge ever inflicted on this country, by creating an indefinite and universal appetite for litigation, with no other break or interval in the exercise of it, than the halcyon month of August. This immediate effect of the act will be industriously promoted, and extended with corresponding energy, by an accession to the professsion, in increased numbers, of that class of practitioners designated as *pettifoggers*, whom to discountenance and extinguish, has been a primary object with all the best and leading solicitors of the present day.

"It appears to me utterly inconsistent with the avowed purposes of the Common Law Commission — the repeal of the law taxes — the appointment of additional judges — the intended laying open of the Court of Exchequer — and the facilities afforded in practice in the superior courts; — thus at once to withdraw from them two thirds at least of their ordinary business, subjecting it to a new and experimental tribunal, and superseding much of the labour derived from the elaborate machinery of Westminster Hall, with no compensating reduction in the expense of working it.

"Although personally, after a drudgery of thirty years, much withdrawn from active practice, and meditating, at no distant day, entire secession from it, I feel too much sense of gratitude, and, I hope, a laudable *esprit du corps* in favour of an employment which has afforded me the means for competence and independence, to be altogether insensible to the degradation to which the profession of an attorney will be reduced by the operation of your proposed new bill, which, I repeat, will necessarily bring into action a large class of low practitioners, who, having no fair means of adequate remuneration, must and will resort to trick, if not to fraud, to supply the deficiency of profit, no reasonable allowances for which (in keeping with the general purview of the bill) will afford a return for the education, skill, and attention, the conduct of the business of the local courts will require.

"While on this subject, it is with great regret I would allude to the tenor of your speech as reported in the *Times*, on the occasion of your giving notice of your plan; you, in it, assumed a tone of unmeasured contempt for the attorneys, imputing to them in the aggregate, and without exception, gross ignorance and the most selfish motives, while you at the same time, in equally unmeasured terms, lauded the Bar as actuated by the highest, noblest, and most liberal principles, with a possible exception of one in a hundred as not quite perfect."

I should be disposed to add a word or two of my own, in vindication of attorneys, but happily the *confidence reposed by the public in the profession*, renders vindication unnecessary.

The enormous salaries proposed for the new judges, the system of *nepotism* and abuse, which the official patronage of the courts would inevitably create, and the miserable degradation of the attorneys practising in them, are animadverted upon by Mr. Tooke in a subsequent part of the letter.

"If I could for a moment think it possible that the Local Jurisdiction Bill could pass into a law, in any thing like its present shape, I should observe on the preposterous amount of salary to the judge of 2000*l.* per annum; thus constituting a valuable object of ministerial patronage and borough influence, like a Welsh judgeship, rather than having the direct view of getting some useful plodding man for the situation, as is the case in the County Palatine Court at Preston, where Mr. Addison, for 400*l.* per ann., does as much, and as well, as can be expected from any county judge.

"The total absence of qualification for the office of registrar is fraught with liability to abuse; some son or nephew of the judge will hold it in sinecure, and the duties will be performed by the clerk, who will make it pay better than is in the contemplation of the act.

"The registrar, to give knowledge, experience, and efficiency, in the conduct of the business, ought to be an attorney of at least five years' certificated standing, and strictly debarred from practising directly or indirectly.

"The summary jurisdiction of the judge over the attorneys exceeds that of the superior jurisdiction; and the power of mulcting them is an arbitrary novelty, fraught with the most mischievous consequences of subjection and oppression, and only of a piece with the whole apparent scheme for degrading to one uniform standard of low cunning and subserviency, the great bulk of country practitioners.

The bill will never do. Mr. Tooke's letter alone ought to be sufficient to destroy it.

Dec. 27. PAX.

## SUPERIOR COURTS.

### TERMS AND RETURNS OF WRITS.

HILARY TERM.

| *To begin,* | *To end,* |
|---|---|
| 11th January. | 31st January. |

EASTER TERM.*

| | |
|---|---|
| 15th April. | 8th May. |

* The prolongation of Easter term (under 1 W. 4. c. 70.) in case any of the days between the Thursday before, and the Wednesday after, Easter-day should have fallen during the term,

TRINITY TERM.

22d May. 12th June.

MICHAELMAS TERM.

2d November. 25th November.*

GENERAL RETURN DAYS.

Writs usually returnable before the last act of 1 W. 4. c. 3. on general return days, may now be made returnable,

"On the third day exclusive before the commencement of each term; or on any day, not being Sunday, between that day and the third day exclusive, before the last day of the term.

"And the day for appearance shall, as heretofore, be the third day after such return, exclusive of the day of the return; or, in case such third day shall fall on a Sunday, then on the fourth day after such return, exclusive of such day of return."

COMMON RETURN DAYS.

Neither the 1 W. 4. c. 70., nor the act to amend, make any provisions for the return of common writs; but the old general return days having been abolished, it seems the writs which were formerly returnable on a day certain may now be returnable either on the day of term (or, of this present term), or on the day of instant (or, next; or, one thousand eight hundred and thirty †.)

NEW ORDER OF THE COURT OF CHANCERY.

The Right Hon. the Lord Chancellor, the Right Hon. the Master of the Rolls, and the Right Hon. the Vice Chancellor, have ordered that whenever the time allowed for any of the following purposes, that is to say, for amending any bill, for filing, delivering, or referring exceptions to any answer, and for obtaining a Master's report upon any exceptions, would expire in the interval between the last Michaelmas and the first seal before Hilary term (1831), such time shall extend to and include the second day of motions in Hilary term.

THE LORD CHANCELLOR'S SITTINGS.

*Motions.*

Thursday, January 20th.
Thursday, January 27th.
Monday, January 31st.

*Rehearings and Appeals.*

12th to 19th January inclusive.
21st to 26th January inclusive.
28th and 29th January.

THE VICE CHANCELLOR'S SITTINGS.

*Motions.*

Thursday, January 20th.
Thursday, January 27th.
Monday, January 31st.

*Pleas, Demurrers, Exceptions, Causes, and further Directions.*

12th to 19th January inclusive.
21st to 26th January inclusive.
28th January.

*Short Causes, Pleas, Demurrers, Exceptions, Causes, and further Directions.*

Saturday, 29th January.

A day will be appointed by the Vice Chancellor for hearing cause petitions in Hilary term. In the interval between the end of the term and the first seal, his Honour will hear bankrupt petitions and motions.

COMMON LAW SITTINGS.

KING'S BENCH.

*In Term.*

Middlesex.
Wednesday 12, Tuesday 18, Friday 28 } January, at 11 o'clock.

London.
Friday 14, Thursday 20, Saturday 29 } January, at 11 o'clock.

*After Term.*

Middlesex.
Tuesday, Feb. 1., at half-past 9.

London.
Wednesday, Feb. 2., at half-past 9.

COMMON PLEAS.

*In Term.*

Middlesex.
Wednesday { 12, 19, 26 } January, at 11 o'clock.

London.
Thursday { 13, 20, 27 } January, at 11 o'clock.

*After Term.*

Middlesex.
Tuesday, Feb. 1., at half-past 9.

London.
Wednesday, Feb. 2., at half-past 9.

EXCHEQUER.

*In Term.*

Middlesex.
Saturday { 15, 29 } January, at 12 o'clock.

London.
Monday 17, Friday 28 } January, at 12 o'clock.

*After Term.*

Middlesex.
Monday, Feb. 7., at 10 o'clock.

London.
Wednesday, Feb. 2., at 10 o'clock.

---

is repealed: such days are now deemed part of the term, although there shall be no sittings in Banco.—1 W. 4. c. 3.

* In case the day of the month on which any term is to end shall fall on a Sunday, then the Monday next after such day shall be deemed and taken to be the last day of the term.—*Ibid.*

† The first return of a common writ would therefore be "on Tuesday the eleventh day of January next *coming*." This last word seems to be adopted in practice.—*Extracted from "Exchequer Practice, epitomized, with Practical Forms and Bills of Costs." By an Attorney of the Court. Richards, Fleet Street.*

FEME COVERT.

The plaintiffs were solicitors, and filed their bill to have declared that they were entitled to payment of their bill of costs out of property settled to the separate use of one of the defendants. The facts were these:—By the marriage settlement of *Mrs. Barlee* the rents of certain copyhold, freehold, and leasehold estates were settled to her separate use, not subject to any debts or contracts, but entirely subject to her own control, or that of her appointee. In 1819 a separation took place between Mrs. Barlee and her husband; and in the same year she filed a bill against Edward Barlee and other trustees, calling upon them to account. The Court appointed a receiver. In the conduct of this and other suits, Mrs. Barlee became indebted to her solicitors to the amount of upwards of 700*l.* which she promised to pay, or gave them to understand that she would pay. At the time she had no other assets than those arising from the rents of the estates settled for her separate use. Mr. Barlee had become bankrupt and quitted the country.

Mrs. Barlee put in a general demurrer.

The question was, Whether a female having property settled for her separate use, and giving a general express promise to pay, and not an express promise to pay out of her separate estate, where there was no other property, was liable?

Demurrer over-ruled.

*Murray* v. *Barlee. V. C. Sittings before Hilary T.* 1831.

ASSIGNMENT OF POLICIES WITHOUT NOTICE.

A person named *King* had, in July, 1829, assigned certain policies of assurance to a creditor named *Davis*, as a security for 8000*l.*; but no notice of the assignment was given to the offices. In October following, King became bankrupt. The commissioners ordered that the policies should be sold, and the proceeds paid over to Davis. The policies were sold, the one for 840*l.*, the other for 540*l.* The assignees alleged that the policies belonged to them; and the question was, Whether the property remained at the order and disposition of the bankrupt, according to the 77th section of the bankrupt act?

The *Vice Chancellor* held, that as no notice had been given to the offices, the transaction was bad as against the assignees, and that the petitioners were entitled to an order; but, as this was an appeal from the commissioners, his Honour would not grant costs.—*Ex-parte Colville* v. *Severn. V. C. Sittings before H. T.* 1831.

SLAVE TRADE.—COSTS.

An application was made on behalf of the commander of his Majesty's ship *Sybil*, for costs incurred in prosecuting a claim for an equal partition of the proceeds arising from the sale of a Brazilian slave ship called the *Zepherina*, which was jointly captured on the coast of Africa by his Majesty's ship the *Primrose* and the *Black Joke* tender. The *Sybil*, although some hundreds of miles distant from the scene of action, claimed a moiety of the prize money, on the ground that the *Black Joke* tender was attached to her. The question had been referred to this Court by the Lords of the Treasury, and decided against the claim set up by Commodore Rogers, the commander of the *Sybil*. The amount of the bounty money was 2180*l.*; of which the sum of 1744*l.* was awarded to the *Primrose*, leaving the remaining 300*l.* to be divided between the *Sybil* and her tender the *Black Joke*, that being the sum to which the latter vessel was adjudged entitled. The object of the present application was, that the expense incurred by both parties in prosecuting and defending the suit should be paid out of the entire fund.

It was contended that the commander of the *Sybil*, having failed in the experiment which he had tried, had a right to pay his own costs.

Sir *C. Robinson* decided that the application could not be granted.

*High Court of Admiralty, Nov.* 12.

SHERIFF'S INDEMNITY.

*Richards* showed cause against a rule calling on a defendant to show cause why the sheriff of Montgomeryshire should not have time to return the writ until the first day of the next term. The *fi. fa.* had been made returnable on Monday next after the morrow of St. Martin. On the 1st of November the writ had been delivered at the sheriff's office, and the sheriff accordingly proceeded to levy. He was then informed that the whole of the goods on the premises had been assigned to a person named John Jones. Now, there was no reason stated for suspecting the assignment to be fraudulent, except that Jones was the nephew of the defendant. The parties all lived in the neighbourhood, and consequently ample opportunity was afforded of enquiring into the circumstances under which the assignment took place. This was not the ordinary case of an application by the sheriff for indemnity. There was here no bankruptcy.

*Tomlinson*, in support of the rule, stated that an application had been made by the sheriff, both to the execution creditor and to the assignee of the property, for an indemnity; but it had been refused by both.

*Littledale* J. observed, that in the case of a bankruptcy, it was a matter of course to grant time to the sheriff to return the writ until an indemnity was given; and here, he thought, it was only right that the sheriff should have a reasonable time, until the first day of the next term, for the purpose of enquiring into the matter.—Rule absolute.

*Sutton* v. *Jones, M. T.* 1830.

SERVICE IN EJECTMENT.

Where the declaration in ejectment had been served on a servant living on the premises, and the defendant afterwards admitted that it had come to his hand; but it did not appear that he meant to admit its receipt before, or on, the essoin day of the term: Holden, that the service was bad.—*Littledale* J.

*M. T.* 1830, *Doe* v. *Hare.*

PRACTICE.—COGNOVIT.

In answer to a communication from two of our subscribers on the subject of a report which

appeared among the "Recent Decisions," in our 8th Number, under the head "Practice — Cognovit," we beg to state that we find, on reference to the papers, that the application was to set aside the proceedings on the ground of the cognovit, on which they were issued, being invalid, from having been given before declaration filed or delivered. The decision of the *Court*, on reference to the Master, was, that the cognovit was irregular.

This is certainly a subject on which the 1 W. 4. c. 70. s. 11., by which eight or more of the judges, always including the chiefs, are empowered to assimilate the practice of the courts, should be called into effect. For in the Common Pleas it is now settled that cognovits may be taken before declaration*, and in the Exchequer, under special circumstances, the *Court* would not set aside judgment on a cognovit, on the ground that no process had been actually served on the defendant, or even sued out before he signed the cognovit. †

OFFICE OF CHURCHWARDEN.

The defendant was cited to show cause why he refused to perform the duties of churchwarden of the parish of Great St. Helen's, Bishopsgate.

It appeared that at Easter last a Mr. Hodgson had been elected to the office of under-churchwarden; and having, by a custom which had been in use since 1715, been exempted from serving, on the payment of a pecuniary fine, the election then fell on Mr. Birnie, who refused to take the office, alleging that the vestry had no right to exempt the individual first elected.

Sir *H. Jenner*, in giving judgment, said the real question is, Whether the vestry have, or have not, the power of rescinding their former resolution? I am of opinion that they have the power; but I do not feel myself called upon to say, judicially, whether or not they proceeded on the legal grounds. Under these circumstances, I pronounce, that the defendant is bound to serve the office until next Easter.

*Well and Elliot against Birnie. — Court of Dean and Chapter, Dec.* 11.

## QUERIES.

1. A, by will, devises to his nephew, B, all his estates, in W., his heirs and assigns, for ever, he allowing the testator's brother, C, all the clear profits during the natural life of his brother. A dies, B is in possession, and pays C the rent, upon the promise of C to grow a large quantity of timber. Can B cut down and dispose of the timber to his own use during the life of C, without being accountable to him?

2. A granted a lease for ten years, from Lady-day last, to B, of a brewhouse and plant. B took possession under his lease, and carried on the business of a brewer till he became bankrupt. At the expiration of the lease will the plant with the premises revert to the landlord, or will it pass to the assignees under the commission, by virtue of the clause in the new bankrupt act relating to reputed ownership, as goods in the order and disposition of the bankrupt, to be absolutely disposed of for the benefit of his creditors?

* Webb and another v. Aspinall, 7 Taunt. 701. 1 Moore, 428. S. C.

† 8 Price, 513. Tid. Prac. v. i. p. 559. ed. 9.

## MISCELLANEA.

LAW ON THE LIGHT FANTASTIC TOE.

HATTON was a very good dancer, and that was his best qualification, and was the means of promoting him to be *Lord Chancellor of England*. Being in that high and undeserved station, he became proud and arrogant, and at last began to favour the popish party more than the queen thought well of. The queen thereupon told him that he was too much exalted by the indulgence of his fortune, which had placed him in a station for which he was unfit, he being ignorant of the Chancery law, and needing the assistance of others to enable him to do his duty. This reproach struck him to the heart, and he resolved to admit no consolation. When he was almost half dead, the queen repented of her severity, and did what was possible to retrieve him; but it was to no purpose, for he was obstinately resolved to die. — *Bohun's Character of Queen Elizabeth*, p. 360.

*Fuller* is more favourable to the Chancellor's character, and he gives a somewhat different account of the cause of his death, in his usual quaint style.

"*Sir Christopher Hatton* was born (I collect at Holdenby) in this county (Northampton), of a family rather ancient than wealthy, yet of no mean estate. He rather *took a bait*, than *made a meal*, at the inns of court, while he studied the laws therein. He came afterwards to the court in a mask, where the queen first took notice of him, loving him well for his handsome dancing, better for his proper person, and best of all for his great abilities. His parts were far above his learning, which mutually assisted each other that no manifest want did appear; and the Queen at last preferred him Lord Chancellor of England. The gownmen, grudging hereat, conceived his *advancement* their *injury*, that one not thoroughly bred to the laws should be preferred to the place. How could he cure diseases unacquainted with their causes, who might easily mistake the *justice* of the common law for *rigour*, not knowing the true reason thereof? Hereupon it was that some sullen sergeants at the first refused to plead before him, until, partly by his power, but more by his prudence, he had convinced them of their errors, and his abilities. Indeed, he had one Sir Richard Swale, doctor of the civil law, (and that law, some say, is very sufficient to dictate equity,) his servant friend, whose advice he followed in all matters of moment. A scandal is raised, that he was popishly affected; and I cannot blame the Romanists, if desirous to countenance their cause with so considerable a person. Yet most true it is, that his zeal for the discipline of the church of England, gave the first being and life to this report. One saith that he was "a mere

vegetable of the court, that sprung up at night and sunk again at his noon;" though indeed he was of longer continuance. Yet it broke his heart that the Queen (which seldom *gave boons*, and never *forgave due debts*,) rigorously demanded the present payment of some arrears, which Sir Christopher did not hope to have remitted, but only desired to be foreborne: failing herein in his expectation, it went to his heart, and cast him into a mortal disease. The Queen afterwards did endeavour what she could to recover him, bringing, as some say, cordial broths to him with her own hands; but all would not do. Thus no *pulleys* could draw up a *heart* once cast down, though a Queen herself should set her hand thereunto." — *Fuller's Worthies*, ed. 1811, vol. ii. p. 165.

The writer quoted by Fuller is Sir *Robert Naunton*, who says,—

"Sir *Christopher Hatton* came into the court, as his opposite, Sir John Perrot, was wont to say, by the galliard; for he came thither as a private gentleman of the innes of court, in a mask; and for his activity and person, which was tall and proportionable, taken into her favour. He was first made Vice Chamberlain, and shortly afterwards advanced to the place of Lord Chancellor; a gentleman who, besides the graces of his person and dancing, had also the adjectaments of a strong and subtill capacity; one that could soon learn the discipline and garb, both of the times and court. The truth is, he had a large proportion of gifts and endowments, but too much of the season of envy; and he was a meer vegetable of the court, that sprung up at night, and sunk again at his noon."—*Fragmenta Regalia*, 1642, p. 25.

It is but fair to add *Hatton's* character by *Camden:*—

"He was a man (I speak incontestible truth) of singular piety to God, fidelity to the state, uncorrupted integrity, and extensive munificence in charitable donations, and (which is not the least part of his praise) gave the kindest encouragement to learning. * * * His praise will live in the annals of literature, better immortalised than by the splendid monument, worthy of so great a man, erected at a great expense in St. Paul's Church, London, by his adopted son, Sir William Hatton."— *Britannia*, Gough's edit., 1789, vol. ii. p. 165.

The personal grace and activity of Sir Christopher Hatton, were not more remarkable than the sensitive delicacy of his moral frame. In both respects he affords a perfect contrast, to more than one of his successors. Lord Thurlow, for instance, would never have danced his way to the woolsack; nor would all the queens in Christendom have been able to break his heart, which was not made of penetrable stuff.

The saltatory powers of Lord Chancellor Hatton, as well as the elegance of his costume, with the effect of these combined attractions upon the heart of his royal mistress, are celebrated by *Gray*, in his "Long Story:"—

"Full oft within the spacious walls,
When he had fifty winters o'er him,
My grave lord keeper led the brawls;*
The seal and maces danc'd before him.

"His bushy beard, and shoe-strings green,
His high-crown'd hat, and satin doublet,
Mov'd the stout heart of England's queen,
Though Pope and Spaniard could not trouble it."

* A figure-dance, so called.

## TO CORRESPONDENTS.

*We have been compelled, by the urgency of temporary subjects, to postpone several* Reviews *which have been long ready for insertion. Among these is one on "Familiar Exercises between an Attorney and his Articled Clerk, on the General Principles of the Laws of Real Property, &c. By Francis Hobler, jun. Attorney at Law;" a copy of which work was transmitted to us some time ago, and which, so far as we have seen, appears to possess considerable merit.*

*A Letter to Lord Tenterden on the Bill for establishing Courts of Local Jurisdiction, by William Raines, Esq. has been received, and shall have an early perusal, with the view of pointing out whatever novelty of research or remark it may contain.*

*"A Subscriber" who takes us severely, yet kindly, to task, for inserting the communication of "Militia mea multiplex," shall find that, at all events, we are impartial. The quotation he has sent us from Mr. Park certainly shall be inserted in our next.*

*The third contribution of* Delta *on "The Examination of Attorneys" has been received, and so far as practicable we will attend to his wishes.*

*The valuable paper of* X. *shall have the earliest attention; and we thank him cordially for his very encouraging letter.*

*The Letter of Mr. Hamilton to the Lord Chancellor contains many excellent suggestions. We presume we are at liberty to adapt it to the compass of the plan of this work.*

*The Letter of* F. W. G. *on Fees for Searchers is forcibly written, and points out an important distinction which ought to be known.*

*The "Hints for the Common Law Commissioners" from* M. M. T. *shall have our best attention.*

Veritas, *an old friend with a new name, we trust will not think us inattentive to his merits in further postponing the insertion of his several communications.*

*We have received a second Letter on the subject of a complaint made by Attorneys' Clerks. This and the former Letter are the only communications on that subject, and we conceive, therefore, the evil is not very generally felt. However, we will make enquiries, and act accordingly. We are very desirous to serve this numerous class of our readers, but are apprehensive that, at present, no alteration can be effected.*

*We are obliged by the Extracts of* J.W. *relative to the Inns of Court. We are also favoured with some other selections of legal antiquities, which will shortly appear in our Miscellanea.*

# The Legal Observer.

VOL. I. SATURDAY, JANUARY 22. 1831. No. XII.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## TO THE LORD CHANCELLOR,

ON HIS PROJECT FOR ESTABLISHING LOCAL COURTS.

### LETTER II.

*Its Effect on the Bar and on Attorneys and Solicitors.*

MY LORD,

I SHALL now resume the subject on which I had lately the honour to address you. I hope before the meeting of Parliament to be able to lay before you all my reasons for differing with your Lordship as to the justice or expediency of your measure. I have in my first letter pointed out its direct tendency to degrade the administration of justice in the persons of the judges, whom your Lordship's bill would call into existence; I shall devote this letter to proving that it would also extend the same withering and disastrous influence to the bar and the other branches of the profession.

I am not fighting the battle of the profession; it is the common weal that is my object. It is too clear for argument that if justice be administered by inferior men, the public are the losers. It perhaps may not be so clear to all, that if the situation and standing of the barrister and the attorney be lowered, the public will be injured in an equal or to a greater degree. To this point, therefore, I will call your Lordship's attention.

It is true, my Lord, that the bar has met and has deserved some reproach. Some of its members have been dazzled by their own elevation, and have fallen from it. But take the whole profession, think for a moment on the numerous body of persons who from century to century have filled its ranks; remember the temptations to which they have been exposed, and the duties which they have performed, and you, my Lord, you will not hesitate a moment, no other intelligent or unprejudiced man will hesitate, in awarding them the fair meed of their labours, in admitting their unwearied exertions, their commanding talents, their bright and determined independence. It has ever been the proudest boast of this part of the profession that its honours are open to all. Its high standing has been admitted by all intelligent persons to be a public benefit. Indeed if the importance and consequence of the body merely tended to their own benefit and advancement, they would indeed be paltry and inconsiderable; but the public are served; the interests of all are ably, zealously, and faithfully attended to and protected; and if this be denied, I have, among a thousand others, one instance so undeniable, so recent, and so overwhelming, of the truth of the principle for which I contend, that in a moment I can dash down the hand raised against it.

What, let me ask, placed your Lordship in a situation in which your talents enabled you to demand the highest preferment? In what station did you perform your proudest feats? From what rank was the champion selected, who hurled his indignant thunders against corruption and oppression? Of what station was he who set at nought the proud and the noble? Who was he who smote down government after government? On what vantage ground did he stand? This will be the question which posterity will put. What, my Lord, will be the answer? That you were a simple barrister; that for a long time, from political prejudice, you held the lowest rank in that profession: but that station sufficed; that you were one of a powerful, numerous, and distinguished body, and that you only left it to demand, as your right, the most splendid gift of the crown, the proudest situation which a subject can hold!

This, then, my Lord, is the advantage to the public; that as the profession is at present constituted, they can command talents the most exalted, exertions the most unwearied, good faith the most pure

and unshaken. The bar is at present a profession to which any man may count it an honour to belong, and in this lies the safety and the benefit to the public. Beware, my Lord, how you venture to tamper with these advantages!

This being the present state of the profession, consider the changes which your Lordship's measure must inevitably effect. It must be assumed to be effectual, and to answer the purposes intended. A large portion of the business of the superior courts is to be abstracted from them, and is thrown into the local courts; and a bar will be necessary both in the superior and inferior courts. The metropolitan bar of course will be deprived of a large portion of their business, which will be distributed amongst the provincial bars. This is the direct effect of the measure. Now does not your Lordship see the immediate consequence of this? The strength of the bar is at once diminished. Not only are its emoluments greatly curtailed, but its members become either unemployed, or scattered and isolated. Its importance vanishes; its distinctions are confined to a more narrow *arena;* its honours dwindle away; it becomes no longer desirable to belong to it, either for profit or ambition; in a word, it is DEGRADED.

The metropolitan bar would no doubt be still the first; but it must be an inferior bar to the present. Its members would be inconsiderable; its resources and variety confined; the present admirable system of dividing the labour must be abandoned: there would be no hope of obtaining a reasonable share of occupation if a man confined his attention to one court or to one department. It would no longer be the chosen profession of the talented, the highly gifted, or the ambitious. It would sink into comparative insignificance; and the public would no longer command the same qualifications as before. At present it is undoubted that you can procure the assistance of men who have devoted their whole lives to one particular branch; you may have the joint benefit of their separate exertions at a moderate expense; but this I fear will be impossible under your Lordship's proposed reform. The talent will not exist, or it will be almost impossible to obtain it. The best leader will live in London, the best junior at York, and the black-letter lawyer will have been banished to Exeter. But if this be true, my Lord, as to the metropolitan bar (and how it should be otherwise I cannot devise), how will it be as to the provincial bars? Here and there, in the most eminent towns, some really superior man will beat down all opposition; will lead the unresisting judge whichever way he may please, and force his competitors to submission. There will be no fair conflict of talent. The one or two or three clever men may all be easily monopolised. They may all be readily engaged on one side, and the success of that particular side secured.

This will be the case, or the provincial bar will have a felicitous absence of all talent whatever; they will all be equally stupid and incompetent; unable to do justice to the cause of their clients, they will blunder on to the end. Justice will be administered in a mist. The whole atmosphere of the court will be hazy. Facts ill explained, law misunderstood, arguments misapplied, and judgments unwarranted: these courts will present a melancholy example of the greatest possible degree of evil with the least possible degreee of good.

This, my Lord, will be the state to which the bar will be reduced; and will the public be advantaged, think you? Will the public be benefited by having inferior judges and an inferior bar? Will their interests be attended to by passing a measure which, if unsuccessful, will at once entail upon them a heavy expense, if successful, will deprive their right hand of all power to defend them?

And mark, my Lord, another effect of the bill incidental upon the degraded condition of the bar. You must remember that *the judges of the superior courts are selected from that bar.* The public, therefore, has a direct interest in maintaining its importance and respectability, when it knows that from its ranks are to be chosen those who are to decide upon its dearest and most sacred interests. Thus then will the infection spread; class after class will become contaminated; justice will grow weaker and weaker every day; she may be oppressed and trampled on with facility; palsied in every limb; blear-eyed and decrepid, she will thus falter on to the close of her miserable existence!

No, my Lord, if your bill passes into law, farewell to the honour and the respectability of the bar! Farewell to its eloquence and its independence! Would that I could call up the shades of the mighty men who have departed, to frown their displeasure on the plan, and combat on my side! How gloriously then would the battle be fought! How crowded and conspicuous would be its ranks! Then might I summon to my aid the immeasurable learning of Coke, the

majestic eloquence of Mansfield, the reasoning of Hardwicke, and the keen penetration of Thurlow! But I say again, farewell to the bar: its days are numbered, and its glories are departing for ever!

The baneful effect of your Lordship's bill would not however stop here. In the two higher branches of the profession, this is somewhat less direct; but the tendency of your Lordship's bill to degrade the profession of an attorney is as clear as the simplest rule in arithmetic.

And now one word upon that part of the profession. Your Lordship will readily admit that the most important duties are intrusted to attorneys, and that at present they are discharged with great care, ability, and faithfulness: it is well known that in this part of the profession a greater confidence is reposed than in any other. They are brought in immediate contact with their clients, and they are the depositaries of their inmost and dearest secrets. Every thing is intrusted to them: the whole of the matter which is to form the subject of future contention is laid before them; and the slightest disclosure might frequently bring ruin and disgrace on their clients. How then is this duty discharged? I am speaking of the attorneys who practise in the superior courts: look through the whole ranks of the profession, tax the utmost limit of the memory, and you will scarcely find a single instance of this confidence being abused. The duties intrusted to them are performed ably, honestly, and faithfully: their good faith is inviolable.

But, my Lord, think for a moment on the class of attorneys (or the persons who call themselves such), who now practise in the inferior courts — courts which are almost precisely similar to the courts which your Lordship's bill would introduce into the country. Look upon this class of men, inferior in talent, and utterly worthless in character; men who have been expelled by their own misconduct from a higher branch of practice, and who now, having nothing to lose, grow callous to all sense of shame; who cannot be degraded to a "deep" of infamy more low than that in which they have placed themselves. Such are the men who compose the majority of the regular practitioners in the existing inferior courts; and mark, my Lord, the consequences. The unfortunate suitor, although perhaps the scale of fees be nominally low, is defrauded without hope of redress; no means are too gross to be employed in the game of extortion and plunder which is here openly played. The cause of their clients is constantly betrayed; their confidence unfeelingly abused; their interests entirely neglected. I defy a person who knows any thing of a local court not to admit the truth of this description. The ordinary practitioners are the lowest of their profession: there is an eager scramble for business, and when obtained, the only anxiety is to plunder the client to the utmost possible extent. They have no character to lose; they set public opinion at defiance; the authorised fees of the court are not sufficient even to repay their exertions and loss of time, and they wring out what *is* sufficient by extortion and treachery.

Reflect then, my Lord, on the frightful consequences of your measure, if you reduce two thirds of the whole profession to this standard. The great safeguard to the best interests of mankind is the old rule of honesty being the best policy. Men must, as a general rule, be satisfied of the advantage of keeping in the right course. If the honest man, surrounded with temptations, find the ninety-nine knaves thrive better than himself, his confidence in honesty will, I fear, be considerably shaken. The important duty of the government to the public is to raise the standard and the character of the profession, not to lower it. It must be in such a state that it will in fact be worth while for a respectable man to engage and continue in it; there must be a fair remuneration for character, as well as exertions. This is what the public must look to. It is their interest that is at stake. The profession must not be DEGRADED.

And will it not be degraded, my Lord? Can you induce respectable men to practise in your local courts as attorneys? Every attorney of respectability of whom I have asked the question has said at once that it was impossible. It will not be worth while for a respectable and able man to undertake causes in these inferior courts. They will, as they are now, in similar courts, be committed to the care of young and incompetent men; or to the lowest class of the profession to which I have already alluded. There will be an unhappy uniformity in the quality of all the parts of the court. Incompetent judges, incompetent advocates, and incompetent attorneys; and in the two last classes of persons at least, I fear fraud would be added to incompetency. If unsuccessful, the measure must be an additional burden upon the country; if successful, or rather if practicable, it would entail upon it a lasting misfortune.

And now, my Lord, permit me to allude

to another topic which has been much pressed upon this question. The emoluments of professional men have been pointedly alluded to; they have in fact been greatly exaggerated, — let that pass, however; — but it has been said by many, and the charge has been countenanced to a certain extent by your Lordship, that they are greatly overpaid.

Now, my Lord, permit me to ask you to recollect for one moment what you yourself have gone through; permit me to remind you of what every other professional man in practice, be he barrister or attorney, goes through: remember how much depends on his unassisted exertions, and the qualifications necessary to perform his duty with advantage to his client, and you cannot entertain this opinion for a moment. The professional man to succeed in practice must join unwearied industry to considerable talent: it is absolutely necessary that he should condescend to be a mere *drudge* for the interests of his client; it is equally necessary that he should rise above this character, and be able to avail himself of his drudgery, by the exercise of superior talent. The persons who join these two qualities are extremely rare: it is they only who are fit for the profession of the law, and their services *cannot be overpaid.*

Reflect, my Lord, on the painful life of a professional man, a life passed in constant conflict; in the continued exercise of responsible duties; harassed, perplexed, exasperated; fighting his way through a host of foes; tormented by day, and sleepless by night; assailed in a thousand ways by enemies direct and indirect, whom his exertions for others have created; difficulties which must be overcome, thrown in his way at every step! Reflect on this for one moment, and your Lordship will at once admit that he is not over-paid. Over-paid! Nothing can over-pay, nothing can compensate him for his exertions! If he gives his best faculties to the employment; if he preserves inviolable good faith to his client, I say again, his exertions cannot be compensated. Root out and utterly destroy, if you will, the useless weeds which now disfigure the venerable fabric of our laws. Smite to the uttermost the crew of sinecurists which the law now maintains. A reform of this nature is demanded on all hands; but touch not those who earn a fair and honourable meed, by industry and ability the most conspicuous and deserving.

Your Lordship will find work enough on your hands in removing grievances which are palpable and enormous. The great expense of the present proceedings both at law and in equity does not consist of the fees paid to professional men, but to useless and sinecure officers. Destroy the drones, if you will, but let the working bees enjoy their own honey. I shall hereafter call your Lordship's attention, in detail, to the sinecurists which the law supports. I now only lay down the broad, and I hope to prove, incontrovertible principle, that the fees of the professional men who actually have the labours of a cause on their hands are comparatively small, and that the great portion of the money which comes out of the pocket of the public is paid to men whose only duty is to *receive this money.*

Thus, then, stands the case, my Lord: if your Lordship's measure is persisted in, the profession of the law will be degraded in all its branches. It will not command the exertions of the persons who at present enter into it. It will lose its reputation and distinction, and this will operate to the immediate injury of the public. This I trust I have sufficiently shown in this letter. These are general objections to the principle of the measure; in my next letter, I shall show its impracticability.

I have the honour to be,
My Lord,
Your Lordship's most humble servant,
A Barrister.

---

## ANALYSIS OF THE GENERAL REGISTRY BILL.

The bill (ordered to be printed 21st Dec. 1830) recites, that it is expedient that all assurances and proceedings affecting lands in *England* and *Wales* (with the exceptions hereinafter mentioned) should be registered, and that an office should be established in the metropolis for their registration; it is therefore proposed to be enacted that a general register office be established.

*Building and Officers.*

That the lords of the treasury provide proper buildings.

That his Majesty may appoint a registrar and assistant registrars.

That the lords of the treasury may appoint subordinate officers; and make regulations as to the duties of the several officers.

That the registrar general shall be a serjeant or barrister at law, and shall, at the time of his appointment, have practised as a conveyancer for ten years at the least, or have acted as assistant registrar for such a period as shall have made up, with the time he shall have practised as a conveyancer, the period of ten years; and every assistant registrar shall be a serjeant or barrister at law, and shall, at the time of his appointment, have practised as a conveyancer for

at least three years; and that every registrar general and assistant registrar shall take an oath for the full execution of his office.

That the registrar general and assistant registrars shall not be removed from their offices unless the two houses of parliament shall present a joint address to his Majesty, praying for such removal; but that the clerks and subordinate officers shall hold their offices during pleasure.

That the registrar general and other officers shall give security for the due performance of their duties.

*Mode of Registration.*

That England and Wales be divided into districts for the purposes of this act. Notice of the divisions to be published in the London Gazette.

That assurances executed after December 31. 1831, or in the case of wills where the testator shall die after Decembrr 31. 1831, may be registered by depositing the original, or (where there shall be duplicate original documents) one of the duplicate originals, and making the proper entries.

The documents deposited to be made up into books or parcels, and numbered. This applies to all deeds and papers hereafter directed to be registered.

That all assurances (except wills and such other assurances as are directed to be otherwise indexed) shall be indexed according to the regulations following: —

1. An index, to be called "The General Index," to be kept for each district; and assurances affecting lands within such district to be indexed in the general index under heads designated by numbers.

2. Where the grantor does not derive title under any registered assurance, the assurance is to be indexed under a new head.

3. Where the grantor does derive title under a registered assurance, the assurance is to be indexed under the same head as the assurance under which the title is derived.

Where the title to the same interest shall be derived under several assurances indexed under different heads the entry shall be made under the same head as the assurance last executed.

4. The grantor may require that the assurances shall not be indexed under the head under which his title is derived. In such case, a reference to be made from the last-mentioned head to the head under which the assurance shall be indexed, and memorandum made on the document that it contains a requisition to index the same under a new head.

5. The grantor, in such cases, may require a specification of the parcels to be entered under the head under which his title is derived. The specification may either include lands conveyed and exclude other lands, or include other lands and exclude those conveyed. The terms of the specification must be inserted in the assurance. This regulation is not to authorise the insertion of a specification of the quantity of estate or interest to be conveyed, or otherwise affected.

6. Lands previously held under different titles may be brought together on the index; and lands previously indexed under the same head may be separated; reference entry as in 4th regulation.

The power of indexing under a new head may be exercised at the discretion of the person registering; but that of indexing under an existent head subject to the consent of registrar general or assistant registrar.

7. No assurance to be indexed under more than one head.

8. If any conflicting applications shall be made with respect to the head under which an assurance is to be indexed, the decision of the registrar general or an assistant registrar on such applications shall be final; and he is authorised (if he shall think fit) to direct the same to be indexed under a new head.

9. An alphabetical index, to be called "The Index to the Roots of Titles," to be kept for each district; and where the grantor does not derive title under any registered assurance, an entry of the grantor's name to be made in such index, with a reference to the head under which the assurance is indexed.

10. Where, by any of the preceding regulations an entry is directed to be made, the entry shall express the year and the day of the month when made, the date of the assurance, the book or parcel in which the document deposited at the register office shall be made up, and the number of document in such book or parcel; and the index entries and the reference entries in the general index shall be distinguished in form from each other. This applies to all entries hereafter directed.

11. Where references are required to the head under which an assurance is indexed, corresponding references are to be made from that head.

12. The grantor of an equity of redemption is not to be considered as deriving his title under the mortgage deed.

Where a specification is inserted under the fifth regulation, the assurance shall not be considered to be duly regitered as to lands not included in the specification.

*Clerical Errors.*

The effect of an entry not to be invalidated by any error in the date of the entry, or in the date of the assurance, nor by reason of such dates or either of them having been omitted. This applies to all entries directed under this act.

Errors in references not to affect the validity of registration, except for the purpose of the third regulation, by which a subsequent assurance would be required to be indexed under the same head as the first assurance. This applies to all references.

Where an assurance shall have been erroneously indexed, such assurance shall nevertheless, for the purpose of the third regulation, be considered to be duly indexed, except as against any person claiming under an assurance, of which an index entry or a reference entry shall have been made in the manner required under a head under which the first-mentioned assurance shall have been duly indexed.

If an assurance shall be indexed under any two or more heads, the assurance shall, as to any particular lands, in respect of which the same

shall have been indexed under any such head, be considered to be duly indexed under the head under which the same shall so have been indexed; and as to any other particular lands, in respect of which a reference shall have been made in the manner directed, to any one of the heads under which the assurance shall have been so indexed, the assurance shall be considered to have been duly indexed under such last-mentioned head.

*Legacies and Charges.*

All assurances affecting legacies charged upon land, or judgments or debts due from the estates of bankrupts and insolvents (except wills, &c.), to be indexed as follows: —

An index, to be called "The Index to Assignments of Charges," and an index, to be called "The Index to the Roots of Titles to Charges," to be kept for England and Wales, and the provisions respecting assurances to be indexed in the general index (except the sixth regulation), to apply to the registration of the last-mentioned assurances.

*Private Acts, Decrees in Equity, &c.*

Every private act of parliament affecting lands to be an assurance.

Decrees in equity, creating, transferring, or determining interests in land, and also decrees in equity by which any such decree shall be varied or reversed, are to be considered assurances. Memorial to be deposited.

Every act or matter evidenced by writing, and by which any estate or interest in lands shall be created or transferred, may be registered by registering such writing.

*Wills.*

An index, to be called "The Index to Wills," to be kept for England and Wales; and where a will is registered, an entry of the testator's name to be made in such index, and also an entry of the will.

Persons claiming an interest in lands affected by will may require the officers of the court in which the will has been proved to transmit it to the register office for registry.

Where the original document is lost, a copy or extract may be deposited, affidavits of the loss being made.

In such cases the registration to be effectual only so far as the copy or extract agrees with the original.

Where the document directed by this act to be deposited at the register office is required by any other act to be deposited at any other office, a copy may be deposited at the register office.

*Power to enforce Registration.*

Persons claiming under an assurance may compel the registration thereof by application to a judge, except any agreement shall have been made for the non-registration of such assurance.

Judge may make any order as to costs; and may order an office copy to be furnished at the expense of the applicant.

*Commissions of Bankrupt.*

Commissions of bankrupt may be registered by depositing a memorial, and making the proper entry.

Every such memorial shall express the name of the bankrupt, his addition, and the date of the commission, and shall be signed by the person for the time being appointed to enter of record matters relating to commissions of bankrupt, or by his deputy.

An index, to be called "The Index to Commissions of Bankrupt," to be kept for England and Wales; and on registering a commission, an entry to be made of the name of the bankrupt, and also of the memorial.

An index, to be called "The Index of Entries referred to from the Index to Commissions of Bankrupt," to be kept; and conveyances to the assignees of any bankrupt, and re-conveyances by them to be indexed under a head designated by the name of the bankrupt; and a reference to be made to such head from the entry of the commission of bankrupt.

In every case of any such assurance, where the commission shall have issued before the 31st of December, 1831, an entry of the commission of bankrupt shall be made in the said "Index to Commissions of Bankrupt," and the reference made as directed.

*Judgments, Statutes, Recognizances, &c.*

Judgments, statutes, and recognizances (other than such as shall be obtained or entered into in the name or upon the proper account of his Majesty, his heirs or successors,) may be registered by depositing a memorial, and making the proper entry.

Memorial shall express, in the case of a judgment, the name of the defendant, with his addition, the name of the plaintiff, and the sum recovered, and the time of signing the same; and in the case of a statute or recognizance, the name of the conusor, with his addition, the name of the conusee, and the sum for which the same was acknowledged, before whom it is acknowledged, and the date; such memorial to be signed, in the case of a judgment, by the officer who shall sign the judgment, his deputy, or successor, or (in the case of a statute or recognizance) by the proper officer in whose office the statute or recognizance shall be inrolled.

An index, to be called "The Index to Judgments, Statutes, and Recognizances," to be kept for England and Wales; and an entry of the name of each defendant and conusor to be made in such index, and also an entry of the memorial.

Judgments, statutes, and recognizances to his Majesty, and inquisitions, by which debts shall be found due to his Majesty, may be registered by depositing a memorial, and making the proper entry.

Memorial shall express, in the case of a judgment, statute, or recognizance, the particulars before required, and in the case of an inquisition, the name of the defendant, with his addition, the sum found to be due, and the date to be signed by the proper officer.

Obligations and specialties within the statute 33 Hen. 8. c. 39. may be registered by depositing a memorial and making the proper entry.

Memorial to specify particulars and to be signed by the proper officer.

Acceptances of offices within the statute 13 Eliz. c. 4. may be registered by depositing a memorial, and making the proper entry.

Memorial to specify particulars, and be signed by the officer of the crown.

An index, to be entitled "The Index to Debtors and Accountants to the Crown," to be kept; and an entry of the name of each defendant, conusor, &c. to be made in such index, and also an entry of the memorial: the last-mentioned index may be divided into separate lists.

*Proceedings in Equity.*

Bills in Equity (*lis pendens*) may be registered by depositing a memorial of the bill or information, and making the proper entry.

The memorial to express the day of filing the bill or information, and the name or name of office, and the addition, so far as contained in the bill or information, of each plaintiff and defendant, and in the case of an information, the name of office of the party informant, and in every case the prayer of the bill or information, or so much of it as shall relate to the lands sought to be affected, and the description or statement of the lands as set forth or referred to in the bill or information, or some other description or statement which may be sufficient to ascertain the same; and every memorial to be deposited, of any amended bill or information, or supplemental bill or information, or bill or information in the nature of supplement, shall express the day of making the amendment, or of filing the bill or information, and in all other respects the memorial of an amended bill or information, &c. shall contain expressly, or by reference to some prior registered memorial, the same particulars as are required to be contained in the memorial of the original bill or information.

Petitions of appeal against decrees transferring, creating, or determining interests in land, may be registered by depositing a memorial, and making the proper entry.

Memorial to express all necessary particulars, as *ante*.

An index, to be called "The Index to Suits in Equity," to be kept for England and Wales; and on registering a bill, information, or petition, an entry of the name of each plaintiff and defendant to be made in such index, and also an entry of the memorial, expressing the date of filing the bill or information, or making the amendment, or of presenting the petition, and such particulars as to the nature of the proceeding, or the title of the cause or causes, as the registrar general shall direct.

Names of parties informant need not be entered in the index.

Memorials of bills, informations, petitions, and decrees, to be examined by the proper officer.

"The Index to Suits in Equity" may be kept in separate lists.

Names hereby directed to be entered are to be entered according to the two first letters.

*Protection to Purchasers.*

Wills to be void as against *bona-fide* purchasers unless registered; but wills registered within two years after the testator's death to be valid.

Other assurances and proceedings authorised to be registered to be void as against purchasers unless registered.

Acts and matters affecting lands, and not authorised to be registered, to be void as against purchasers. But estates or interests created or transferred by operation of law not to be prejudiced.

Payments made in satisfaction of charges not to be affected.

The priority given by the preceding clauses to be enforced in equity, notwithstanding notice.

Assurances registered at the same time to have priority according to the time of execution.

The protection of the act to extend to persons who claim under purchasers.

Conveyances to the assignees of bankrupts and insolvents not to be protected by the act.

So far as priority is not given by the act all estates and interests in land to take effect in the order of acquiring them: this clause not to give any effect to a voluntary assurance against an assurance for valuable consideration.

Equitable rights existing before Jan. 1. 1832 may be protected by legal estates.

Terms assigned to attend the inheritance to be a protection only against claims prior to Jan. 1. 1832.

The act not to affect the jurisdiction of equity in cases of *lis pendens*; but an assurance executed during the pendency of a suit to be valid, unless the bill or information, if filed before 31st Dec. 1831, shall have been registered before the registration of the assurance.

Decrees authorised to be registered to prevail against assurances executed during the pendency of the suit, unless the assurance shall be registered before the decree.

A decree varying a decree creating an interest in lands to be void against a purchaser under a prior assurance, unless the decree or the petition of appeal be registered before the assurance.

An assurance which would have the effect of merging any interest not to have such effect as against a subsequent purchaser of such interest, unless an entry be made to lead such purchaser to the assurance.

Commissions of bankrupt not to be considered as issued within the statute 6 G. 4. c. 16. ss. 81. 86. until registered.

The act not to give effect to any assurance as against a commission of bankrupt, except so far as protection is afforded by the last clause.

A deed registered to be as valid for the purposes of the statute 6 G. 4. c. 16. ss. 64, 65. 68. as if the same were inrolled in a court of record.

Where any registered deed shall be vacated under the statute 6 G. 4. c. 16. s. 66. any subsequent bargain and sale shall be registered.

[*To be concluded next week.*]

MEMOIR OF THE LATE

# LORD KENYON.

LLOYD KENYON was born on the 5th of October, O. S. 1732, at Gredington, in the county of Flint.* His father was a gentleman of moderate fortune, and Lloyd being the second son, was intended for a solicitor. He received his education under Dr. Hughes, at the grammar school of Ruthen, in Denbighshire, an institution then in high repute, and which has numbered among its scholars a Lord Keeper of England (Archbishop *Williams*), and more recently a Lord Chief Baron of the Exchequer (*Richards*), besides many other names that have shed a lustre upon the intellectual character of the country. Young Kenyon, it seems, made but little progress in Greek, but his knowledge of the Latin classics was perfect; and, in after life, few men enjoyed more keenly the beauties of Virgil and Horace. In his seventeenth year he was articled to Mr. James Tomlinson, of Nantwich, an eminent solicitor, to whose ability and assiduity he always bore testimony, and frequently acknowledged the advantages which he derived from his instructions.

Upon the death of his elder brother, who was a member of St. John's College, Cambridge, it was determined that Lloyd should enter upon a more ambitious sphere — one better suited to the talents which he had already evinced, and the comprehensive acquaintance, which, even at an early age, he had formed with the most abstruse, and difficult portions of legal learning. He was accordingly entered at the Middle Temple in 1755; and during his noviciate, he devoted himself assiduously to the study of the earlier law books, as well as to the task of gaining an insight into the practice of all the courts at Westminster. †

On being called to the bar, Mr. Kenyon practised at the quarter sessions of Salop and Stafford, and on the Oxford and Chester circuits; but in London his practice increased so slowly, that at the end of ten years, he despaired of succeeding in a profession in which he had met with such slight encouragement; and he would have gladly retired from London, and taken orders, if he could have obtained the small living of Hammer, his native parish.

His talents, however, were appreciated by *Thurlow* and *Dunning*, then the most distinguished names in the profession, and he numbered them among his warmest friends. The known attachment of these eminent individuals, his acknowledged talents, and indefatigable industry, added to the fact, that he assisted Dunning in answering his cases, when the latter was overloaded with business, could not fail ultimately to recommend him to notice and employment.

He originally attended all the courts, a custom which is now discontinued, much to the disadvantage of those gentlemen who happen to be elevated to a judicial seat out of the particular court in which they have been accustomed to practise; but business at last beginning to flow in upon him, he confined himself to the Court of Chancery, in which he soon attained the first practice. As a common lawyer, however, he was not forgotten; and his services were more than once retained in the courts which he had discontinued attending. He was the leading counsel for *Lord George Gordon*, who was indicted in 1780 for constructive treason, and whom, aided by the powerful co-operation of Mr. Erskine, he successfully defended. *

Mr. Kenyon was soon after that period elevated to the rank of Lord Chief Justice of Chester; a situation highly gratifying to his feelings, as the circuit comprehended his own county.

On the 20th of April, 1781, he was appointed Attorney-General, and resigned that office in the month of April in the following year, upon the retirement of Lord Shelburne and Mr. Pitt. At the return of the latter to power, Mr. Kenyon, in December, 1783, was re-appointed the first law officer of the crown. He, however, retained office but a short time, his health having suffered severely from the dis-

* The family was originally settled at Bryno in the same county, and was connected with the Kenyons of Peale in Lancashire.

† His younger brother, Roger Kenyon, was brought up as a solicitor, and practised at Cefn, in the county of Denbigh.

* "Lord George Gordon," Mr. Kenyon said, "was the president of a Protestant association. An act had passed, which, right or wrong, had given offence. Perhaps, in his (Mr. K.'s) opinion, it had given causeless offence. But, because he differed from other men, was he therefore to treat them as traitors to their country? Our laws were not like those of the Medes and Persians, but were subject to revision; and it was the duty of Englishmen, if there were laws which improperly tolerated men whose principles were hostile to the constitution, to petition parliament to revise, or even to repeal, those laws. He did not say that this was the case with the law that gave rise to the association, but if *they* thought so, their right to petition was unquestionable."

charge of his professional and parliamentary duties. *

On the death of Sir Thomas Sewell, in March, 1784, he became Master of the Rolls, and had the dignity of Baronet conferred upon him. It is said that the pleasure arising from his elevation was not unmingled with regret, as he was compelled to resign his favourite appointment of Chief Justice of Chester. He was always averse to engaging in parliamentary life. Indeed the brevity and closeness of his reasoning, were not suited to the arena of St. Stephen's, and politics were not agreeable to his disposition. His known dislike to parliament was so strong, that some years afterwards George III., whose kindness to him was ever a subject of gratitude and pride, observed on his attending at a levee, which his judicial duties seldom allowed him do, "Lord Kenyon, I think you like better coming to me, than attending the House of Lords."

On the resignation of Lord Mansfield in 1788, Sir Lloyd Kenyon was appointed Lord Chief Justice of the Court of King's Bench, with the title of Lord Kenyon, Baron of Gredington, in the county of Flint. On the appointment, his sovereign graciously expressed his gratification, and condescendingly said, "I wish you may live to enjoy it as long as your predecessor;" adding, "if Dunning had lived, I could not have appointed *you*, for I had promised it to *him*."

In fulfilling the important duties of Chief Justice, his views might be deduced from the motto which he adopted upon taking the coif, than which none could more appropriately designate his sentiment, that justice should be the handmaid of morals. The motto was, "*Quid leges sine moribus!*" and assuredly no man ever filled that high station, who laboured more systematically to promote the great object and end of jurisprudence.

It has been observed by a high authority, that the principles and rules of our law courts were always excellent, but that our system of equity at the time of Lord Mansfield was not equally admirable. It was generally considered by the profession, that much praise was due to Lord Kenyon as Chief Justice, for bringing back the rules of the King's Bench to the practices of the courts of law; his predecessor having introduced many crude notions of equity into his decisions.

The dislike of politics by which Lord Kenyon's character was distinguished, in addition to his known integrity, contributed much to gain public confidence towards his administration of justice, during the disturbances and excitements, which were consequent upon the French Revolution. There never was a time when more general confidence was felt by juries, and by the public, than was reposed in Lord Chief Justice Kenyon.

His habitual temperance might have ensured a longer continuance of his official labours, had not a domestic calamity, the loss of his excellent and beloved eldest son Lloyd Kenyon, broken his spirits, and hastened the termination of his valuable life. He died the 4th of April, 1802, in his seventieth year. His sovereign, who was afterwards so deeply afflicted by the death of a beloved daughter, said of his faithful servant, Lord Kenyon, "He never recovered the death of his son."

The private character of his Lordship was most exemplary. He was distinguished for benevolence, and both possessed and deserved the reputation of being ever ready to afford gratuitously his valuable legal advice. He was buried in the family vault at Hammer; and we may conclude with quoting from his monument:—"He has left a name to which his family will look up with affectionate and honest pride, and which his country will remember with gratitude and veneration, so long as they shall continue duly to estimate the great and united principles of religion, law, and social order."

* Lord Kenyon, while at the bar, was remarkable for the celebrity which attached to his opinions. In the year 1781 he received two thousand nine hundred and thirty-six guineas, and in 1782 three thousand and twenty guineas, for answering cases only.

## REVIEW.

*Epitome of the Practice in the Court of Exchequer on the Plea Side; including the new Rules of Court of Michaelmas*, 1830, *and Extracts from the Act of* 1 *Wm.* 4. *c.* 70., "*For the better Administration of Justice*," *&c. With Practical Forms and Precedents of Bills of Costs.* By an Attorney of the Court. London, 1831. Richards.

Lord Thurlow, in a communication to a young friend studying for the bar, said, "Could the writer of this choose his court and practice, he conceives the most ancient and the most learned lies in the Court of Exchequer." According to Chief Baron Gilbert, the Exchequer was the ancient and sovereign court in Normandy, to which appeals from all inferior courts were carried,

it being the grand court of the Duke. The bailiff or sheriff was the *justiciar* of the county. But the highest justices were those called masters of the Exchequer, whose duty it was to amend what the bailiffs or lesser justices had misdone, as well as to call in all things withheld from the Prince.

The constitution and functions of the Exchequer appear to have been nearly the same in England as in Normandy. In this court all complaints were heard against the officers of the crown, which was the original of the writs of false judgment. This, however, was afterwards changed; for the complaints against the *local* officers were so many and grievous, that the ordinary jurisdiction of the sheriff was restricted to the sum of 40*s*., except by *justices*.

The Exchequer, Gilbert says, was the great *Aula Regis*, and the power and dignity of the justiciar were so great, that the sovereign at length became jealous of it; and the Aula Regis was broken into four distinct courts,—the Court of Chancery, the Exchequer, the Court of King's Bench, and the Common Pleas.*

The recent opening of the Exchequer, and the probable influx of business, render it necessary for the general body of practitioners to make themselves acquainted with the rules and practice of a court from which they have hitherto been excluded. The design of the work before us is to give them the requisite knowledge. The necessity of acquiring it, as well as the mode adopted for conveying it, are pointed out in the preface.

"This compendium of the practice of the Exchequer of Pleas has been prepared under the conviction, that the important changes effected by the recent act "For the better Administration of Justice" rendered the early publication of such a work peculiarly necessary.

"The Court of Exchequer on the law side (hitherto limited to twenty practitioners) being now thrown open to the profession at large, it appeared essential that the rules of practice, as modified by the late statute, and by the new orders, should be collected for the use of the attorneys of the court. The utility of the work seemed still more apparent, when it was considered that all the proceedings from the principality of *Wales*, and the city and county of *Chester*, are *necessarily transferred* to this court.

"The plan pursued in the compilation has been:—

"1st. To arrange the mode of procedure in the order which occurs in *ordinary cases*, and to treat separately of *incidental and special proceedings*.

"2d. After expunging from previous collections the obsolete and rescinded orders,—the several clauses of the new statute and rules of court have been introduced in their appropriate places.

"3d. It has been deemed useful, not merely to present the practitioner with the entire sections and rules, in all their elaborated form of expression, but also generally to state their substance, and explain their effect.

"By this method it is trusted that a knowledge of the changes in the practice will be facilitated; and it seemed the more necessary to pursue this course in a court in which the proceedings were hitherto known but to few members of the profession.

"4th. It has been considered desirable to append the various *forms* of process, of notices, and other proceedings, arranged in the order in which they usually take place; and followed by precedents of *bills of costs*, which may assist the practitioner in the discharge of his duty."

The method pursued will, we apprehend, afford great facilities for attaining the necessary information.

The work is divided into thirteen chapters, and these are subdivided into sections. The FIRST chapter contains two sections; the first treating of the officers of the court, their fees and duties; the second of attorneys and their admission; the change of attorneys and the service of process on them. The SECOND chapter treats of process to bring the defendant into court. It is divided into two sections; the first on the different kinds of writs, venire, summons, subpœna, capias; the second on arrest. The THIRD chapter is on the defendant's appearance. It has four sections; the first, of common appearance; the second, of special bail and exception; the third, of the justification of bail and render; the fourth, of proceedings on the bail bond, and against the sheriff. The FOURTH chapter is devoted to the pleadings. It presents seven sections with the following titles; first, of the declaration, *de bene esse*, in chief, and by the bye, and time of delivery or filing; second, of notice, rule, demand of plea; third, of imparlance and time of pleading; fourth, of oyer and particulars; fifth, of the plea and demurrer; sixth, replication, rejoinder, &c.; seventh, the issue. The FIFTH chapter treats of occasional proceeding before trial. It has four sections; first, of the defendant's set off; second, of summonses; third, of motions; fourth, of paying money into court. The SIXTH chapter, devoted to trial and final judgment, is also divided into four sections; first, of the notice of trial, continuance, and countermand; second, of subpœning witnesses; third, of the jury process, record, and entering the cause; fourth, of the sittings. The SEVENTH chap-

* Gilbert's Treatise of the Court of Exchequer, chap. 1.

ter applies to the proceedings subsequent to the trial. There are two sections; the first, treating of the postea, new trials, and arrest of judgment; the second, of final judgment, taxation of costs, and execution. The EIGHTH chapter conveys the requisite information regarding incidental proceedings. It has four sections; the first, of judgment by default, and of the writ of enquiry; the second, of judgment, as in case of nonsuit; the third, of non-pros and discontinuance; the fourth, of the cognovit and warrant of attorneys. The NINTH chapter relates to proceedings against prisoners, which it delivers in four sections; the first, treating of the detainer and declaration; the second, of pleading, trial, and judgment; the third, of the execution; the fourth, of discharging a prisoner. The TENTH chapter is occupied by a novel and important subject, which it expounds in three sections, treating, respectively; first, of the removal of causes from the courts abolished in Wales and Cheshire; second, of the attorneys of the abolished courts; third, of the assizes in Wales and Chester. The ELEVENTH chapter is devoted to proceedings in ejectment, and the TWELFTH to proceedings in error. The THIRTEENTH is occupied by a variety of miscellaneous proceedings, resolved into six sections; first, of the habeas corpus; second, of enrolling deeds; third, of arbitration; fourth, of saving the statute of limitations; fifth, of taxation of costs between solicitor and client; sixth, of the proceedings as to privileged persons.

A considerable number of useful practical forms are appended, as well as some precedents of bills of costs; and a concise index terminates the volume.

From the analysis which has been given, our readers will be enabled in a great degree to judge of the work for themselves. They will see that the object of the author has been practical utility; that he has endeavoured to give a mass of information, which it is *now* necessary for practitioners to possess, within moderate limits, and at a moderate price.

---

*Some Account of the Election for Truro, August 3—6. 1830, with a Copy of the Charter, and a Table of Parliamentary Patronage.* London. 1830. Baldwin.

THIS publication derives extraordinary interest, from the circumstances of the times. Truro is a very ancient borough, and from the earliest period returned members to parliament. In 1589 a charter was granted to the town by Queen Elizabeth, constituting a mayor and two classes of burgesses — capital burgesses and common burgesses. The right of election has long been exercised by the capital burgesses only. This, it is contended in the work before us, arose from the *laches* of the general body.

It is remarkable that a similar question has lately been agitated with regard to the boroughs of Marlborough, Romney, Hastings, and Rye, and might probably be raised in many other places. In the case of Truro there are two decisions of the House of Commons in favour of the right of the select body; one in 1660, the other in 1689. It is maintained, however, that the charter favours the more extended right of voting, and that the adverse decisions may be accounted for by the circumstances of the times in which they took place. The charter ordains that the inhabitants of the borough, and their successors, shall be one corporate and body politic, by the name of the mayor and burgesses of the borough of Truro. It further ordains, that there shall be twenty-four of the most discreet and honest inhabitants of the borough, who shall help and assist the mayor; four aldermen to be annually chosen by the said twenty-four capital burgesses out of their own body. Power is given to the capital burgesses to elect a recorder, and a steward of a court of record established within the borough by the charter. The following is the passage relating to the election of members of parliament: —

"And we do will also, and for us, our heirs and successors, do grant to the aforesaid mayor and burgesses of the said borough, and to their successors, and do ordain, that there may and shall be in the said borough two burgesses of Parliament, of us and of our heirs and successors, as heretofore hath been used and accustomed, for the said borough; and that, therefore, *the mayor and burgesses* of the said borough, and their successors, *when and as often* as the Parliament of us, our heirs and successors, shall happen to begin, or be assembled by virtue of the writ of us, our heirs or successors, concerning the election of the burgesses of the Parliament to them directed, may and shall have authority and power *or else*, by their common council, or the greater part of them, to elect and nominate two discreet and honest men to be burgesses of the Parliament of us, or of our heirs and successors, for the same borough."

---

## METROPOLITAN GENERAL REGISTRY.

*To the Editor of the Legal Observer.*

SIR,

As a friend and subscriber to your useful publication, I think it incumbent upon me to put you upon your guard against allowing your editorial character to be compromised, as it has been in your last Number, by a correspondent,

signing himself "Militia mea multiplex." The letter on the proposed General Registry, which you have selected, was completely demolished in a reply in the *Times* of Feb. 6. (which I subjoin), bearing the signature of Mr. Park the conveyancer, a non-supporter of registration, and therefore an unbiassed witness.

"As to France, although the system is avowedly imperfect,—and because such, reprobated all over Europe,—publicity, or registration, prevails as to all hypothèques or mortgages, except a particular class of them created by law. It prevails, also, and that to the extent of 'transcription,' or enrolment, as to all the substitutions, or settlements, which are still permitted by the Code Civil; and according to the more prevailing opinion of French lawyers, the true construction of the Code requires the transcription of all transfers of landed property; although upon this point the Code was rendered dubious and incoherent in passing through its different stages of revision. With regard to Holland, as the Code Napoleon has been the law of that country ever since the year 1809, your correspondent is of course equally in error; and he is not less so as to Italy. The Neapolitan Code of 1809 follows, step by step, the Code Napoleon; the Italio-Austria Code of 1812 goes still further; and an edict of 1822 gave to the Piedmontese the system of publicity from the ensuing year.

"As to Germany, your correspondent should be informed that in the three great empires of Austria, Prussia, and Bavaria, the system of publicity or registration has existed in the greatest vigour, and in all its ramifications; in the two former, from the middle of the last century, and in Bavaria, from the year 1825; and he may form some idea how far these vast monarchies come within his argument of 'simple machinery,' &c., when he is told that it was calculated that 3750 register books (large folios of about 1200 pages) would be required for the condensed registry system of Bavaria alone, not including the territories on the Rhine. The duchies of Oldenburg and Mecklenburg, and, I believe, most of the other Germanic states, have also adopted a similar machinery; and it is proper to state, that those countries which are now engaged in remodelling their legislations, as the Netherlands and the Canton of Geneva, have never admitted, for a moment, the idea of abandoning registration; and that the *Projét de Loi* of the latter commences with an avowal, that 'No people who had once enjoyed the advantages of publicity, would return to a state of things which would permit the debtor to dissemble the true state of his affairs, and the charges with which he had already encumbered the estate which he offers as a security.'"

Now, sir, I say, that so far from the proposition of your correspondent being true, that the Commissioners can "find no precedent for this plan of registration in any of the civilised states of the world," I have already shown that, both on authority and on precedent, so strong a case is made against the system of non-registration, that if the Commissioners had ventured to evade or blink the question, they would have drawn upon them the surprise, not to say the contempt, of all Europe; and would have afforded a handle to those who affect to treat the existing labours of reform as subterfuges, which never could have been wrested from them. The grounds upon which, individually, I hesitate to advocate the adoption of the system in this country apply only to the peculiarities of our own jurisprudence, and are much too abstruse for discussion in this place.

I am, Sir,
Your obedient servant,
A Subscriber.

## STAMP ACTS.

*To the Editor of the Legal Observer.*

May I take the liberty of enquiring, through the medium of your useful columns, whether the Commissioners of Stamps are *bound* to put any additional stamp which may be required on a skin or piece of paper which has not been written on, but which has already been stamped.

If a person having a 6*l.* or 8*l.* stamp wishes to increase the amount to 9*l.*, the commissioners refuse to put another stamp upon the parchment or paper, and the applicant is obliged to get the original stamp transferred to another instrument and purchase the increased one. Where a mortgage is intended to be secured by the deed conveying the fee, they require to see the deed partly written to assure themselves of your intention. This grasping system never could have been the intention of the framers of the act of 55 Geo. 3., and as an act for the better regulation of the stamp duties introduced last session will be probably revived after Christmas, the attention of the profession may be usefully drawn thereto. Your notice of this point will oblige

A Constant Reader.
O. S.

Lincoln's Inn,
Dec. 16. 1830.

## RIGHTS OF SOLICITORS.

*To the Editor of the Legal Observer.*

The rights of solicitors, to be present for their clients at the sittings of magistrates, is a question of great importance to the profession. In addition to the case of *Daubney* v. *Cooper*, mentioned in No. IX., I wish to refer you to one of more recent date, not confined to *judicial*, but applying to *all* proceedings before magistrates. The case alluded to is that of *Jones* v. *Simpson*, tried before Mr. Justice James *Parke* at the last Stafford assizes. The plaintiff was an attorney, and the action was brought for an assault and imprisonment, for turning him out of the room whilst in attendance on behalf of some clients. In the summing up, Mr. Justice *Parke* observed, "there was no doubt but that an assault had been committed (the imprisonment was the mere taking into custody), and that a verdict must pass for the plaintiff. The principle (he added) was clear, that *not only* solicitors, but *all* persons conducting themselves properly, *had a right to*

*be admitted into a public court*, if there was room, *and the magistrates had* NO RIGHT *to shut up their doors, or to exclude* the plaintiff; it was clear also, he had a right AT ALL TIMES *not only as a subject, but as the legal adviser of his clients.*"

If this were not the case, the greatest injustice would be often done to persons appealing to the quarter-sessions against the decisions of magistrates, where alone the appellant seeks for redress, and to prevent a solicitor from cross-examination before them would be in effect a denial of justice, because on the cross-examination alone might depend the appellant's chance of success.

I have always myself insisted upon this full right of being present before magistrates, and I trust the profession will in all cases claim it. In the present age of improvement (when coroners' inquests also begin to be open to solicitors) should the justice rooms of magistrates be shut? Respect is always due to persons exercising judicial functions, but a calm and firm adherence to the interest of a client should never give way to fulsome compliments to magistrates, who (nine out of ten) imagine they are really granting a concession by allowing the presence of a solicitor, when in fact they are conceding nothing but a right.

B.

Staple Inn,
Jan. 5. 1831.

## COMMON PLEAS WRITS OF ERROR.

Mr. EDITOR,

MOST of your readers are by this time convinced of the trouble occasioned to the profession by the late acts "for the more *effectual* [query] administration of justice," &c. as far as relates to the returns of writs; but few perhaps are aware of the difficulty occasioned by *the alteration in the practice as to writs of error from the Common Pleas.*

These were formerly returnable in the Court of King's Bench; and much of the delay arising from writs of error returnable in the Exchequer Chamber, as your readers well know, was thereby avoided: but by the new act, error from the Common Pleas is to be brought in the Exchequer Chamber also; and thus the delays intended to be prevented by one act of Parliament, are likely to be increased by another.

The old practice for compelling an assignment of errors was, by *sci. fa. qua executionis non*, issued in the Court of King's Bench; but no information is given in the act upon the subject of further proceedings. But this is not all:—a new office is created by the new act, viz. a clerk of the errors from *the Common Pleas* to the Exchequer Chamber, and no person is appointed to sustain it—no officer with whom the transcript can be lodged, or from whom the proper rules may be obtained; so that, in a case coming under my own observation, the defendant in error is literally set fast by the new act, to the no small amusement of the plaintiffs in error, whose only object is delay.

J. N.

## MINOR CORRESPONDENCE.

### PRICE OF LAW BOOKS.

SIR,

YOUR valuable pages appear to be accessible to the opinions and sentiments of all classes of the profession; and I am therefore induced to venture an observation upon a subject of the utmost importance to the profession, and most particularly to those who have recently made, and are about to make, their *entré* into it. Your Journal imparts information at a price within the reach of all; and as the same spirit, I trust, actuates the talents and industry of our Reformers, who are now labouring with the pruning-knife and spade in the legal vineyard, I submit to you the propriety of curtailing the expense of law publications. Surely the publishers ought to see the necessity of this, and follow the example which has been set them.

Your Friend and Reader,
Dec. 28. 1830. J. H.

A. B. is ill five miles from town. He is unluckily defendant in two suits—one in the Exchequer—one in Chancery. Why is the law such that he must pay a baron and a master sundry guineas for coming to take his answers?

E. G. has been so served with a subpœna in a chancery suit for an injunction, that his appearance must be entered on 1st January—entered accordingly, by good luck and management. No office copy to be bespoke, however, till the office opened on the 7th. Injunction therefore goes against him as for a *contempt*.

Wanted by L. M. at the end of December, a commission of bankrupt, the orders of the court *requiring* it to be bespoke for the first public or *a private seal* within a given number of days, with no provision against the *maker of the order removing himself three hundred miles off*. My Lord absent, and his seal and wax in Westmoreland. He is therefore, or some of his servants, to be paid for a purpose journey, and an opening of the seal.

## SUPERIOR COURTS.

### REGULATIONS IN CHANCERY.

THE *Lord Chancellor* stated that it was usual for two of the Masters in Chancery to attend the court during term. It was a remnant of the old practice of the Masters actually sitting; but being productive of no public benefit, he conceived it useless to be kept alive. Inconvenience and delay arise from the Masters being absent from their chambers; and for this reason the practice ought to be discontinued. He had made arrangements by which those honourable and learned persons would be spared much trouble. The Vice Chancellor and the Master of the Rolls attended the Lord Chancellor on the first day of term, and as this was quite sufficient, the attendance of the Masters even on that day might be dispensed with. But as there might be occasions on which the attendance of the Masters would

be desirable, he had arranged that there should attend in rotation two Masters in each term. It consequently would fall to the turn of each Master not quite once in two years. He intended to enquire as to the business in the Six Clerks' Office, and if any practice existed there at variance with the public utility, however ancient the custom out of which it arose, he should act in the same way. Having stated what he had done, and what he intended to do, he wished to hear the opinion of the bar.

The *Solicitor General* assented to the propriety of the arrangements, but supposed that his Lordship did not intend to make an order on the subject.

The *Lord Chancellor* said, No. His successors might be attended by the Masters, if they thought fit: he had mentioned the subject to Lord Henley, who had no objection to the arrangement.—*Hilary Term*, 1831.

NEW TRUSTEES. 1 W. 4. c. 60.

In this case, Mrs. Thornton was entitled to an estate for life in real property under the settlement on her first marriage, which directed that on the deaths of the trustees new trustees should be appointed with *the consent* of Mrs. T.; but it did not give her or any other person *the power* to appoint.

Both trustees were dead, and the heir of the survivor was living within the kingdom, and was sane and adult; but he declined to act in the trust, although willing to transfer it under the sanction of the Court.

*Mr. Coote* applied under Sir E. Sugden's act, 1 W. 4. c. 60. s. 22., on the joint *petition* of Mr. and Mrs. Thornton, the other parties interested, and two *proposed new* trustees (the heir appearing by counsel to consent), for an order to appoint the trustees, and direct the heir to convey the estate to them upon the trusts of the settlement; and his Honour granted the order, without a reference to the Master, or requiring the parties to file a bill.—*At the Rolls. Ex-parte Thornton.* 5th Dec. 1830.

COSTS — ATTACHMENT.

*Channel* applied for an attachment for non-payment of costs pursuant to the Master's *allocatur*. The costs were not taxed as in a cause, but in obedience to the usual order obtained by the client to tax his attorney's bill. The only question was, whether the rule was absolute in the first instance, or only *nisi*.

The *Court* was inclined to think, that the rule was only *nisi* here in the first instance, though absolute in the first instance where the costs were taxed in a cause.

On reference to the Master, he reported that the practice was in this case also to grant a rule absolute in the first instance.

The *Court* granted the rule absolute in the first instance. — Rule absolute.*—*Parke* J. *Rayner* v. ——. *H. T.* 1831.

* On enquiry, we find that the rule was only drawn up *nisi*, as according to established practice.

JUSTIFICATION OF BAIL.

*Hoggins* opposed the justification of bail in error, on the ground that as the time for justification expired in the vacation of Michaelmas term and the 1 W. 4. c. 70. s. 12. allowed the justification of bail at chambers in vacation, although the party was not in custody at the time, the notice of justification should have been for a day in vacation, and not for the first day of Hilary term, as it was here.

The *Court* observed, that it was not necessary to decide whether the words of the statute referred to were compulsory or not. If the notice of justification were no *supersedeas*, the defendant in error might sign judgment. There was, however, no objection to the bail justifying. —*Anonymous.*—*Parke* J. *H. T.* 1831.*

RESIDENCE OF BAIL.

*Scotland* objected to notice of bail, on the ground that the number of the house in the street, in which the bail were stated to reside, was not stated.

The *Court* overruled the objection, stating, that no case had gone the length of deciding it to be necessary to mention the number of the house in the street; although, where the defendant takes upon himself to state the number of the house, he is bound to state it correctly.† —*Anonymous.*—*Parke* J. *H. T.* 1831.

SET-OFF.

On an application to be discharged, by a defendant in custody at the suit of a plaintiff, for a sum of 48*l.*, on entering satisfaction for that sum on the roll in another action against the plaintiff, in which the defendant had obtained judgment for 72*l.*

The *Court* refused to make the rule *nisi*, which had been obtained, absolute; and observed, that this was not the common case of entering satisfaction on the roll. A party could not enter satisfaction on the roll for a portion of a claim. —*Littledale* J.—*Bath* v. *London. M. T.* 1830.‡

In the Common Pleas, the cases of *Vaughan* v. *Davies*, 2 H. Bl. 440.; *Thrustout* v. *Crafter*, 2 W. Bl. 826.; and *Peacock* v. *Jeffery*, 1 Taun. 426., show that it may be done.

Where debts in cross actions are allowed to be set off against each other, the practice as to the lien of the attorney on the judgment differs in the King's Bench from that of the Common

* Before the 1 W. 4. c. 70. s. 12., bail could only have been justified in vacation where the party was in custody. 43 Geo. 3. c. 46. s. 6. Archb. Pr. K. B. v. 1. pp. 118, 119. Vide Dowling's Statutes, p. 378. note (m).

† When a notice described one of the bail as resident at No. 44., when, in fact, he resided at No. 1., *Bayley* J. rejected the bail, but allowed time to give a corrected notice. 1 Chit. Rep. 493.

‡ No case was cited to the *Court* on the subject of this application. If any had, it can hardly be conceived that such would have been the decision.

Pleas. In the cases already mentioned, except that of *Peacock* v. *Jeffery*, the Common Pleas held that the lien of the attorney on the judgment was subject to the claims of the parties. The same was holden in *Hall* v. *Ody*, 2 B. & P. 28. In the King's Bench, on the contrary, the claims of the parties are subject to the lien of the attorney on the judgment. Vide *Mitchell* v. *Oldfield*, 4 T. R. p. 123.; *Randle* v. *Fuller*, 6 T. R. 456.; *Glaister* v. *Hewer* and two others, 8 T. R. 69.; *Middleton* v. *Hill* and another, 1 M. & S. 240.; *Symonds* v. *Mills*, 8 Taun. 526; *Harrison* v. *Bainbridge*, 4 Dow. & Ry. 363.; *Stephens* v. *Weston*, 3 Ba. & Cr. 535, 5 Dow. & Ry. 399. S. C. It might perhaps be as well, now that so many reforms are going on in the law, to assimilate the practice of both courts on this very important point.

## LIABILITY OF BAIL.

ARE bail discharged by the plaintiff's taking a cognovit from their principal without their consent, when by the terms of the cognovit he is to have time for the payment of the debt, but not a longer time than he would have had, if the plaintiff had proceeded regularly in the action?

It has recently been adjudged in the King's Bench, in the case of *Roche* v. *Stevenson*, 9 Barn. & Cress. 707., that bail are not discharged by the plaintiff's taking such a cognovit of their principal; but, as that judgment seems to me very unsatisfactory, with reference to the general principles which prevail in the law relating to sureties, I will venture to offer a few remarks upon it.

The judgment referred to was delivered as follows: —"We are clearly of opinion that bail are not discharged by the plaintiff's taking a cognovit from their principal without their consent or knowledge, unless by the terms of the cognovit he is to have a longer time for the payment of the debt and costs than he would have had if the plaintiff had proceeded regularly in the action."

Whether the Court considered the point in question as new, or as one which was settled by antecedent practice and authorities, does not appear, for the judgment is stated in the form of a naked dictum. In the argument, however, which preceded, a passage in Mr. Tidd's Practice, p. 295. 9th ed., was referred to by the counsel, where the rule is stated the same as the judgment; which probably had a material influence with the Court in forming their judgment. Mr. Tidd supports his text by a reference to the case of *Croft* v. *Johnson*, 5 Taunt. 319.; and therefore, should it appear that that case is inapposite, the rule stated, it would seem, had previously to *Roche* v. *Stevenson* no existence under a judicial sanction. *Croft* v. *Johnson* was an application by bail for an exoneration on the ground that the plaintiff had accepted of the defendant a cognovit for the payment of the debt by instalments; and the Court is said to have enquired, whether judgment could have been had and execution issued within the time fixed for the payment of the latest instalment; and the reporter adds, "Finding such was the case, the Court made the rule (for entering an exoneration) absolute." This decision, therefore, it is clear, is an authority for Mr. Tidd's text only on the supposition, that had the case been the opposite of what, upon enquiry, it was found to be, the Court would have discharged the rule, instead of making it absolute. But such a supposition, under the circumstances, is a mere assumption, and, considered as a proof of the rule, is a mere begging of the question. The truth, I conceive, is, that the enquiry made by the Court originated, not in any opinion which the Court had deliberately formed concerning the question, whether bail continue liable if the plaintiff gives the defendant only the same time as he would have had in the regular course of proceeding, but in a mere obiter doubt, which, as the case proved to be, was wholly immaterial.

Having investigated Mr. Tidd's authorities, I shall proceed at a future time to marshal those which seem to me opposed to the rule stated, and to the judgment in question.

*Inner Temple Lane.* W. T.

## MISCELLANEA.

### A REVEREND JUDGE

Is one who desires to have his greatness only measured by his goodness. His care is to appear such to the people as he would have them be, and to be himself such as he appears; for virtue cannot seem one thing, and be another. He knows that the hill of greatness yields a most delightful prospect, but withal that it is most subject to lightning and thunder, and that the people, as in ancient tragedies, sit and censure the actions of those who are in authority: he squares his own, therefore, that they may be far above their pity. He wishes fewer laws, so they are better observed; and for those which are mulctuary, he understands their institution not to be like briars or springes to catch every thing they lay hold of, but, like sea marks on our dangerous GOODWIN, to avoid the shipwreck of ignorant passengers. He hates to wrong any man—neither hope nor despair of preferment can draw him to such an exigent. He thinks himself then most honourably seated, when he gives mercy the upper hand. He rather strives to purchase a good name than land, and of all rich stuffs forbidden by the statute, loathes to have his followers wear their clothes cut out of bribes and extortions. If his prince call him to a higher place, there he delivers his mind plainly and freely, knowing for truth there is no place wherein dissembling ought to have less credit, than in a prince's counsel. Thus honour keeps pace with him to the grave, and doth not, as with many, there forsake him, and go back with the heralds, but fairly sits over him and broods out of his memory many right excellent commonwealth's men. — *Sir Thomas Overbury's Characters.*

HINTS TO CLIENTS.

Attorneys will be very much formed according to the uses which their clients make, or desire to make of them; and it will be a temptation too strong for the virtue of young men who have their fortunes to seek, or families to maintain, if they observe men of fortune and interest employ, or countenance attorneys who are expert in the low cunning of the law, and who stick at no means to serve their clients. The gentlemen, merchants, and traders, in and near cities and great towns more especially, have it much in their power by encouraging men of INGENUITY, PROBITY, MODESTY, and DILIGENCE in their profession, to prevent and redress many of those abuses in the law, of which they often so justly and loudly complain.— *Observations on the Duty of an Attorney and Solicitor*, 1759.

MEANS OF LEGAL SUCCESS.

Without acquiring a capacity of making a solitary life agreeable, let no man pretend to success in the law. I have heard his Lordship often remember a lesson the citizens used to their apprentices,— "Keep your shop, and your shop will keep you;" as being no less true of a lawyer with respect to his chamber.— *North's Life of Lord Guildford*, vol. i. p. 15.

LAWYERS ANCIENTLY CLERGYMEN.

It is believed (says *Herbert*, in his antiquities of the English law, from whence the following particulars are taken) and with great probability, that the chief and in fact the only persons, learned in the laws of England before the Norman conquest, were the clergy: those ages being so illiterate, on account of the continual inroads of the barbarous northern nations, which obliged the noblemen and gentry to employ their whole time in martial exercises; and on account of this ignorance it no doubt happened, that the decision of most controversies, in civil cases, was so much by combat, and in criminal by fire and water ordeal. In the great controversy which existed betwixt Lanfranc, Archbishop of Canterbury, and Odo, Earl of Kent, it appears that Algelric bishop of Chichester was the lawyer then chiefly employed; "being brought thither" says the Textus Roffensis, "in a chariot to discuss, and instruct them in the ancient laws of the land, as the most skilful person in the knowledge of them." In the same reign also, one Alfwin, rector of Sutton, and several of the monks of Abingdon, particularly Sacolus and Godric, were said to be persons so expert in the laws, that their opinion was held in great reverence. Ranulph, a clergyman, in the reign of William Rufus, is likewise called by William of Malmsbury, an unvanquished lawyer; though in fact in those days there were not many to contest the palm with him, it being long after this period before settled seminaries for the study of the common law were established. The first restraint that was put upon the clergy from publicly pleading and acting as *attorneys*, was about the beginning of the reign of Henry the Third, when Richard Poor, bishop of Salisbury, forbid, by his constitution, the clergy of his diocese from practising in the secular courts, except under certain limitations.*

* Spel. Concil. Com. 2. sub. an. 1217. We are indebted to Mr. H. B. Andrews for this extract.

## TO CORRESPONDENTS.

A CITIZEN *has given us some good advice "from pure friendship." We receive it thankfully, and shall endeavour to follow it.*

*We have received* one *Letter and* two *Messages, objecting to the Tale of* WILLIAM BARNIVALE. *The purpose of those Articles is misunderstood, for they are in strict conformity with the original plan of the work. The intention of the Author is, to convey, in an agreeable form, the result of much research into* THE STATE OF THE LAW, AND THE CONDITION OF LAWYERS IN EARLY TIMES. *The literary merit of these contributions cannot be questioned; but perhaps we are mistaken in supposing that they are generally adapted to the taste of the profession, although they have been approved by those whose judgment we respect. For ourselves, in such matters, we are, we trust, duly diffident. We are anxious to meet the wishes of the Profession; — we are not obstinate — but confess that before we can abandon a plan which appears to us happily conceived, and ably executed, we must receive unequivocal marks of disapproval from a sufficient number of subscribers who have read the two chapters already published. We wish to interest the minds of a very large class of the community; and in the course of Twelve Numbers we are not aware that we have devoted too large a space to light reading.*

*The Paper on the "Real Estate Liability Act" is valuable.*

AMICUS *on the Sketches of the Bar is entitled to our thanks.*

F. W. G. *has laid us under new obligations by his Letter on* ATTORNEYS' CERTIFICATES.

*The Letter of* E. T. *on Life Insurance and other subjects was overlooked. We shall aavert to the points observed upon as early as possible.*

# The Legal Observer.

VOL. I. SATURDAY, JANUARY 29. 1831. No. XIII.

——"Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

"We have entered into a Work touching Laws, in a middle term, between the speculative and reverend discourses of Philosophers, and the writings of Lawyers." BACON.

## JUDICIAL CHARACTERS.—No. II.

### EARL OF ELDON.

WE approach the consideration of the judicial character of this eminent person with very considerable diffidence in our own powers. We have, indeed, to confine our attention to one portion of his life, and one branch only of his numerous labours; but we feel that it is the most difficult of any to treat and characterise with complete justice. We shall not, however, shrink from the task; it is highly important that correct views of his Lordship's judicial character and labours should be laid before the public and the profession, and we shall spare no pains in endeavouring to enable them to come to an accurate conclusion. We trust that this series of articles will not merit the fate of being treated as mere passing remarks or as personal comments; we hope they will in some degree serve as a guide to the leading principles decided by the judges whose characters are discussed in them, and they will have some value on that account.

Without professing to enter into any particulars of Lord Eldon's private life, we shall shortly allude to the steps of his professional career. He was admitted at the Middle Temple in Hilary Term 1772, and was called to the bar in Hilary Term 1776. This period was not passed unprofitably. The noble lord has himself told us that some part of it was spent in the chambers of a celebrated conveyancer. In the case of the Marquis of Townsend v. Bishop of Norwich, on the 27th of January, 1820, he observed with reference to the subject then in dispute, "I do not enquire whether there may have been intermediate transactions since the creation of the term, farther than to remark, that having in days which perhaps may be thought days of yore passed about two years in the office of Mr. Duane, and during which I had frequent opportunities of knowing the opinions entertained by Mr. Booth, Mr. Fearne, and other eminent conveyancers of that day, I well know that they were in the habit," &c. How his Lordship availed himself of the opportunities which Mr. Duane afforded him is well known, and exemplified in his luminous judgments on the subject of the law of property.* It is usually said, that he was a very long time before obtaining business at the bar. This, however, is incorrect. He was soon known as a sound and judicious junior, and, as well on circuit as in town, his business was considerable. He early attracted the attention and regard of Lord Thurlow, who was then Chancellor, and was offered by him the situation of a Master in Chancery; which he declined, preferring to remain at the bar. But Lord Thurlow's desire to serve him, and his sense of his talents, was soon after manifested in another way. In 1783, seven years after he was called to the bar, he obtained a patent of precedency, and very shortly afterwards was returned to parliament for Weobly, in Herefordshire, a borough then under the influence of Lord Weymouth. His success at the bar, therefore, was any thing but

* It is well known that few men ever read so hard as the subject of this article when under the bar. When all other chambers were wrapped in gloom, tradition tells us that from his window "one eternal light" was visible. The difference in this respect between his brother and himself is well remembered. Lord Stowell, as Dr. Scott, was well known in the celebrated association called the Literary Club, of which Johnson, Burke, &c. were members; but he could never prevail on his brother to join it. "Where do you dine to-day, John?" William Scott would ask, hoping to get him to meet some of his celebrated associates: "I dine with Lord Coke," was the reply.—"You had better come and dine at my chambers—you will meet the Doctor."—"He cannot draw a bill!" and thus they parted.

tardy. In 1788 he was made Solicitor General, and in 1793 Attorney General. In 1799 he was made Chief Justice of the Common Pleas, and created Baron Eldon, of Eldon in the county of Durham. This office he has repeatedly declared, and particularly on a late memorable occasion (the Catholic relief bill), was the only one which he ever asked for in his life, — "and here," he said, with tears in his eyes, and in a manner we shall never forget, "and here I fancied that I was qualified to serve my country." His judgments in a court of law are held in very high estimation. There is no instance on record, not excepting Lord Hardwicke, of a judge whose talents have been equally conspicuous in a court of law and in a court of equity.

In 1801 Lord Eldon was made *Chancellor;* and, with the exception of the few months in which Lord Erskine presided in Chancery, he retained possession of the office for a period of nearly twenty-six years. He resigned the great seal in the year 1827, and was succeeded by Lord Lyndhurst.

His qualifications for the immense duties of a Lord Chancellor were undoubted. His support was courted by minister after minister; and although he had to encounter opposition and invective the most fierce and unsparing, he was able to bear it with calmness and patience. He "midway left the storm," and pursued his own course with stedfast deliberation.

His Lordship's judgments commence in the 6th volume of Vesey junior, and continue throughout the whole nineteen volumes of that reporter, and the subsequent reporters in the Court of Chancery, down to the two first volumes of Mr. Russell's reports. We shall not attempt to go through them; but we shall hereafter advert to some of the most important. It must be recollected that they have settled all the leading rules of equitable interference; and reference is made to them in nine tenths of all the cases which are now argued in courts of equity. We might notice many judgments in which the most intimate knowledge of the doctrines of equity and of the laws of property is displayed. It would be almost endless to enumerate the important rules established by them. We shall, however, prefer mentioning some of his judgments which were given on subjects of a more general and popular nature, as they will, equally with the more abstruse, explain the character of his mind, and at the same time be more interesting.

His manner in court was mild even to a fault: he would patiently hear the addresses of any number of counsel; he showed neither petulance nor weariness; although his quickness in seeing the point in dispute was remarkable, he very rarely interrupted or confined the argument. This feeling he carried, perhaps, to an excess. We recollect hearing him declare, that when at the bar he always viewed a question in every point of view; and that Lord Thurlow had frequently observed, that although he had carried him with him during the first part of his argument, yet in the latter portion he had found that learned person to change an opinion which he as an advocate had originated. It might have been with this view, perhaps, that he was content to hear all that could be said. A less charitable construction has, however, been put on the circumstance. It has been said that he, in fact, paid no attention to the arguments of counsel, that he made up his opinion from the perusal of the papers in the cause; that his head was of that *pantile* nature that the arguments slid off it, without leaving any impression. It has been said that his thoughts were, in fact, far from the matters before him; that, although apparently devoting his best attention to the Court of Chancery, his mind was occupied with very different subjects; that his duties as a minister engaged his attention; that he was one minute planning the means of attacking and overwhelming the Child of Destiny; the next was busied in court intrigues; that his thoughts would run back from the tedious details of equity to the deep debate of the preceding night, or the busy mysteries of the cabinet; that he was in fact arranging materials for some speech which should arrest the march of innovation, or strengthen the basis of the constitution. All this has been said, perhaps with just that portion of truth which would give currency to the story; but we think it entitled to little weight. * His style of address in Court was colloquial almost to familiarity. He frequently indulged in anecdote, and sometimes in jocoseness †: his humour, however,

* A letter is said to be in existence from Lord Eldon to one of his daughters written in Court, which contains among other things the following passage: — "They think I am listening to their arguments, while in truth I am writing to you!" This may be very true, but does not at all prove that the practice was habitual.

† The noble earl would often take a whimsical opportunity of indulging his fondness for a pun; one instance among many others may be related. Every one knows who has attended the debates in the House of Lords, that when a

was seldom very pointed and never ill-natured. During the whole course of his judicial life we do not recollect more than one instance of an altercation with the bar; and, although his patience and forbearance were often much tried by personal applications from suitors, he was never betrayed into any intemperate use of his authority, or even into angry expressions. This conduct was the more praiseworthy, as the noble and learned Lord is said to have felt the attacks made upon him and his judicial functions most sensibly. It has been said by those whose word is of some authority, that on the nights in which a motion relating to his Court was to be brought forward his anxiety on the subject was extreme: he is described on these occasions as waiting in his private room in the House of Lords, having disposed of the business connected with it, and receiving fresh intelligence every hour of the manner in which the debate was conducted, and the substance of the charges brought forward against him. As the eagerness of the debate increased, and the warmth of the speakers heightened, his feelings became more and more agitated. Some additional details of apparent oppression — some new case of long and protracted delay — some indignant or sarcastic invective, would thus be related to him fresh from the House of Commons: he would hear them all with attention; he would question the narrators again and again; he would demand the exact words of the orator. Walking rapidly through the room, he could not command the ardent expression of his indignation, and at last he would sink into a chair overcome by his feelings. Once only, however, did he carry this emotion out of his own study. This was in the instance of the present Lord Chief Baron of Scotland (then Mr. Abercrombie). A speech of that learned gentleman seemed to affect him more keenly than any other, as being perhaps more "germain to the matter" than the harangues of the present Lord Chancellor and the Queen's Attorney General. He alluded the next morning in Court to the statements of "gentlemen with gowns on their backs," in a manner which induced Mr. Abercrombie to bring the subject before the House of Commons; and the interesting debate which followed is still fresh in the memory of all. But, excepting on this occasion, we know of no other public man who has been so long and so powerfully attacked, and who has showed so little bad feeling in return. His bitterest enemy will be ready to concede to him a kindness of manner and a courtesy of address almost unequalled.

We shall complete this character in our next Number.

Z. Z.

(*To be continued.*)

bill is brought up from the House of Commons to the Lords, the Lord Chancellor comes down to the bar, purse in hand, to receive it. When Lord Eldon held the great seal, Sir James Graham, (not the First Lord of the Admiralty, but the respectable solicitor of that name,) being engaged in a great many private and other bills, was very frequently entrusted with this duty of bringing up the bills from the one House of Parliament to the other. On one particular evening Sir James came bowing up no less than twelve times, with no fewer than twelve separate bills. Twelve times did Lord Eldon come down to the bar to receive the message; and eleven times did he receive a bill from Sir James Graham: the twelfth time, on the presentation of the bill to him by the same honourable member, his Lordship said to him smiling, "What, another! When I used to know you first you used to be called *Jem* Graham, but now we'll call you *Bill* Graham!"

## ANALYSIS OF THE GENERAL REGISTRY BILL.

(*Concluded from* p. 183.)

*Caveats and Inhibitions.*

A caveat may be entered in the general index, or in the index to the roots of titles in favour of any person to be named or described against acts whereby the person by whom such requisition shall be made, or any person who shall claim under him, shall affect either generally any lands within the district, or any lands to be specified or described within the district.

Caveats to be entered in the "Index to the Roots of Titles" by the name of the person against whose acts the caveat shall be entered, with his addition, as set forth in the requisition.

Entries of caveats to be distinguished from entries of assurances.

Persons entering caveats, and who shall register assurances before the expiration of the time that the caveat shall remain in force shall be entitled to the same protection as if assurance had been so registered at the time of entering caveat. No caveat to be entered under any head in the general index for any district, shall be a protection to any assurance not hereby required to be indexed or entered under such head, and no caveat to be entered in the "Index to the Roots of Titles" for any district shall be a protection to any assurance not hereby required to be entered in such "Index to the Roots of Titles."

Caveats not to continue in force longer than six months from the date of the requisition; and if by error or otherwise the date of the entry shall be earlier than the date of the requisition, the time shall be computed from the date of the entry.

Provisions relating to caveats to apply to the "Index to Assignments of Charges," and the "Index to the Roots of Titles to Charges."

To provide for cases in which it may be desired that a caveat shall be entered, and time shall not be allowed for ascertaining the proper index or head, an inhibition may be entered in favour of any person to be named or described against acts whereby the person by whom the requisition shall be made shall affect either generally any lands within any district or districts to be named, or any lands to be specified or described.

An index to inhibitions to be kept.

Protection the same as in caveat.

Inhibition not to remain in force longer than six months. Provision as to erroneous entry the same as in caveat.

No caveat or inhibition to be of any force, except by way of protection to a contract entered into at or before the date of the requisition, or by way of protection to an assurance executed in pursuance of such contract, or by way of protection to an assurance, which at the date of the requisition shall have been executed, or by way of protection to an assurance which shall have been in contemplation at the date of the requisition.

The entries and references required by the act to be made immediately on the receipt of the instruments at the office.

Where the proper entries and references are omitted in part, the registration of the assurance to be valid *pro tanto.*

*Omissions and Errors.*

That it shall be lawful at any time after any instrument shall have been deposited at the register office to make any entry or any entry and reference which may be required to render the registration of the assurance or proceeding, or the caveat or inhibition, effectual, or to give any further effect to it; and from such time as such entry or such entry and reference shall have been made the same shall be of the like force and effect as if made at the time when the instrument was deposited; but no such entry to have any retrospective effect; and every entry and every reference to be made under this present power to be in the same form, and subject to the same provisions, as to errors or otherwise, as a similar entry or reference made immediately on the receipt of the instrument at the said register office.

Omissions and errors to be corrected by making new entries and references, and not by altering the former ones.

*Order of Entries.*

The entries under each head of any index to be made consecutively in the order of making the same.

The entries to be made under each head to be considered as made consecutively; and each such entry to be considered as prior in time to every entry under the same head which shall be subsequent in order; but the dates of the entries, as contained in the indexes, to be *primâ facie* evidence of the time of making the same.

*Seal.*

A stamp to be kept, to be called The Seal of the Register Office, and the impressions to be taken judicial notice of.

*Duplicates, Copies, and Extracts.*

Duplicates of deposited documents may be compared at the office, sealed and certified.

Every document so sealed and certified to be received as evidence that another part of the same assurance has been deposited.

Copies of and extracts from deposited instruments to be provided on application, and to be certified.

Copies made from deposited copies to be marked as such.

Such certificate to be evidence that the instrument certified is a copy of or extract from a deposited document.

Office copies of or extracts from memorials deposited to be evidence of the contents of such memorials.

Extracts from the indexes to be provided on application, and to be certified.

Office extracts from the indexes to be evidence of the contents.

*Production of Copies, and Costs.*

After notice, unless a counter notice be given, parties to suits may give deposited originals, or certified duplicates, or office copies, in evidence, without proof of execution.

Where the notice is given for a copy, and the counter notice requires the original to be produced only, the deposited original or a certified duplicate may be given in evidence, without proof of execution.

When counter notice is given, the costs of proving or of producing the document required shall be taxed against the party who shall have given such counter notice, whatever may be the event of the action, unless the court determine that there was some reasonable cause for requiring the proof or production.

A document or office copy once given in evidence under the preceding clauses to be afterwards allowed in the same cause.

The clauses for dispensing with proof of execution, and with the production of original documents, to apply to requisitions for caveats and inhibitions.

*Communication with the Office.*

Instruments may be sent, and applications made, to the register office through the post office.

Persons sending instruments to be deposited, or duplicates to be compared, may require receipts; and persons ordering copies or extracts may require acknowledgments of such orders.

Where the instrument is sent, or the copy or extract ordered through the post office, the receipt or acknowledgment to be sent through the post office.

Where a duplicate is brought to the office to be compared, or a copy or extract is ordered, a "warrant of delivery" to be signed, and the duplicate copy or extract to be delivered to the person holding such warrant.

Where the duplicate is sent, or the copy or

extract is ordered through the post office, the same is to be returned or sent through the post office.

Where there is no "warrant of delivery," or where no direction is sent through the post office, the duplicate or the copy or extract may be withheld for enquiry.

*Removal of Instruments.*

Instruments deposited at the register office not to be removed, except on legal process; indexes not to be removed on any occasion.

Wills deposited at the register office may be removed for the purpose of being proved; after being proved, the will is to be returned.

An entry to be made in the book in which the will shall be copied, on being proved.

*Symbols.*

Symbols to be marked on deposited documents, and on office copies, &c.

Persons claiming under an assurance which shall have been registered may require any person who shall have in his possession any instrument showing the symbol of any head under which such assurance shall have been indexed either to produce such instrument or to disclose the symbol; and in case of refusal, any judge of any of the superior courts at Westminster, upon a summary application, may make such order as the circumstances of the case may require.

Judge may make any order as to costs.

The indexes, &c. to be under the control of the Registrar General, who is to make regulations for verifying the entries, and who may substitute other marks than numbers as symbols.

*Searches.*

Every person, on application at the register office, shall, under such regulations as shall be made by the Registrar General, with the consent of the Lord Chancellor, be allowed to inspect and search any of the indexes, and to examine and inspect any of the instruments deposited, and to take extracts from any such indexes or instruments; and the Registrar General shall also, upon any application for that purpose, cause searches to be made in any of such indexes; and a certificate shall be made of the result of such search, to be stamped with the seal of the register office, and signed by the proper officer.

The duties of attorneys to be fulfilled by causing an office search to be made.

A directory to symbols to be kept for each district.

Memorandums may be made in the indexes by direction of the Registrar General.

Preliminary defects not to invalidate registration.

*General Regulations.*

The Registrar General may, from time to time, by notice in The London Gazette, order and direct that all instruments of any description to be specified, shall be written or engrossed bookwise, or in such other manner as shall be specified in the notice, and shall be written or engrossed either on paper, vellum, or parchment; that such paper, vellum, or parchment shall be of such description, and of such shape and dimensions, as shall be specified; and if in any case, after the time when any notice to be given in pursuance of this power shall have taken effect, any instrument within the meaning of the notice shall be brought or sent to the register office which shall not be conformable with the direction, the person by whom the application for registering the assurance or proceeding, or for entering the caveat or inhibition, shall be made, shall forfeit a sum of with full costs of suit, to be recovered by an action of debt to be brought by the Registrar General in any of his Majesty's courts of record at Westminster.

The last power may be exercised by any person to be appointed Registrar General before the Act shall commence in effect.

The Registrar General may require statements for regulating the entries to be sent with assurances; and also that they shall be either indorsed on the documents or written on separate papers, as he shall think fit.

Statements may be sent, and entries required to be made, after an assurance has been received at the office.

No officer of the register office to be responsible for omissions or mistakes occasioned by defects in the statement.

Any person who shall, in any statement or application to be sent to the register office, wilfully set forth any matter or thing which shall be untrue, with intent to procure any entry to be made which ought not to be so made, shall forfeit a sum of with full costs of suit.

The power to require statements may be exercised by any person to be appointed Registrar General, before the act shall commence in effect.

*Actions.*

Actions for damages occasioned by the omission or misfeasance of any officer of the register office to be brought against the Registrar General. Venue to be laid in Middlesex.

If final judgment be recovered, the damages to be paid out of the Consolidated Fund.

Notice to be given to the Attorney General, and also to the Registrar General, one calendar month at least before the commencement of such action.

The Registrar General not to be personally liable.

If judgment shall be given in favour of the nominal defendant; or if the plaintiff shall discontinue or become nonsuit, the plaintiff shall be liable to pay the costs of defending such action, and the same (when taxed) shall be levied in the name of the nominal defendant by the like process of execution as in other actions on the case.

If at any time before payment to the plaintiff of any damages a writ of error shall be brought, such damages shall not be paid until the judgment shall be affirmed; and if after payment to the plaintiff of any damages such judgment shall be reversed, the court shall, on the prayer of the Attorney General, award a writ of restitution against the plaintiff, in the name of the nominal defendant; and when the moneys thereby directed to be levied shall be brought into court,

the court shall order the same to be paid into his Majesty's Exchequer, to be carried to the account of the consolidated fund of Great Britain and Ireland.

Registrar General may compromise any action, with the consent of the Lord High Treasurer, or Lords Commissioners of his Majesty's Treasury. Money agreed to be paid under such compromise to be paid out of the consolidated fund.

The time which, by the act intituled "An Act for Limitation of Actions, and for avoiding of Suits at Law," is limited for commencing or suing actions, shall, so far as respects any action which shall be brought to recover damages for any loss or damage arising from any omission, mistake, or misfeasance of any officer of the register office, be computed and run from the time when actual loss or damage shall have arisen from such omission, mistake, or misfeasance.

Actions by and against the Registrar General not to abate by his death or removal.

*Fees and Deposits.*

The fees specified in the schedule to be paid.

The fees for registering any assurance or proceeding, and for entering any caveat or inhibition, shall be brought or sent to the register office with the instrument to be deposited; and the fees for making office copies of and extracts from any instruments, and of making extracts from any of the indexes, shall be paid when such office copies or extracts shall be delivered, or before they shall be sent; and the fees for the several other acts and things for which fees are in the schedule expressed to be payable, shall be paid before such acts or things respectively shall be done or permitted.

Certificate of payment of fees to be given on registering an assurance or proceeding, or entering a caveat or inhibition.

In such cases, if the fees are not sent with the instrument to be deposited, no such certificate shall be given till payment of the fees, with a penalty, not exceeding a per centage of five per centum on the amount thereof for every complete period of one calendar month, computed from the time when the instrument shall have been received at the said register office.

Till a certificate is given, no duplicate to be compared with the deposited instrument; nor any office copy of or extract from the same to be provided; and on process to compel the production thereof, the same may be withheld till payment of the fees and penalty.

Duplicates not to be returned; and copies, extracts, and certificates of searches not to be delivered till payment of fees. The delivery or transmission through the general post office of any duplicate, or office copy, or extract, or certificate of search, shall be sufficient evidence of the payment of the fees.

The Registrar General may by notice in the London Gazette require a sum to be limited as a deposit, where copies of or extracts from instruments are applied for.

In case any fee be unpaid for the space of one calendar month, upon its being made to appear by affidavit to any of his Majesty's courts of record at Westminster that the act or thing in respect of which such fee shall be payable has been done for the space of seven days, and that the fee or any part of it remains unpaid, the court may, upon the prayer of the Registrar General, make a summary order upon the person on whose application the act or thing shall have been done or permitted, to pay the said fee, together with any sum for the costs of such application at the registrar's office, at such time as the said court shall think fit; and upon failure, it shall be lawful for the said court to proceed summarily against such person by attachment, or otherwise, as for a contempt of court.

The Registrar General, or assistant registrar, may allow time for payment of fees, or wholly remit them.

*Salaries and Pensions.*

His Majesty may assign salaries to be limited to the Registrar General, assistant registrar, clerks, and subordinate officers, and allot pensions to retired officers.

Sums for defraying the expenses of the register office to be allowed out of the consolidated fund.

The lord high treasurer or the commissioners of the Treasury may apply money received at the office in payment of the expenses of the same.

Subject to the last power, all monies received by the office to be paid to the consolidated fund.

Accounts of the office to be audited by the commissioners appointed under the authority of an act 25 G. 3. c. 118. s. 2.

*Postage.*

The postage on packets sent to and from the register office to be borne by the office.

Rate of postage to be paid for such packets to be limited.

Postage to be part of the current expenses of the office.

No packets to be received at the register office unless through the post office, or free of expense.

If in any case in the judgment of the Registrar General or assistant registrar the expense of postage be needlessly increased, he may direct that any letter or packet sent from the register office by the general post shall be at the expense of the party to whom the same shall be sent; and for that purpose he may cause an indorsement to be put on such letter or packet intimating that postage is to be paid; and he may farther direct that full postage shall be paid.

*Local Registers.*

Local register acts repealed.

Assurances not to be inrolled in local register offices after 31st December, 1831; and no assurances, &c., to be registered in such offices after 31st December, 1836.

Registration in the general register office to have the same effect against acts prior to 1st January, 1832, as registration in the local register office.

Vacancies in office of registrar for local offices in Yorkshire not to be filled up; and after 31st December, 1836, the offices of registrars for Middlesex to cease.

Vacancies in local offices in Yorkshire before 1st January, 1837, to be supplied *pro tempore*.

Provision to be made as to the custody of documents in local register offices by the lord high treasurer, or the commissioners of the Treasury.

Copies of inrolments and entries in the register offices in the county of York and town of Kingston-upon-Hull to be signed by the persons in whose custody such documents shall be placed.

Compensation to be made to officers of local register offices of county of York and town of Kingston-upon-Hull.

Instruments required to be registered in local register offices may be registered in the general register office.

*Exceptions from the Operation of the Act.*

This act not to extend to lands within the Bedford level; nor to copyhold lands; nor to rack-rent leases, &c., for any term not exceeding twenty-one years; but the clause providing that estates and interests shall take effect in the order in which the same shall have been acquired shall apply and extend to every such lease or agreement for or assignment of such lease.

Where possession does not go along with such lease, &c., the same to be void as against a purchaser during the interval.

Shares in companies not to be affected.

Assurances filed or entered in the manner directed by stat. 7 G.4. c. 57. "An Act to amend and consolidate the Laws for the Relief of insolvent Debtors in England," to be of the same force as if registered.

Awards filed or entered conformably with the acts under which they are made to be of the same force as if registered.

*Stamps.*

Where there are duplicates of a registered assurance, one duplicate to be exempted from stamp duty, provided the deposited document is duly stamped: the exemption not to apply where either of the duplicates has the effect of a counterpart.

Office copies and extracts and receipts for deposits to be exempt from stamp duty.

*Forgery and false Swearing.*

Forging signatures required by the act, or counterfeiting impressions of the seal of the register office, felony; punishment, transportation for life, not less than seven years, or imprisonment for four years, not less than one.

Falsely swearing under this act to be punished as perjury.

*Construction of the Act.*

In the construction of this act, the word "lands" shall extend to all manors, messuages, lands, advowson, rectories, tithes, rents, and other hereditaments whatsoever, whether corporeal or incorporeal, in England or Wales, and also to any estate or interest in any such manors, &c. whether the same shall be a freehold or a chattel interest, and whether legal or equitable; and the words "estate and interest" shall extend to a lien or charge; and the word "charge" shall extend to a legacy or other sum of money, whether annual or in gross or otherwise to be payable, and the word "legacy" shall extend to a debt or other sum of money, whether annual or in gross or otherwise to be payable, which shall be charged on any lands by any will, and to all monies and shares of monies to be produced by the sale of any lands directed or authorised to be sold by any will; and the word "assurance" shall extend (in addition to the several matters which it is before provided shall be assurances within the meaning of this act) to a will or codicil, and also to a contract, and also to any other writing whereby any estate, or interest in any such manors, &c. shall be created or transferred or determined (other than any proceeding hereby authorized to be registered as aforesaid); and the word "Will" shall extend to a codicil; and every will or codicil hereby authorised to be registered by which an executor shall be appointed, or by which the appointment of an executor shall be revoked, or by which the right to the personal representation of the testator shall be in any way regulated, shall be considered as affecting any lands which may form the personal estate or part of the personal estate of the testator; and the word "proceeding" shall extend to a commission of bankrupt, and to a judgment, statute, or recognizance, whether obtained or entered into in the name and upon the account of his Majesty or otherwise, and to the record of any debt due to his Majesty, and to an obligation or specialty made to his Majesty, in the manner directed by the act 33 Hen. 8., and to the acceptance of any office, by the acceptance whereof any lands shall become liable for the payment and satisfaction of arrearages under the provisions of the act 13 Eliz., and to every other act or matter by which any estate or interest in any such manors, &c. shall be created or transferred; and the word "person" shall extend to a body corporate as well as an individual; and the expression "title to lands" shall extend to a power or right to convey or otherwise affect lands, and every person claiming derivatively under any assurance shall be considered as claiming under the same: and in every case where the addition of any person is directed to be entered with his name, the word "addition" shall be construed to comprise only the description as to residence, title, rank, profession or occupation; and in cases where the singular number only is used, the word importing the singular number shall be applied to several persons or things as well as one; and in cases where the plural number only is used, the word importing the plural number shall be applied to one person or thing as well as several; and where any word used in this act shall import the masculine gender only, the same shall be held to include and be applied to females as well as males, and bodies corporate as well as individuals, so far as the application thereof shall be consonant with or not repugnant to the subject and context of the act.

Berwick-upon-Tweed to be considered in England.

Act may be altered, varied or repealed, in the present session of Parliament.

## THE RETURN OF A JUDGE TO THE BAR.

It has sometimes been supposed that a barrister, who has once taken upon himself the office of a judge, cannot return again to the bar; and this supposed rule applies, perhaps, to those judges who cannot be removed at the pleasure of the crown. There is nothing, however, to prevent a judge so removable, as for example a Lord Chancellor, from returning to the bar; for when all judges held their offices by a similar tenure, they frequently on their removal returned to the bar. The most celebrated instance of this occurred in the tenth year of King Charles I., when Sir Robert Heath was "discharged and removed from his place of C. J. of the Common Pleas;" but afterwards Sir R. Heath "appeared at the Common Bench Barre, the first day of term, and being in his place of junior serjeant at law, pleaded for his clyents as serjeant at law, which was done by the King's special command, upon his humble petition to his Majesty; who, by advice of the lords of his counsell, granted him leave to practise there, and in all other his courts at Westminster, excepting the Star Chamber only." *Cro. Car.* 375.

## LEGAL ECHOES.

*To the Editor of the Legal Observer.*

Sir,

I have been a "constant reader" of your work from beginning to end, and feel anxious to do any thing in my power to serve it; and it is with this view that I beg leave to call your attention to a curious circumstance which happened to me the other morning.

I was proceeding according to my usual custom in term time to Westminster Hall, and happened to reach it some time before the opening of the courts. I was half angry at finding myself so early, and walked straight through the Hall, with the intention of going to Old Palace Yard. In passing along the narrow passage at the end of the Hall, I endeavoured to console myself, by murmuring the old adage just as I left it, "*Non omnia possumus omnes.*" Imagine my surprise, Sir, when I heard myself distinctly replied to, although no earthly person was near me! I repeated the words. I was again faintly answered! To my astonishment, I discovered that this venerable Hall, so long celebrated in our legal history, is remarkable for a most curious echo! No other spot but the precise one on which I stood will awaken it; and, what is even more extraordinary, it will answer to no other language but Latin! The echo at the Lake of Killarney, Sir, is nothing to it! And I shall now mention some few of the singular answers which it made. I may recollect the others at some future time; but, in the mean time, I give you those which are hereinafter contained:—

*I. I.*

Non omnia possumus omnes!

*Echo.*

We can't all ride in an omnibus!

*I. I.*

Tria juncta in uno!

*Echo.*

Tria juncta and you know what!

*I. I.*

Magnæ injuriæ gravamen!

*Echo.*

Making a jury aggrieve a man!

*I. I.*

Sed semble alio intuitu!

*Echo.*

You'll tremble if I show it you!

*I. I.*

In sæcula sæculorum!

*Echo.*

For two whole days I'll bore 'em!

*I. I.*

E contra, toties quoties!

*Echo.*

A counsellor in both his coaches!

Trusting that some correspondent will explain the physical phenomena of this curious echo,

I am, Sir,
Your most obedient servant,
And subscriber,
Jekyll Junior.

## REVIEW.

*A practical Treatise on the Law of Partnership, with an Appendix of Precedents. By* Neil Gow, *Esq. of Lincoln's Inn, Barrister at Law. The 3d Edit. With considerable Alterations and Additions. London,* 1830.

The Law of Partnership has of late years become so important and interesting, that there are now no want of treatises on the subject. The first systematic publication was by Mr. Watson. In 1815, Mr. Montagu published his treatise, and this subject has been further elucidated by the present writer; and there is another treatise by Mr. Cary.

We have no hesitation in saying that Mr. Gow's treatise is the best of all these.

We have examined it with very considerable attention; and although in one or two points we are inclined to disagree with the learned author, yet as a whole we have found it accurate, well arranged, and perspicuous. We are not entirely satisfied with the precedents which he has appended to his treatise; — we think there are better forms in print before the profession.

We consider Mr. Gow incorrect when he says that one partner may by an action of assumpsit enforce from his co-partner contribution towards a debt which he might have discharged, but to which they were jointly liable; p. 79. Now the general rule as to this is that one partner cannot maintain an action of assumpsit against his co-partners for money expended on account of the partnership. *Per* Abbott C. J. Holmer *v.* Higgins, 1 *B. & C.* 76.; and see also Milburn *v.* Codd and another, 7 *B. & C.* 419.; and we do not think, on a close examination, that the cases cited by the learned author sufficiently support his position, or make out an exception. But these are almost the only points on which we can object to the work, of which we shall now give some account.

The first chapter is devoted to the consideration of the contract of partnership. The learned author thus considers the question whether partners can depart from the original objects for which their partnership was formed.

"When the object or purpose the partners have in view, in forming a partnership, is clearly and distinctly defined, and the contract of partnership does not expressly or impliedly confer upon some the power of binding all to the adoption of different projects, it is not competent to any number of the partners, short of the whole of them, to engage the partnership in adventures which are incompatible with the declared object or purpose; because, if it were so, an individual, by engaging in one specified concern, might be implicated in any other concern whatever, however different in its nature, against his consent. Each partner, therefore, has the power of insisting that the original contract of partnership shall not be contravened by an extension of its purposes; and he is not deprived of that power, notwithstanding the other partners offer to indemnify him against the loss that may be sustained by their embarking in transactions which were not, in the first instance, intended to form a part of the partnership concern: for, whilst the partnership continues, the right of a partner is to hold his co-partners to the specified purposes of their association, and not to rest upon indemnities, with respect to what he has not contracted to engage in.* And this principle (upon which a court of equity will act in the case of a common partnership) applies with equal force to all companies or societies whose objects are, at the time of their institution, defined, and who are not purposely invested with a power of binding the body by a majority, or any select part of it. Such companies, if there be one dissentient member, cannot embark in undertakings not originally contemplated; nor can they compel that member to retire from the company on receiving his subscribed capital and interest, in order thereby to leave them at liberty to pursue their extended operations. And it is not a sufficient answer to the requisition of the shareholder who calls upon the company to observe the objects for which the company was formed, to urge, that he may dispose of his shares at a price considerably beyond what he gave for them; because, for that very reason, coupled with having the partnership concern carried on according to the contract, he may expect augmented improvement in the value of his shares.* A covenant, in articles of partnership, that none of the partners shall carry on, for their respective private benefit, that branch of commerce in which they are jointly engaged, is not only allowed, but is the constant course.† Indeed, the principles of a court of equity will not permit that parties bound to each other, by express or implied agreement, to promote an undertaking for their common benefit, should any of them engage in another concern, which necessarily gives them an interest directly adverse to their original undertaking." ‡

The interest of partners in the stock of trade is then treated of, and the rules clearly and concisely stated; but as these rules have been considered as settled for some time past, little novelty could be introduced into their discussion.

The author next enters upon the important and numerous classes of cases relating to the acts, by which one partner may bind the firm; and we cannot give a better specimen of Mr. Gow's labours than the portion of this chapter in which he considers the power of one partner to bind the firm by note or bill.

"The signature of one partner, as the maker of a joint promissory note, or the drawer of a bill of exchange in respect of a joint transaction, is therefore binding upon his co-partner §, and equally binding is his acceptance of a bill of exchange ‖; for, the bill being drawn upon them jointly, the acceptance of a single partner, in the names of both, is in legal effect a joint acceptance.¶ So *primâ facie*, the indorsement of a bill or note by one partner, in the name of the

* Natusch v. Irving, Appendix, *post*.

* Id. Ibid.

† Morris v. Coleman, 18 Ves. 438.

‡ Glassington v. Thwaites, 1 Sim. & Stu. 133. And see Burton v. Woolley, 6 Mad. 367.

§ Smith v. Baily, 11 Mod. 401. Lane v. Williams, 2 Vern. 277. S. C. 16 Vin. Abr. 243.

‖ Anon. Styles, 370. Bull, Nisi Prius, 279.

¶ Anon. Holt. 67. Pinkney v. Hall, 1 Salk. 126. S. C. 1 Ld. Raym. 175.

partnership, binds all the firm.* Even where one partner indorses a bill in a different name from that of the actual firm, such an indorsement will be binding, if it be proved that the partner was in the habit of issuing bills into the world indorsed under the former designation: because such evidence would establish an acting by procuration, and there seems to be no doubt but that one partner may so act for the whole firm.† Nor in the case of a note or bill does it form any valid objection to their enforcement against a firm, that the former is made, or the latter accepted, by one partner in his individual name, if it appear from the securities themselves that it was intended they should have a joint operation: in such cases the holder may, at his election, enforce payment either jointly against the firm, or separately against the party whose signature is attached.‡ Thus, a promissory note, by which the maker individually, but on the behalf of himself and his partners, engaged to pay a stipulated sum, has been held to affect the whole firm; and it is not to be considered as a mere personal undertaking, by the individual partner, to pay a debt due from himself and his co-partners.§ In like manner, a bill of exchange drawn upon a firm, but accepted by one in the name of the other partner, is binding upon the firm, because the mere acceptance, as indicating an intention to be bound by the terms of the request in the bill, would be sufficient to give the bill validity, and the effect of that acceptance cannot therefore be controlled by the addition of the name of an individual partner.‖ And although the indorsement of one partner, which cannot be treated as the indorsement of the firm, will not render the firm liable, notwithstanding the money thereby raised be applied to partnership purposes*; yet it is clear that a firm, consisting of several, may carry on business in the name of an individual partner, and then the whole firm will be bound by acts done by him as representing the firm.† Thus, where one partner of a firm in England proceeded to a foreign country for the purpose of establishing a branch concern, to be carried on in his individual name, with strict instructions that the names of the firm should appear as little as possible on paper, and that no greater than a stated sum should at any time be risked on partnership speculations; he, however, against those instructions, entered into risks greatly exceeding that sum, and indorsed bills in the course of such dealings in his own name, the firm in England subsequently sanctioning them, and the transaction being for the benefit of the partnership; it was determined that such indorsements were to be deemed the indorsements of the firm, in the name used by them for the purposes of the foreign business, and that they were liable upon those bills.‡ And it is indisputable, that in every case in which a firm becomes, through the instrumentality of a single member, a party to a negotiable security, and the transaction which occasioned the giving the security was *bonâ fide*, and fairly referable to the partnership concerns, the act of the single partner, in pledging the joint credit, will have a conclusive binding operation upon all the partners collectively. And cases exist in which one partner may enter into a joint engagement in a transaction not relating to the partnership, and it will be binding upon the firm if it have received either their express or implied sanction. In many cases of partnership it is frequently necessary for its salvation, that the private demand of one partner should be satisfied at the moment, as the ruin of the one might affect the other partners; and therefore the firm, to avert such a possible evil, would rather allow the individual partner to liberate himself by dealing with it, than expose themselves to the consequences which might ensue from their non-acquiescence.§ In these cases the joint liability depends upon the degree of evidence adduced to prove the authority, the mere relation of partners not of itself being sufficient to confer upon each the power of binding the firm in separate transactions.‖ The nature of

* Wells v. Masterman, 2 Esp. N. P. C. 731. Swan v. Steele, 7 East, 210. Ridley v. Taylor, 13 East, 175. Where a bill or note is payable to several persons, not in partnership, the right to transfer it is in all collectively, not in any individually; and an indorsement by and in the name of one only will not give the indorsee a right to sue. Carvick v. Vickery, Dougl. 653. n. So, where a bill is drawn on two persons, who are not partners, if it is only accepted by one it must be protested. Holt, 297. Mar. 64. Beawes, pl. 228.

† Williamson v. Johnson, 1 B. & C. 146.

‡ Hall v. Smith, 1 B. & C. 407. See Clerk v. Blackstock, Holt's N. P. C. 474. March v. Ward, Peake's N. P. C. 130. Wilks v. Back, 2 East, 264.

§ Lord Galway v. Matthew, 1 Campb. 403. In Hall v. Smith, 1 B. & C. 497., it was held that a promissory note beginning "I promise to pay," signed by one member of a firm for himself and his partners, was binding upon the party signing as a several note, or as a joint note was binding upon the firm.

‖ Mason v. Rumsey, 1 Campb. 384. Wells v. Masterman, supra. In the case of Thomas v. Clarke, 2 Stark. N. P. C. 451., Lord C. J. *Abbott* held, that a partner who executed a charter-party of affreightment, and in the commencement of it professed to contract for himself and his co-partner, thereby bound the latter, although all the stipulations and obligations in the remaining part of the instrument were made in the name of the said *freighter*.

* *Ex parte* Emly, 1 Rose, 61. Emly v. Lye, 15 East, 7.

† *Ex parte* Bolitho, Buck, 100.

‡ South Carolina Bank v. Case, 8 B. & C. 427. S. C. 2 Man. & Ryl. 459.

§ *Per* Lord *Eldon*, *Ex parte* Bonbonus, 8 Vesey, 580.

‖ *Ex parte* Peele, 6 Vesey, 600. "If a man gives a partnership engagement, in the partnership name, with regard to a transaction not in its nature a partnership transaction, he who seeks the benefit of that engagement must be able to say, that though in its nature not a

the entries in the books, or the appropriation of the money to the partnership, or to a separate account, or the privity and silence of the firm, would be evidence of an authority delegated to the single partner.* Previous authority is not the only criterion by which to determine the joint liability of the partners under such circumstances; subsequent approbation being for this purpose of equal efficacy: for a strong case of subsequent approbation by all the partners raises an inference of their previous positive authority having been given to the particular partner to sign the partnership name to a bill, or to negotiate it, and will subject the partners to liability in a transaction where they would not have been chargeable without such subsequent assent.† In instances of this description, the act of the partner must be ascribed rather to his character of agent than of partner; and, the agency being established, of course the partnership would be as firmly bound by his separate acts, as they would have been had they expressly and personally concurred in them. But where no such agency exists, and a joint security is pledged in a transaction unconnected with the partnership, if it be manifest to the person advancing money upon it that it is sent into circulation upon the separate account of the individual partner, and, consequently, that it is against good faith that he should in such a case pledge the firm, it must be shown that he had authority to bind them; for the law does not imply an authority in individual partners over the joint fund, except in matters which affect the partnership concerns.‡ In the hands of a person aware of, and collusively partaking in the fraud committed upon the partnership by the individual partner pledging the firm in a separate transaction, the joint security would not be available. In such a case it would be the same as if the debtor had pledged the fund of a stranger for his own debt, on his own assertion that he had authority to do so: if he had such authority the pledge would be good; but the creditor would take it at the peril of proving that authority, if it were afterwards denied. The power possessed by one partner of binding his co-partners in joint transactions, without their knowledge or consent, bears in many instances sufficiently hard upon them; but it would be carrying their liability for each other's acts to a most unjust extent, if it were suffered that, in a separate transaction, one partner could pledge the credit of the firm. This subject has frequently fallen under judicial consideration, and the doctrine stated has uniformly received the sanction and support of the different judges before whom it has been questioned. It is indeed indisputably settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void.* Therefore, if a man, who has dealings with one partner only, draws a bill of exchange upon the partnership on account of those dealings, he is guilty of a fraud; and, in his hands, the acceptance made by the partner on the behalf of the firm would be void.† So, where a bill was drawn by one partner, in the joint name, to the order of his separate creditor, it was held that the latter could not recover in an action upon the bill against the firm, notwithstanding that he had not notice of the non-concurrence of the co-partner, and was not apprized that the consideration would be disputed."‡

The power to bind the firm by simple contract, by a guarantee, by deed, by a release, by a receipt, in legal proceedings, by a submission to arbitration, and in bankruptcy, are then severally and ably considered.

Mr Gow next mentions the legal and equitable remedies between partners. It has been thought that a partner cannot file

---

partnership transaction, yet there was some authority beyond the mere circumstance of partnership, to enter into that contract, so as to bind the partnership. *Per* Lord *Eldon*, Id. Ibid.

* *Ex parte* Bonbonus, *supra.*

† Id. Ibid.

‡ *Ex parte* Agace, 2 Cox's Ca. 312. In transactions unconnected with the joint trade, no liability will be entailed upon a dormant partner, where his responsibility was not originally regarded, and the fact of his being a partner was unknown at the time the claim arose. Therefore, where one partner accepted a bill in the name of his firm, but not in a partnership transaction, it was held that an indorsee could not maintain an action on such acceptance against a dormant partner, whose name did not appear, and who was not known to be a partner, nor the bill taken on his credit. Lloyd v. Ashby, 2 Carr. & Pa. N. P. C. 138.

* *Per* Lord *Ellenborough*, Swan v. Steel, 7 East, 210. S. C. 3 Smith, 109.

† Wells v. Masterman, 2 Esp. N. P. C. 731. In *Ex parte* Goulding, in the matter of O'Neil and Martin, bankrupts, before the Vice Chancellor, sittings after Trinity term, 1826, a question arose, whether the joint estate of the bankrupts was liable for a bill accepted by one of them, in the name of the firm, but for his own individual debt, and without the knowledge of his co-partner. The Vice Chancellor, on account of the importance of the question, took time to consider it; and afterwards said, "I am of opinion, that where one partner gives an acceptance in the name of the firm in satisfaction of his own private debt, and without the knowledge of his co-partner, such an acceptance cannot bind the joint estate." MSS. S. C. 2 Glyn & James, 118.

‡ Green v. Deakin, 2 Stark. N. P. C. 347. In Henderson v. Wild, 2 Campb. 561., Lord *Ellenborough* held, that if two persons are in partnership, and a third individual owes them a sum of money on the partnership account, a receipt for this given by one partner upon setting off a private debt due from himself to that third person will be a bar to an action by the partners for the debt due to the partnership. See Skaife v. Jackson, 3 B. & C. 421.

a bill against another for an account, without also praying a dissolution. *Per* Forman *v.* Homfray, 2 *Ves. & Bea.* 329.; and Waters *v.* Taylor, 15 *Ves.* 10. Mr. Gow, however, p. 95., says, that this doctrine has been denied, and cites a contrary decision of Sir John Leach, V. C. in Harrison *v.* Armitage, 4 *Madd.* 143.; and we confess we have always thought the principle a very strange one, as in many cases it would leave the parties entirely without remedy; and in addition to the case mentioned by Mr. Gow, we may also refer to that of Glassington *v.* Thwaites, 1 *Sim. & Stu.* 124. In chapter iii. the legal and equitable remedies for partners against strangers are amply considered, and all the late decisions stated; and in chapter iv. the legal and equitable remedies against partners are discussed. We must find room for a short extract from this chapter.

"Actions of tort may likewise, in some cases, be effectually sustained against partners. Their responsibility in actions of this description may be exemplified by the familiar instances of actions brought against them for driving against carriages or running down ships. In those cases, if the carriage or ship occasioning the injury be the joint property of partners, it is immaterial whether it be under the direction or guidance of one of the partners or of their servant, because the maxim of law is *qui facit per alium facit per se*; and partners, like individuals, are responsible for the negligence of their servants.* And where it appeared that A and B were partners in the business of public carriers, and that by agreement between them A provided horses and drivers for certain stages, and B for the remainder; it was holden, that, notwithstanding this division of the concern between them, they were responsible for the misconduct and negligence of their drivers and servants throughout the whole distance; and that it was not any defence to B that the servant, through whose negligence an injury had been committed, had been hired and was paid by A alone.† So, in an action of trover, it is not necessary that there should be a joint conversion in fact, in order to implicate all the partners; for such a conversion may arise by construction of law. Thus, an assent by some of the partners to a conversion by the others will make them wrong-doers equally with the rest, provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversion: in such a case, the rule of *omnis ratihabitio retrotrahitur et mandato æquiparatur* applies.* And if co-partners are engaged in smuggling, which is a species of tort, on an information filed for the penalty, they are jointly as well as separately liable.† Indeed, in the instance of libels, an anomalous case, a bookseller or the proprietor of a newspaper is answerable for the acts of his agent or co-partner, not only civilly but criminally.‡ But, except in these cases, partners are not generally responsible for the wrongs of each other. If they all join in one trespass or tort, of course they may all be sued, and compelled to make compensation for the injury they have committed; but an action for such a misfeasance would arise from their personal misconduct, and not from the relation of partnership subsisting between them. With regard to matters quite unconnected with the partnership trade or business, there cannot be a doubt but that a joint responsibility would not be incurred for a tort committed by an individual partner. And, in general, acts done in the course of the partnership trade or business, in violation of the law, will only implicate those who are guilty of them. If one of two bankers in partnership should commit usury in discounting bills, or if one of two surgeons in partnership should wantonly ill-treat a patient, the innocent co-partners would not be liable to an action for penalties or damages. But if an attorney be in partnership with another who has not taken out his certificate, and their joint names are put on their papers in causes in their office, it has been ruled that either of them is liable to the penalties imposed§ for practising as an attorney without obtaining a certificate; though it appear that, by a private arrangement, the party sued was to derive no benefit from the suit, in respect of prosecuting which the *qui tam* action for the penalty is brought.‖ The consequence is, and it has accordingly been determined, that two attorneys or proctors cannot be sued together, as for one offence, for practising without a certificate." ¶

In the fifth and last chapter the legal and equitable principles relating to the dissolution of partnerships are given, and the

* Mitchell v. Tarbutt, 5 T. R. 649. Where damages are sought to be recovered against partners for an injury sustained through the negligent conduct of their servant, the proper remedy is an action on the case. Morley v. Gaisford, 2 H. Bl. 442. Hugget v. Montgomery, 2 N. R. 446.; and, if the cause of the mischief be negligence, such an action will lie against all the partners, although one of them be personally present and acting in that which occasions it. But where the injury is inflicted by the wilful act of one of the partners, trespass is the proper form of action against him; and if under the circumstances any action will be against the other partners, case only can be sustained. See Leame v. Bray, 3 East, 593. Ogle v. Barnes, 8 T. R. 188. Rogers v. Imbleton, 2 N. R. 17. Moreton v. Hardern, 4 B. & C. 223.

† Weyland v. Elkins, Holt's N. P. C. 227. S. C. 1 Stark. N. P. C. 272.

* 4 Instit. 317. Com. Dig. Tit. Trespass, C 1. And see Nicoll v. Glennie, 1 Mau. & Selw. 588.

† Attorney-General v. Burges, Bunb. 223. See also Rex v. Manning, Com. Rep. 616.

‡ Rex v. Almon, 5 Burr. 2686. Rex v. Pearce, Peake's N. P. C. 75. Rex v. Topham, 4 T. R. 126. Per *Littledale* J., Rex v. Marsh, 2 Barn. & Cres. 723.

§ See 37 G. 3. c. 90. s. 26.

‖ Edmonson v. Davies, 4 Esp. N. P. C. 14.

¶ Barnard v. Gostling, 1 New Rep. 245. S. C. 2 East, 569.

subject is divided into four sections: 1. The cause of the dissolution of a partnership. 2. The general consequences of a dissolution. 3. The particular consequences of a dissolution by bankruptcy: And, 4. The consequences of a dissolution by death. We shall give a short portion of the last section, with which we must conclude our extracts.

"It seems to be doubtful whether the *good will* of a *commercial trade*, carried on in partnership, *survives*, or forms a portion of the partnership stock. Lord *Rosslyn*, on the one hand, has determined* that in such a case the good will of a trade carried on without articles survives, and is not to be considered partnership stock to which the representatives of a deceased partner have any right. On the other hand, Lord *Eldon* has expressed his doubts of the propriety of that determination, considering it difficult to draw any solid distinction between the lease of the partnership premises, which is clearly a part of the joint stock, and the good will, which consists in the habit of the trade being conducted on those premises.† But whatever doubts may, in this respect, exist as to the good will of a mercantile trade, a very intelligible distinction has been suggested between a commercial and a professional association. Sir *John Leach* has intimated, that where a partnership is formed between professional persons, surgeons for instance, and one dies, it would be difficult to maintain that the other is obliged to give up his business, and sell the connexion for the joint benefit of himself and the estate of his deceased partner. His Honour added, that when such partnerships determine, unless there be stipulations to the contrary, each must be at liberty to continue his own exertions; and where the determination is occasioned by the death of one, the right of the survivor cannot be affected." ‡

We must now take leave of this very excellent work, which we can safely recommend as the best treatise on the important subject of which it treats.

## SUPERIOR COURTS.

### REGULATIONS IN CHANCERY.

The *Lord Chancellor* said that he had made enquiry relative to the attendance in Court of the *Six Clerks*, and found the case to be similar to that of the Masters in Chancery. Their attendance there caused an interruption of their business in another place, where they might be more usefully employed. He should, therefore, for the present, dispense with the attendance of the Six Clerks; and the gentleman then present might leave the Court and communicate the fact to his colleagues.— *Hilary T.* 1831.

### ELECTION.

*Nayler* v. *Wetherall.*—This cause, which was reported in a former number (see *ante*, p. 142.), as to the effect of the covenant made by Thomas Blunt, was again argued on the following point:—The *Vice Chancellor* having decided, that the shares of the personal estate belonging to the children went to Thomas Blunt, as their father and administrator, and were capable of being bequeathed by will; the plaintiff endeavouring to disappoint the will, the question arose, whether he was not put to his election of either taking under the covenant and abandoning his share under the will (he being one of the legatees under it), or to take his share under the will and abandon his rights under the covenant. The *Vice Chancellor* thought, that Thomas Blunt had power to devise the legal estate of his real property, notwithstanding the covenant; and that it passed by his will to the trustees thereof; and that the doctrine of election applied to the plaintiff.—*V. C. H. T.* Jan. 12. 1831.

### NEW TRUSTEE.

*In Re Smith.* This was a petition under the 1 W. 4. c. 60. A trustee appointed under a marriage settlement had become a bankrupt, and had departed beyond the jurisdiction of the Court. The powers to change trustees only applied to the circumstances of the death of the trustees, or their refusal to act. The Master of the Rolls, as the circumstances of the case seemed new, directed a reference to the Master to enquire into their truth, and appoint a new trustee.—*M. R. H. T.* Jan. 21.

### PIRACY.

*Day and another* v. *Binning.*—The *Solicitor General* moved for an injunction to restrain the defendant from selling blacking with labels upon the bottles similar to those used by the plaintiffs. The only variation in the two labels appeared to be, instead of "Manufactured by Day & Martin," which were the words of the plaintiffs' label, the words "Equal to Day and Martin's" were substituted; the words "equal to" being printed in very small letters. The *Vice Chancellor*, having inspected the labels, granted the injunction, observing that it was a palpable imposition.—*V. C. H. T.* Jan. 21.

### AFFIDAVIT TO HOLD TO BAIL.

*Comyn* showed cause against a rule calling on the plaintiff to show cause, why the bail-bond should not be delivered up to be cancelled, on the ground of the abode of the plaintiff being misdescribed in the affidavit of debt. He was there described as of "No. 7. Commercial Road, wool-factor." The affidavit, on which the rule *nisi* had been granted, stated, that a search had been made at that house, but no such person as

* Hammond *v.* Douglas, 5 Ves. 539.

† Crawshay *v.* Collins, 15 Ves. 227. If partners become bankrupts, the good will of their trade passes to their assignees, who may sell it for the benefit of the creditors. Such a sale, however, will not operate to prevent the partners setting up the same trade again, and in the same place. Crutwell *v.* Lye, 17 Ves. 335. S. C. 1 Rose, 123.

‡ Farr *v.* Pearce, 3. Madd. 74.

the plaintiff was resident there. The person residing there was a Mr. Todd, an ironmonger, who had occupied the house for more than "five years." In answer to this affidavit, it was sworn by the plaintiff that he resided at "No. 7. Lucas Place, Commercial Road," which was in one continued line of road with and in the Commercial Road; and that he had received several letters addressed to him "Commercial Road," and not "Lucas Place." This, he contended, was sufficient to satisfy the rule of Court.

*Carrington*, in support of the rule, submitted that the rule of Court * required the true place of abode of the person making the affidavit to be set forth. The address "7. Commercial Road," was not the true place of abode. As to the statement, that Lucas Place was in one line of road in and with the Commercial Road, that was not a sufficient answer. There were several rows of houses in the Regent's Park with different sets of numbers on them; yet it would hardly be contended that "No. 7. Regent's Park" was a sufficient description of a person resident in one of those places.

*Parke* J. I think this rule must be made absolute. The receiving letters addressed "Commercial Road" only, might be in consequence of the plaintiff being known there. If it could be sworn that some persons called this place "Commercial Road" as well as "Lucas Place," that might be something in favour of the plaintiff. But the mere circumstance of its being in the same line of road is no answer, because the Strand is in the same line with Fleet Street. It is not a correct description of the place of abode, and therefore the plaintiff must suffer for it, as it is his mistake. Rule absolute, with costs.—*Anonymous.—H. T.* 1831. *K. B.*

PRACTICE.

*Platt* opposed a rule calling on the plaintiff to show cause why the declaration and notice thereof should not be set aside for irregularity. The ground of the application was, that the declaration was filed, and notice given, before common bail had been filed. The plaintiff, in his affidavit opposing the rule, admitted the irregularity, but stated that the defendant had, since the notice of declaration, applied for time to settle the action. This was a waver of the irregularity.

*Parke* J. There was something to ask time for. It is a question, whether such an application for time was a waver of the irregularity. Asking for time is an admission that the plaintiff is in a situation to go on; but I don't know that it is an admission that the last step was regular.

Rule absolute, with costs. — *Anonymous.— H. T.* 1831. *K. B.*

ATTORNEY'S BILL.

In an action by an attorney against his client for the amount of a bill of costs, it appeared that the plaintiff had omitted to deliver to the defendant a copy of his bill within a month before action brought, as required by 2 G. 2. c. 23. s. 23., and was therefore nonsuited.

*Taddy* Serjt. obtained a rule to show cause why the nonsuit should not be set aside, on the ground that there were three items in the bill upon which the plaintiff was entitled to a verdict, as they did not come within the terms of the statute; namely, one for an advance of 3*l.* to the defendant to pay certain costs, and two charges for merely advising him in certain actions commenced against him by other parties.

*Spankie* Serjt. showed cause against the rule, and contended, that these items were as much within the spirit and meaning of the act as the others. A sum of money advanced by an attorney to his client to pay certain costs in the progress of a cause, came under the same rule as any of the other items in his bill; and the two charges for advice in actions, which were absolutely pending at the time, were also clearly within the words and meaning of the act.

*Taddy* Serjt., and *Jones* Serjt., in support of the rule, submitted, that mere charges for advice, whether given with or without reference to a cause in existence, could not be said, of themselves, to constitute work and labour in a cause in Court, where no other steps were taken within the true construction of the statute; and that the advance of money to the defendant ought to be taken as a common loan, which might have been applied by him to any other purpose as well as to the payment of costs in the cause.

The Court were of opinion, that the two items as to advising the defendant came within the meaning of the statute; and their Lordships all concurred that the item of 3*l.* was to be considered as money paid in the progress of the cause, which was liable to the same rule whether it had been paid by the attorney himself, or given to his clerk for that purpose, or given to the client to be by him paid under the attorney's direction.

*Alderson* J. *dissentiente.*

Rule discharged. — *Taylor, Gent., one, &c.* v. *Smith.—Com. Pl. H. T.* 1831.*

SALVAGE.

The *City of Edinburgh* steam vessel of 450 tons' burden, with 50 passengers and a cargo from Leith to London, in the beginning of January last met with foul weather off Flamborough Head; and, after reaching the Humber on the 12th, she took shelter under a shoal at the mouth of the river. The gale increasing, she was driven from her anchor, and proceeded towards Blakeney, on the coast of Norfolk, but was unable to cross the bar. On the 13th she anchored about three miles from the coast, in nine fathoms' water. Here the circumstances took place which formed the subject of the suit. On the part of the salvors (boatmen in Blakeney, twenty-five in number) it was alleged, that the steam vessel, when

* R. M. 15 Car. 2. Reg. 1. K. B. Tid. Prac. v. i. p. 179. ed. 9.

* The words of the statute are, "fees, charges, or disbursements, at law or in equity." *Vide* the decision in 6 B. & C. 86., and *Prothero* v. *Thomas*, 6 Taun. 196. *Mowbray, one, &c.* v. *Fleming*, 11 East, 285. *Thwaites, one, &c.* v. *Mackerson & another*, 3 C. & P. 341. Tid. Pr. v. i. p. 528, 329. Supp. p. 86.

first seen, was in great distress, driving towards a lee shore, the wind E.N.E.; that she made signals of distress; and the salvors, after endeavouring in vain to get out the life-boat, kept watch all night on the deck; that the steamer manifested an intention of running on the lee shore, which would have been certain destruction, but the salvors, by waving a jacket, warned her off; that the weather continued extremely boisterous after the vessel had got off Blakeney bar, the salvors still endeavouring to get to her assistance, and the steamer still showing signals of distress, night and day; that on the 15th they succeeded in getting to her, and found that a boat from Wells had reached her; that the mate of the *City of Edinburgh* had admitted that her engine was ruined, that she was strained to pieces, and that her seams were so open that you might see the green sea through the engine room; that the master told the salvors the vessel and cargo were worth 33,000*l.*, and that they would be well rewarded for their trouble; that they exerted themselves at the risk of their lives, and got her into Blakeney harbour that day, and continued on board till the 17th, when the storm had abated; that the master (Fraser) refused then to make any remuneration beyond the sum of 10*l.* for pilotage, which had since been increased to a tender of 15*l.*

On the part of the owners of the ship and cargo it was alleged, in the first place, that when they were approaching Blakeney the wind was not E.N.E., but E. by S., which did not blow direct upon the land; and further, that upon nearing Blakeney, the flag was hoisted on the church, to denote that there was sufficient water, but being unable to see the buoy, owing to a sudden fall of snow, the master was obliged to haul off, and remained all the ensuing day (the 13th) within three miles of the shore; that no signal of distress had ever been shown; that the only colour shown was the union jack at the foretop-mast head, the usual signal for a pilot, which in the evening (as was customary) was exchanged for a light; that on that and the following day no pilot came out (though a boat might have come with the greatest safety), notwithstanding an additional (customary) signal shown in the mizen rigging; that at daylight on the 15th, the vessel having rode out the gale during the night, a boat from Wells came to the vessel, and tendered aid; that the master was warned of the extortionate character of the Blakeney men; that the only engagement made when the Blakeney boat came up (which claimed the right of piloting) was for piloting the steamer into Blakeney harbour; that when in the harbour the master was informed, that during the gale some sailors had volunteered to man the life-boat, to go to the assistance of the vessel, but the Blakeney men had taken it from the sailors, saying it would not pay them for their trouble, but, if the storm increased, the vessel would go on shore, and then they should get well paid; that the master never stated the value of the ship and cargo was 33,000*l.*, or any other amount; that it was in fact only 13,000*l.*; and he denied that he had promised any remuneration beyond the pilotage.

Dr. *Adams*, for the salvors, contended that a fair claim for salvage was laid in the whole of the conduct of the salvors, from the time of waving the jacket, which saved the vessel from destruction, to the salvors going off, at the imminent peril of their lives, as soon as it was practicable, and bringing the vessel into Blakeney harbour. He contended, that it was not the duty of a pilot, for mere pilotage, to risk his life by going in bad weather to a vessel which wanted a pilot. Attempts had been made to put off the life-boat, which was found to be impracticable; and with respect to the extraordinary statement alleged on hearsay, that the salvors had prevented others from going to the vessel's relief, he would only say, that if these men had so misconducted themselves, they should have been proceeded against before the local magistrates, under an act of parliament (57 G. 3. c. 70.) for improving Blakeney harbour, and which inflicted penalties on pilots refusing to go out. He contended that the charge should have been differently made; and that it was only set up to detract from the merit of the service, and to injure the present benefit and the future prospects of the men by unfounded and cruel allegations.

The *King's Advocate* (with whom was Dr. *Phillimore*) said, that in a claim for salvage the first merit was promptness in rendering service, and contempt of danger; but he looked in vain for one circumstance to show such merit in this case. The utmost service was one of pilotage. As to the assertions respecting the state of the vessel and its open seams, it was strange that she had actually undergone no caulking since, and had yet performed thirteen voyages. Giving to the salvors the whole benefit of their plea, there had been no salvage service rendered. But when the evidence of the owners was examined, the case assumed a character of importance to the interests of navigation, which the Court was bound to protect against extortionate demands of this nature.

Sir *C. Robinson* proposed to the two Trinity Masters by whom he was assisted the following questions:—First, whether, regard being had to the state of the wind and weather on the 15th and 14th of January, it was in the power of the salvors to go off to the vessel as pilots, and bring her into the harbour; secondly, whether their services on the 15th were so enhanced by the danger as to establish a claim to a reward, in addition to their pilotage, on that account.

The two Gentlemen declared their opinion to be, that, allowing there was difficulty and danger in getting off on the 13th and 14th, there had been a want of exertion on the part of the salvors; and that they had made no fair trial, which it was their duty to make, as pilots; and that there was no danger whatever on the 15th; and that all the service rendered that day was simple pilotage, the weather being moderate, and the wind fair for the harbour.

Sir *C. Robinson* declared that such was his opinion; and he therefore pronounced against the claim for remuneration. With regard to the charge against the salvors, of refusing to go out, in expectation of reaping an advantage from the expected augmented peril of the vessel, he ob-

served, that the charge ought to have been more specific, and brought in a different form. As to the costs, he was not, under all the circumstances, disposed to give them against the salvors. He could not by any means extenuate their conduct. It was wrong, it was foolish; but it was the way in which persons in their situation were too apt to act, and he could not put such interpretation upon it as to say that it was malicious. On the other hand, the master's conduct had been negligent, to say the least of it, in not bringing the charge in a more specific shape, and not making any complaint upon the subject in his protest. By giving costs against the salvors, he should throw upon these poor people a burden greater than their pilotage. He should pronounce for the tender, and decree all the salvors' expenses. — *Admiralty Court, H. T.* 1831.

## MISCELLANEA.

### VALUE OF A DOCTOR'S EVIDENCE.

It is, perhaps, not generally known, that the evidence of a physician is, in some cases, twice as good as any other person; as, although it is settled that the declarations of deceased servants and acquaintances, however intimate, are not admissible in questions of pedigree, *Johnson* v. *Lawson and another*, S. C. 2 Bing. 86., 9 Moore, 183., yet the mere conversation of a deceased doctor with a deceased barrister, although related by the doctor to a third person, is good evidence! Thus, when the question was, whether a barrister or a packer was heir to an estate, and for the packer a witness was called to give evidence of what he had heard a deceased physician of the packer say, as to declarations made by the barrister, who was also dead, the evidence was admitted; viz. that the physician had said that he had gone to his chambers and asked him whether he had *any relations*, to which he answered that he *believed not*, and that if he had, they must be very distant. M. S. E. T. 1776, 9 Moo. 187.

The answer of the barrister to this Paul Pry of a doctor reminds us of the conversation between Lord Thurlow and the officer of the Herald's College. When Lord Thurlow's patent of peerage was registered by the herald, he begged to know the name of his Lordship's mother? The reply was delivered in a voice of thunder, — "I cannot tell!"

### A JUDGE'S FEAST ON TAKING HIS SEAT.

"The days of chivalry are over!" A judge is now sworn in as quietly as a special constable! No pomp, no processions, no banquets are now to be seen.

Our forefathers managed these things differently. How interesting are these little descriptions in our old reporters! Little *oases* in the black-letter desert! Here is one of them, for example: — "Sir John Finch," having been appointed Chief Justice of the Common Pleas, "came unto the Chancery barre, where, after a speech made by the Lord Coventry, Keeper of the Great Seal, and his answer thereunto, was sworn serjeant at law. And upon Monday (being the day of essoins of *Quindenæ Mich.*) appeared at the Common Bench barre, clad and attired in his party-coloured robes and habilaments of a serjeant at law, and counted upon a writ of right *de præcipe in capite* brought by the said Queen (Elizabeth) against Henry Earl of Holland, Chief Justice in Eyre of all the King's forests, chases, parks, and warrens *citra Trent;* and steward of all the Queen's courts, &c. And the said Sir John Finch gave rings. *Quorum inscriptio fuit, rosæ et lilia dant purpuram, and kept his feast.* And upon the Saturday following, arrayed in his judge's robes, and accompanied by the Earls of Dorset, Holland, Newport, and forty other of nobles, knights, and esquires, (the Society of Gray's Inne, and Inns of Chancery, and officers of the Court attending him,) was so brought into the said Court." — *Cro. Car.* 575.

### ANCIENT LEGAL COSTUME.

In the thirty-second year of Henry VIII. an order was made in the Inner Temple, that the gentlemen of that company should reform themselves in their cut or disguised apparel, and not wear *long beards;* and that the treasurer of that Court should confer, with the other treasurers of court, for an uniform reformation, and to know the Justices' opinion therein. In Lincoln's Inn, by an order made the twenty-third of Henry VIII. none were to wear cut or pansied hosen or breeches, or pansied doublet, on pain of expulsion; and all persons were to be put out of commons during the time they wore *beards.*

In the reign of Philip and Mary the grievance of long beards was not removed. An order was made in the Inner Temple, that no fellow of that house should wear his beard above *three* weeks' growth, upon pain of forfeiting twenty shillings. In the Middle Temple an order was made in the fourth and fifth of Philip and Mary, that none of that Society should wear great breeches in their hose, after the Dutch, Spanish, or Almain (German) fashion, or lawn upon their caps, or cut doublets, on pain of forfeiting three shillings and four-pence; and for the second offence the offender to be expelled. In the first and second of Philip and Mary a gentleman of Lincoln's Inn was fined five groats for going in his study gown into Cheapside on a Sunday, about ten o'clock in the forenoon." — *Brayley's Londiniana.*

# The Legal Observer.

VOL. I. SATURDAY, FEBRUARY 5. 1831. No. XIV.

"——— Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

## JUDICIAL CHARACTERS.—No. II.

### THE EARL OF ELDON.

WE now return* to the consideration of the character of Lord Eldon. In the first part of this article we have been anxious to lay before our readers his habits and manners in court. We shall now address our attention to his judgments. He commenced them generally according to the usual custom, by stating the facts of the case; but in doing this he showed that the minutest details had not escaped him. He would then advert to the authorities either directly relating to the point in dispute or having some remote bearing upon it; and as well to those cited in the argument as those remembered or discovered by himself; and in doing this he was indefatigable in bringing to light every decision which could be obtained. He would quote all the reported cases; enter with the utmost nicety into the variations of each report of them, if there were more than one; pass his opinion on the merit of the reporter; and then, taking all the circumstances into consideration, decide upon the precise weight to be attached to each case. His judgments in this respect are highly valuable: they are also extremely curious as legal criticisms; and are useful and interesting for many reasons.

Lord Eldon, however, was not satisfied with the mere printed reports. He was able frequently to bring forward manuscript cases and notes of cases relating to the point to be decided. He never spared any amount of trouble in this respect. He was never satisfied until he had the most ample materials for making up his mind on the subject which he was to decide.

Having thus entirely exhausted and deliberately considered all the facts of the case, and stated all the law on the point down to the period of the judgment being pronounced, he would then apply his mind to the decision. This of course was the great struggle. The former part of his judgment might possibly have been worked up by dint of sheer plodding, industry, and capability of mastering details; but to apply correctly the existing law to the facts of the case, and to draw the right distinction, this was the trying point, — it was here that the Chancellor was to be displayed. The plan which Lord Eldon almost invariably selected in giving judgment is quite peculiar. He was never satisfied by taking his first impression. He would view the case in all its bearings; he would approach it in all directions; he would proceed step by step; he would examine all its remotest bearings, and enquire into its most extended effects. In doing this his ingenuity and forethought were wonderful. He seemed to draw from an exhaustless store of legal research. He was able, without any apparent effort, to present the subject in a point of view perfectly novel. He explained all the minutest distinctions of the subject. Difficulties unthought of by others, the potency of which was immediately admitted, were suggested by him. He would state the rule attempted to be established, and then show how utterly inapplicable it was to meet the circumstances of the particular case, or to do justice to all parties. The trite line "exhausted worlds and then imagined new" may be applied with perfect truth to Lord Eldon's judgments. They are entirely *sui generis*, and will probably remain so; for we shall hardly ever see a man so extraordinary in the same situation. He is the last of that long line of black-letter lawyers whose whole lives were devoted to the acquirement of the knowledge of their profession; who were perfect masters of all the existing law, and were satisfied with this extent of reputation. The times have now altered; the reasons for the study and labour formerly

* See ante, p. 195.

required do not perhaps exist; division of labour is now the principle; but we repeat that Lord Eldon is the last of the line: with him depart the glories of the Cokes and Hardwickes.

The most conspicuous merit of Eldon's judgments is their direct application to the particular circumstances of the case. Few decisions ever gave so much satisfaction to the parties as his Lordship's. This has never been denied. The majority of his judgments, — and we think this even a greater advantage, — have also been decided on some great principle of equity, or have themselves established some great and leading principle. There are numerous and splendid instances of this in Lord Eldon's judgments. It is our duty, however, to state that a considerable number of his decisions are open to one great objection; and it is in fact the only objection which can be urged against them. They are sometimes decided on grounds which are too subtle and insignificant. They sometimes throw very considerable doubt on the law which they attempt to decide, so that it is very difficult to draw a distinct or precise rule from them. Lord Eldon, in applying his mind to the decision of a case, was frequently dissatisfied with the law which he found to be established: he would express his dissatisfaction very strongly in his judgment; but finally decide in favour of the established rule, on some particular and special ground. This practice frequently left the law thus brought before him in a very unsettled state. It was the first blow struck at the recognised rule; and it could not be known when the second would be given. Succeeding judges might or might not follow up the attack. This is found often to be very embarrassing in practice. The rule, if bad, should have been distinctly overturned; and if prior cases rendered this impossible, this should have been distinctly stated. But Lord Eldon sometimes attacked a well recognised principle *totis viribus;* showed how false it was on principle; criticised and weakened the effect of the cases deciding or favouring it; and finally, on the special circumstances of the case, *decided in favour of the established rule.* He was fond also of going out of the points which the individual case was to decide, and alluding to others; and the objection which we have made to his judgments applies equally to this habit of adverting to other cases and rules. He never actually overturned them, but frequently expressed a doubt of their propriety which has been often found afterwards to perplex the judge and the practical man.

This, however, is our only objection to the judgments of Lord Eldon. They are now the great land-marks of equitable principles; they are entitled as a whole to the highest respect and attention; and we look upon them as some of the proudest monuments of legal learning.

We had at first intended to give considerable extracts from them. We think, however, on consideration, that this would not be attended with much advantage, and would occupy a space which can be ill afforded at this interesting period of the year. We shall therefore at any rate defer this, contenting ourselves with two extracts only which in fact are but imperfect specimens of his style, but have been selected from the circumstance of their being detached from any detailed statement either of fact or law. The first case we shall notice is that of Priestley v. Lamb, 6 *Ves.* 420., in which the circumstances are as follow: —

"Ann Lamb, entitled to a fortune of between 2000*l.* and 3000*l.*, was placed by her uncles, living in Lincolnshire, at a boarding school at Camberwell, kept by three sisters. In January, 1801, when she was about the age of seventeen, Timothy Priestley, the brother of the governesses, and employed there in the capacity of a writing master, being a widower, paid his addresses to her; and in February they were married; Ann Lamb being a ward of court. The Lord Chancellor said, 'I cannot, consistently with my ideas of justice, call upon any of the parties now present for any explanation. Upon the circumstances disclosed, it is just to say, I hold in such abhorrence the robbery that has been committed by this man of the fortune of this young lady, that I will not believe upon his affidavit the account of what passed between him and the clerk of St. Andrew's. If she did go from the school to this residence, it must have been an evasive residence. It could not have been more than a week. With respect to Eliz. Priestley, it would not be out of the practice of the Court to commit her for the contempt. As to the other sisters, it is a miserable explanation of their conduct to say only that they did not know of the fact of the marriage. It will rest with them to explain further, or not, whether they knew of the treaty. By the affidavit of the clerk of the parish of Lambeth, it is disclosed that they conceive in that parish that they do their duty to the public, and to individuals whom they are to marry, never making any enquiry as to the residence of the parties. In the canon law, which binds the clergy of this country, from 1328 to 1603 it is laid down that it is highly criminal to celebrate marriage without a due publication of banns, which must be interpreted a publication of banns by persons having, to the best of their power, informed themselves that they publish banns between persons resident in the parish; and very heavy penalties are by that law inflicted upon clergymen celebrating marriage without licence, or a due publication of banns. It does

not rest here; for, by the statute law, it would be very difficult for the clergyman to protect himself against express penalties by more than one act. Then the Marriage Act expressly provides (26 G. 2. c. 33. s. 2.), that no parson, vicar, minister, or curate shall be obliged to publish banns between any persons, unless they shall, seven days at least before the time required for the first publication, deliver to such parson, &c. a notice in writing of their true christian and surnames, and the house or houses of their respective abodes within such parish, &c., and of the time during which they have dwelt in such house or houses respectively. A subsequent clause (sect. 8,) makes it felony in a clergyman to celebrate marriage without license, or publication of banns. I do not mean to intimate that a clergyman, believing there was a residence, would be guilty within the clause; but upon the principles of the common law, as well as the statute law, laying penalties upon marriage without license or a due publication of banns, though such a fact should not be within the meaning of that clause, it has the character of an offence within the law of this country. What other sense can be given to the 10th section of the act, which, looking at the person ruined, as this girl is, enacts that after there has been a marriage *de facto*, with publication of banns, no evidence shall be given to disprove the fact of the residence, in any suit in which the validity of marriage comes in question? But for all other purposes it may be the subject of enquiry, and the law of the country would reach it by a criminal information. It is a more difficult question, whether it can be called a conspiracy. From what I have seen in this court, alluding to the cases in which Lord Thurlow and Lord Rosslyn ordered the attendance of the clergymen, I know that this subject has been carried on with a negligence and carelessness which draws in gentlemen of good intentions; and I feel that it may be very difficult in this great town, with all possible diligence, to execute this duty as effectually as the law seems to require that they should execute it; but where a case has occurred in which it is clear that if any one of the parties had done what the law required from all of them this marriage could not have taken place, I must say it amounted to a criminality which I hope will not occur in future. This is so base and wicked a transaction, that treating it merely as a contempt will not satisfy the ends of justice. Following the case upon which a marriage was had upon a license unduly obtained, I will have the point examined for the sake of the public, whether obtaining a marriage without a due publication of banns is not an offence at common law.' "

We shall next give a part of his Lordship's celebrated judgment in the case of Lord St. John v. Lady St. John, 11 *Ves.* 526., in which the validity of a separation-deed between man and wife was one of the points discussed. This case amongst others bears out the objection we have made to some of his judgments. It is, however, a very forcible piece of reasoning.

" The question," he said, " furnished by a case of this sort, is one of the most important to the public interest, that can fall under discussion in a court of justice. When I see such *dicta* as occurs in the case of the King v. Mead, 1 *Burr.* 542., falling from great men, and establishing a course of decision that can be demonstrated to stand upon no principle consistent with the law of the land, I feel great difficulty in deciding upon such authority. Considering the consequences, and the late cases, I am now authorised to say, no attention is to be paid to the dicta, that after a deed of separation executed, the wife becomes, to all intents and purposes, a *feme sole*. How does she get into that situation? She cannot execute any deed. She has not the power of contracting. The first consideration, therefore, independent of all principles of policy, is, how does that become the contract of the wife? 2dly, If the husband can enable her to do that, does she become, to all intents and purposes, a *feme sole?* Can she be a witness against her husband? Can she be guilty of felony in his presence? Twenty-five years ago I could have asked with confidence, could an action be maintained against her? and I can now say there is no principle for that proposition; which, however, prevailed throughout a long course of decisions, founded by dictum, followed by dictum: but when it became necessary to state the principle, it fell; and all the judges agreed, that it was impossible to maintain an action against her as a *feme sole*.

" Independent of the effect of the contract of marriage itself, the rule upon the policy of the law is, that the contract should be indissoluble, even by the sentence of the law: to a certain extent the legislature thinking it for the interest of the community that it should not be dissolved, except by the legislature; upon the principle, probably, that people should understand that they should not enter into these fluctuating contracts; and, after that sacred contract, they should feel it their mutual interest to mend their tempers. If such a contract as is contained in the second of these instruments, an engagement under the hand of the husband, that his wife and children shall be free from all control by him, that she shall dwell in his house as long as she pleases, and take herself away when she pleases, could not be infused into a marriage settlement, (and it is to be observed, that before marriage she has more capacity to contract than afterwards,) how can it be the subject of subsequent stipulation? The consequence would be constant misery. Then how is it as to the children? The father has control over them by the law; as the law imposes upon him, with reference to the public welfare, most important duties as to them. If the husband can contract with his wife, who cannot by law contract with him (and in this instance the contract as to the children is between the husband and wife only), it deserves great consideration before a court of law should by habeas corpus upon a unilateral covenant, as the Scotch call it, take from him the custody and control of his children, thrown upon him by the law, not for his gratification, but on account of his duties, and place them against his will in the hands of his wife.

"Then as to the husband, is he, according to the policy of the law, capable of making such a contract? As to the case of Guth v. Guth, 3 *Bro. C. C.* 614., I feel with Lord Rosslyn all his doubts upon that case (Legard v. Johnson, 3 *Ves.* 352.); which, notwithstanding Lord Rodney v. Chambers, 2 *East*, 283., is the only instance in which the Court did enforce the deed. The question has never been put upon the contract of the husband and wife. The Court has always put it upon the contract of the husband and trustee; from the covenant of the trustee to indemnify the husband against her debts; the existence of which covenant ought to have reminded the Court, that those who framed these instruments had no idea that the wife herself was bound. In that way of considering it, the question occurs, what was to be done if the husband had sought to get back his wife by force; that is, by force of his marital right; which, according to King v. Mead, 1 *Burr.* 542., would be an indictable offence; but that I desire may not be understood as being universally acceded to, until it shall be determined upon a special verdict. Consider the consequences. The contract of marriage cannot be affected by any contract between the parties. It is admitted every where, that by the known law, founded upon policy, for the sake of keeping together individual families, constituting the great family of the public, there shall be no separation *a mensa et thoro*, except *propter sævitiam aut adulterium*; and I believe they held, with Mr. Justice Buller, in Fletcher v. Fletcher, 3 *Bro. C. C.* 619. n., that even where a separation is for such cause, if once they come together again, there is a complete end of it; and that can never again be made a cause of complaint for the same purpose. The Ecclesiastical Court will not read these deeds, but determine whether there has been *sævitia aut adulterium*, and if there has not, in the opinion of the judge, he is not only prohibited from agreeing that they shall separate, but he is by the law compelled to oblige them by sentence to reside together. The state of the law would be strange, if the trustees may come to this Court, saying, the Court has no jurisdiction to try the conduct or misconduct of the husband and wife for this purpose; the law has not permitted them to contract for separation; but the trustee has covenanted to indemnify the husband against the debts of the wife; that the inducement to do that, something like a consideration was the hope that the wife would be permitted by the husband not to perform the duties of the most sacred relation in which she had placed herself; that their object upon entering into that covenant would be disappointed; and therefore desiring the Court not specifically to perform the covenant, but to compel the husband to permit his wife to live separate. In Guth v. Guth (*ubi sup.*) that was done; as it was the deed not of the wife but of the husband. But suppose the wife was suing for the restitution of conjugal rights, saying that it was another deed; but if it was they could not look at it; what a strange state of circumstances, if the husband, suing in an Ecclesiastical Court, the trustees could come to this Court to compel him to give up his rights; but if the wife sues, the same equity fails; for it is impossible to say the wife is bound in any degree by a deed of this sort. Independent therefore of all difficulty on the policy of the law, there is difficulty upon the remedies to be given in the different courts. It is very difficult upon true principles, with respect to the policy of the law, to maintain the dicta upon this subject. No case has gone to this extent; that the husband may enter into a contract not to separate, on the grounds of differences existing at the moment, but determining that it is fit at that moment to live together; to leave it altogether to the discretion of the wife to say whether that cohabitation and performance of duty to the children by their keeping together is to continue a month or six weeks, or that either shall regulate how long they shall continue to live together, upon the principle that party shall think proper. If that can be so, I agree with Mr. Romilly, there is no reason why it should not be in the marriage settlement. But we are running counter to the law of the Ecclesiastical Court indeed. If it is the law of that Court, separating for adultery or cruelty, that by returning the past offence is pardoned; and we say that under such circumstances it is competent to a husband and a father, upon whom the law has imposed duties, with regard to the wife, and sacred and affecting duties, with reference to the public, as to the children, to stipulate with his wife, though she cannot contract to bind herself for sixpence, even the trustees, not parties, that whenever she chooses, she shall have no duties imposed upon her; and he shall be a husband and a father, freed from those duties which the law throws upon him. It is impossible for the Court to maintain such a contract. It is said, this is checked by the trustees. How is it checked? If it is good as a contract, it is enough to say upon the contract there is this right; and the Court has nothing to say to the acquiescence of the trustees. But is the judge of the Ecclesiastical Court to say, though there is no allegation of adultery or cruelty, the trustees have determined that these persons are to separate? He can look at this act as nothing, and must compel the parties to reside together. Then are they to say here, I have no jurisdiction as to adultery or cruelty; but upon the certificate of trustees it is fit that the contract of marriage should be dissolved? It is impossible specifically to perform such an agent. If this were *res integra*, untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit in this Court. But if *dicta* have followed *dicta*, or decision have followed decision, to the extent of settling the law, *I cannot, upon any doubt of mine, as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords, than that the law should remain in this state, upon a point connected with the very well-being of society.*"

We must now close this very imperfect sketch of a man for whom we have the

highest veneration as a lawyer. There are few judges who have merited or who have obtained more affection and respect from the bar and all classes of the profession than the noble and learned lord. Z. Z.

## RECENT STATUTES.

### *Analysis of An Act, entitled "An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estate."*

[1 Gul. 4. c. 47. Royal Assent, 16th July, 1830.]

THIS Act not only consolidates the existing laws on the subject, but effects some important alterations. The following are the principal novelties: — A devisee is expressly made liable to an action of covenant. An action or suit may be maintained against the devisee of the devisee. Where there is no heir at law, actions may be maintained against the devisee alone; and the difficulties arising from infancy and limited interests are removed by providing that the parol shall not demur by or against infants, and that a conveyance made by an infant or tenant for life, under the direction of a court of equity, shall be valid and complete.

Some valuable remarks upon the act communicated by a correspondent will be inserted in an early number.

Sect. 1. Recites the 3 & 4 W. & M. c. 14., entitled "An Act for the Relief of Creditors against fraudulent Devises," made perpetual by 6 & 7 W. 3.; an act of the Parliament of *Ireland*, 4 Anne, c. 5., entitled as above; and the 47 G. 3. c. 74., entitled "An Act for more effectually securing the Payment of Debts of Traders;" all which are repealed except as regards the estates of persons who died before the passing of this act.

Sect. 2. Enacts, that all wills and testamentary limitations, dispositions, or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements, or hereditaments; or any rent, profit, term, or charge, out of the same, whereof any person or persons at the time of his, her, or their decease, shall be seised in fee-simple, in possession, reversion, or remainder, or have power to dispose of the same by his, her, or their last wills or testaments, shall be deemed or taken, only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators, and assigns, and every of them, with whom the person or persons making any such wills or testaments, limitations, dispositions, or appointments, shall have entered into any bond, covenant, or other specialty, finding his, her, or their heirs, to be fraudulent, and clearly and absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

Sect. 3. Enacts, that every such creditor may have and maintain action, and acts of debt or covenant, upon the said bonds, covenants, and specialties, against the heir and heirs at law of such obligor or obligors, covenanter or covenanters; and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly; and such devisee and devisees shall be liable or chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements by him descended.

Sect. 4. Enacts, that if there be no heir at law, the creditor may have and maintain his action against the devisee or devisees solely. Devisee to be liable for false plea as aforesaid.

Sect. 5. Provides, that where there hath been or shall be any limitation or appointment, devise or disposition, for the payment of any just debt or debts, or in pursuance of any marriage contract, *bonâ fide*, made before such marriage, the same shall be in full force until such debts or portions shall be paid and satisfied.

Sect. 6. Enacts, that any heir at law liable to pay the debts or perform the covenants of his ancestors, in regard of any lands, &c., descended to him, who shall sell, alien, or make over the same before action brought or process sued out against him, shall be answerable in an action of debt or covenant to the value of the said lands, in which cases all creditors shall be preferred, as in actions against executors and administrators; and execution shall be taken out upon any judgment so obtained, to the value of the said land, as if the same were his own proper debt or debts; saving that lands, &c. *bonâ fide* aliened before the action brought shall not be liable to such execution.

Sect. 7. Provides, that where an action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or bill filed; and the plaintiff may reply that he had lands, &c. from his ancestor before the original writ brought or bill filed; and if, upon the issue joined, it be found for the plaintiff, the jury shall enquire of the value of the lands, &c. so descended, and thereupon judgment shall be given and execution awarded; but if judgment be given against the heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be the debt and damage, without any writ to enquire if the lands, &c. so descended.

Sect. 8. Provides, that devisees shall be liable in the same manner as heirs at law, notwithstanding the lands, &c. shall be aliened before action brought.

Sect. 9. Enacts, that the real estate of any person, being at the time of his death a trader within the meaning of the bankrupt laws, which he shall not by his last will have charged with or devised subject to the payment of his debts, and which would be assets for the payment of his debts, due on any specialty, in which the heirs

were bound, shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well by simple contract as on specialty; and that the heir or heirs at law, devisee or devisees, and the devisee or devisees of such first-mentioned devisee or devisees shall be liable to all the same suits in equity at the suit of any creditors, whether by simple contract or in specialty, as they are liable to at the suit of creditors by specialty in which the heirs were bound; but in the administration of assets by courts of equity by virtue of this provision all creditors by specialty, in which the heirs are bound, shall be paid the full amount of their debts before any of the creditors by simple contract or by specialty, in which the heirs are not bound, be paid any part of their demands.

Sect. 10. Enacts, that the parol shall not demur by or against infants.

Sect. 11. Enacts, that courts of equity may direct and compel infants to convey estates decreed to be sold for the payment of debts, of deceased persons to which their heirs or devisees may be liable; and that such conveyance shall be valid and effectual.

Sect. 12. Enacts, that where lands, &c. liable to the payment of debts, shall be devised to any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or vested in some person or persons from whom a conveyance cannot be obtained, the Court may direct the tenant for life or other person having a limited interest, or the first executory devisee, to convey, release, assign, surrender, or otherwise assure, the fee-simple, or other the whole interest, to the purchaser, or in such manner as the Court shall think proper; and every such assurance shall be effectual.

Sect. 13. This act not to repeal or alter an act of the parliament of *Ireland*, 33 G. 1., entitled "An Act for the better securing of the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers."

## HOW A NAME MAY BE CHANGED.

*To the Editor of the Legal Observer.*

SIR,

As the circulation of your journal is not confined to the legal branches of the community, I think I shall at least serve the general reader, by calling his attention to a little point of law, which may be particularly interesting to him. We all know, that by the accident of birth, or by some other capricious circumstance, many persons undergo much mortification and annoyance, from bearing some absurd or unpronounceable (if there be such a word) surname. There are some of these which are sometimes a decided hinderance to the advancement of a man in the world, and were I inclined to do so, it would be easy to relate some whimsical proofs of this; but no doubt the truth of what I assert is well known to most of your readers.

Now, Sir, the purpose of this letter is to point out to this class of persons a remedy for the annoyance, I might almost say misfortune, to which they are subject without any fault of their own. It has sometimes been thought that an act of parliament, or at least a license from the crown, is necessary, in order effectually to change a name. This is a mistake. An act of parliament or license may be necessary in certain cases, where it is distinctly directed by deed or will to be obtained; but in all other cases *a person may change his name at his own pleasure without any expense whatever.* Thus, if a person inherit by birth a particular name, it is quite clear he may change it whenever he pleases. I shall only notice two of the authorities on the point. In the case of Barlow v. Bateman, 3 *P. Will.* 66.; Sir Joseph Jekyll, M. R., says, "Surnames are not of very great antiquity, for in ancient times, the appellations of persons were by their christian names, and the places of their habitations, as Thomas of Dale; viz. the place where he lived.* I am satisfied the usage of passing acts of parliaments, for the taking upon one a surname, is but modern, and that any person may take upon him what surname and as many surnames as he pleases without an act of parliament." The same opinion has been lately expressed by Lord Tenterden in the case of Doe v. Yates, 5 *Barn. & Ald.* 544.: "A name assumed by the voluntary act of a young man," said his Lordship, "at his outset into life, adopted by all who know him, and by which he is constantly called, becomes, for all purposes that occur to my mind, as much and effectually his name as if he had obtained an act of parliament." It is proper to observe that the case of Barlow v. Bateman, 2 *Bro. Parl. Ca.* 272.; although it reversed Sir Joseph Jekyll's decision, does not interfere with this principle, but was decided upon its special circumstances. See Leigh v. Leigh, 15 *Ves.* 100. 111.; 1 *Roper on Legacies*, 725.

It may therefore be laid down, that any person who chooses to change his name may do so; and if he do it when young, so much the more complete will be the alteration.

Under these circumstances, I seriously

* See Camden's Remains, ed. 1637, 141.; 3 B. & A. 552. n. A singular custom exists to this day in Wales amongst the lower orders. If John Thomas have a son named David, he is called David *John*, (and not David *Thomas*,) after the *Christian* name of his father.

suggest to all persons whose surnames are not either to their own liking, or the liking of the world, which is rather fastidious in such matters, that they should change them, which they may do by writing to all their friends and acquaintances, and informing them of their intention, and constantly signing the name which they may think proper to select.

I am, Sir,
Your obedient servant,
And subscriber,
A CHANCERY BARRISTER.

Lincoln's Inn, Feb. 1. 1831.

## REVIEW.

*A Letter to the Right Honourable Lord Tenterden, Lord Chief Justice of the Court of King's Bench, &c. &c. &c., on the Bill for Establishing Courts of Local Jurisdiction.* By William Raines, Esq. of Lincoln's Inn. London, 1830. Saunders and Benning.

WE some time since analysed two pamphlets on the subject of the proposed Local Courts. We shall adopt the same plan with that now before us; giving a brief outline of the arguments adduced, and occasionally introducing the author to speak for himself.

Mr. Raines commences by paying some high compliments to the intellectual power and diversified acquirements of the Lord Chancellor, in the propriety of which every reader will, of course, acquiesce. Of course, also, every one will agree with the writer, in doing justice to the sincerity of his Lordship's conviction of the advantages attending the proposed change; though some, judging from his Lordship's declared opinion on the subject of the Welsh jurisdiction, as well as from the facts adverted to by a correspondent in a former number*, may, perhaps, be disposed to doubt whether "he has *long* had its accomplishment very seriously at heart."

Some observations follow on the ancient Local Courts of the country, and the causes of their disuse; a subject discussed at some length in one of our late numbers.† On the modern *Courts of Requests*, the opinion of Mr. Raines coincides with that of all other sensible and impartial men. He quotes the condemnatory sentence of Blackstone, and adds with great reason, that "it is much to be feared, cases brought before them are too often determined on the side of the hardest swearer, whether right or wrong."*

The Welsh Courts, with the Lord Chancellor's sweeping condemnation of them, come next under review. A comparison is instituted between those abolished courts and the new ones proposed to be established. After showing that judges in the new courts must generally be men much inferior to the deprived Welsh judges, the author adverts to the Lord Chancellor's strong objection to the Welsh Courts, "that the judges never changed their circuits." On this point he says,—

"Could it have been supposed — would any one, without the most undeniable proof, for one moment have given credence to any thing so extraordinary, as that the man who could deliver this opinion on the Welsh system should himself, two short years afterwards, bring forward a measure, the ultimate object of which is to establish, in every county in England, tribunals to take cognizance of, for the most part, precisely the same description of cases, the judges of which are to reside, the whole of their lives, within their jurisdiction, who are to be continually going the circuit of their counties, and are not only to become acquainted with those within them by merely presiding in their courts and receiving the usual civilities of a judge on circuit, but are to add to the intimacy acquired by a continual residence, that consequent on being the private adviser and arbitrator to whom individuals are themselves in person to refer. Was ever scheme more admirably calculated than this, to produce what the Chancellor declares to be the greatest defect of the Welsh system?"

The evils which the Lord Chancellor so ably pointed out in the Welsh Courts, and

* *Vide* a letter signed PAX, p. 170.
† P. 121.

* The following statement has recently appeared in the public papers. "In 1829 there were committed to Whitecross Street prison on process out of the Courts of Requests for debts under 40*s.* 1563 persons, the amount of whose debts were 2071*l.*, and costs 746*l.* To Horsemonger Lane there were committed in the same year 932 persons, whose debts amounted to 1900*l.* and costs to 574*l.*" The average amount of debts in Middlesex is under 1*l.* 6*s.* 6*d.* It is something higher in Southwark, that being a 5*l.* court. But the average of the two is under 1*l.* 11*s.* 10*d.*; and for sums of this average amount were 2495 persons — in a single year — within the county of Middlesex and a very few parishes in Surrey — subjected to the disgrace, the suffering, and the moral contagion of a prison, their families being for the most part thrown upon the parishes for support. In all these cases also, it is to be observed, the evils inflicted upon the defendants were not compensated by any advantage to the plaintiffs. The latter losing not only their debts, but among them 1340*l.* costs. Surely such specimens of the love of litigation and revenge should make the advocates of petty law pause.

which are inherent in their principle, will under the new system not only be inevitable but progressive. The Local Courts of Wales were kept up to a certain point of respectability, by their connection with the English Courts; but when the system of local jurisdiction is universal throughout England and Wales, what will be the consequence? The general degradation of that class of persons from whom the local judges must be chosen. Can any one believe that the English bar will continue to maintain its present high character? Can any one expect that the advocates in a miserable provincial court will rival the men who now defend the rights of their fellow subjects in Westminster Hall? Surely not. The bar will be composed of men inferior to the present race of advocates in talent, in learning, and in high principle. The degradation of the bar must ensure the degradation of the bench. The first set of judges being taken from the bar, as it exists now, will be such as the courts will never possess again. The second set will be inferior to the first, the third to the second, and so on.

"It is when men of rank, and station, and learning, and ability, will no longer enrol themselves as members of the profession, when the practice and the practitioners become such as no gentleman or man of honour or education will have any thing to do with, when the present generation of barristers has passed away, and those immediately preceding the general erection of the local tribunals; then it will be that "*feelings and prejudices*" will begin to have weight; then it will be that fraud, and chicane, and bribery, and corruption, will begin to have place; then it will be, that the enactment which is to bring *home justice to every man's door* will be found to be one of the greatest scourges, one of the most fertile sources of tyranny and oppression that the wit of man could devise."

The Supreme Courts, being reduced to mere courts of appeal, will partake of the universal degeneracy; and the purity and majesty of English law will silently but rapidly disappear. These baneful consequences depend indeed upon the supposition that the people will have sufficient confidence in these courts, to carry their causes to them. This, however, they will not do, unless *compelled*. The courts will consequently produce nothing but EXPENSE — and *patronage*.

With regard to expense, Mr. Raines gives some calculations, very important and convincing, but into which our space will not allow us to enter. We do conceive, however, that in the present circumstances of the country 150,000*l.* or 200,000*l.* a year is too much to spend in playing at courts of justice. Mr. R. suggests that a much smaller sum would ensure a more expeditious decision of causes in a far more satisfactory manner.

"Suppose it to be necessary that cases should be determined more expeditiously than heretofore, but there still remained as great a necessity for them to be determined fairly and well, to the satisfaction of the parties, and the community at large — might not this be better effected by adding two more judges to each of the supreme courts, who might take their turns upon the bench in term time with the five who now sit there, and their turns with them in going the circuits during those two vacations in which the assizes have not hitherto been held? By such a plan you would preserve the same security for the purity, integrity, and learning of our judges, which we now possess, the same rank and superiority at the bar, and the same respectability and trustworthiness by which the members of the other branch of the profession are generally distinguished; the judges would still continue personally unknown to those on whose cases they have to decide, and in their decisions they would still be guided by strict impartiality; the same law would still continue to be dispensed in Cornwall and in Northumberland, in Pembrokeshire and in Norfolk, instead of different rules and different maxims establishing themselves in every different district, according to the opinion or the ignorance of the judge presiding over it."

The Local Judge may try causes *without a jury*. He may also try them *in private*. These are two very extraordinary provisions. But after the cause has been tried and decided — with or without a jury — in public or in private, as it may happen, if either party is dissatisfied — and with such a court and such modes of trial, it is almost certain that one of them *will* be dissatisfied — the matter may be carried by motion before a judge sitting at *Nisi Prius* at the next assize; and after this, either party may bring it before one of the courts of Westminster Hall. Mr. R. asks: —

"What will be the inevitable consequence of this? Why, that almost every case will at last come there. The dissatisfied suitor will always appeal if he can afford it; the rich suitor, whose object is oppression, will always appeal; those who have not confidence in the judge in ordinary (and appeals will promote this) will always appeal; and the only persons who will not, will be the poor suitors, because they cannot appeal.'

Such are the consequences of the liberty of appeal, while to preclude appeal from *such courts*, would be to perpetuate injustice.

The expedition of the new system is thus illustrated: —

"Suppose the Judge's court to be held in May, at the place where he holds four in the

year, and an action is commenced with the intention of trying the cause at the May court, but that such new matter is pleaded as renders it necessary, as directed by the bill*, that the cause should be put down to be heard, not at the then next sittings, but the sittings following, which will be in August: this will, in most counties, carry the cause over the summer assizes. When the cause comes to be heard in August, suppose one of the parties appealing to the Judge of Assize†; this carries it to March or April. Suppose him afterwards appealing from his decision to one of the courts at Westminster,‡ as Easter Term does not begin till the 15th of April, this may carry him to the month of May again, just one year since the time he first commenced. Suppose an action commenced with the intention of being tried at one of the places at which the Judge holds sittings twice a year, to be put off on account of new matter pleaded to the second sittings, suppose in August; this will add six months to the necessary delay from August to the time before it will be determined at Westminster, making one year and four months. Take one commenced at one of the places to which the Judge goes only once a year, and let the second sittings be in the same month, and the time of delay may be one year and ten months."

The cheapness and convenience of the local courts is also curiously exemplified: —

"The Lord Chancellor says, 'the witnesses, almost of necessity, are brought from the same part of the county with the suitor;' but the bill directs that the defendant's residence shall determine the venue§: if then it be true, that the witnesses are brought from the same part of the county with the suitor, is not laying the venue at the residence of the defendant unnecessarily increasing the expense of the plaintiff, with whom generally is the right? * * * Let us suppose a manufacturer of woollen cloths, at Leeds, or of cotton goods, at Manchester, * * * instead of having to proceed to the assize town nearest to his own home, he must, perhaps, travel to the most distant part of the most distant county, with his attorney and witnesses too, because his debtor chooses to withhold his just right; and if he should have several actions, he may have to make the whole circuit of the county. But this is not all the inconvenience and expense: suppose one trial over; the next is in a different part of the county, and the court will not be held there till the beginning of the following month, the suitor, and his attorney, and his witnesses must all go home again, however distant their residence, it cannot be obviated, and they must again set out on their travels, in time for the Judge in ordinary's next court. It is clear too, that the attorney must have an agent in every district where there is an action, and this will add more to the expense, than that occasioned, at present, by passing the business through the hands of the agent in London.

By way of bringing "justice home to every man's door"—

"The bill directs, that where the parties, having first gone to the Judge in ordinary in his court of reconcilement, afterwards proceed by action, that the statements by the parties being reduced to writing by the registrar, a certificate of the substance thereof shall be made, and the matter of the suit carried before a judge in ordinary of some adjoining county." *

The Welsh system is universally admitted to have been bad; but is to be revived and extended under another name. The Scotch practice of trying without a jury is to be brought into England, and the English practice of trying by a jury carried into Scotland. A new species of *reciprocity*.

"Much has been said in favour of the Scotch system; but it appears extremely inconsistent to me for the legislature to endeavour to establish it in England for the purpose of superseding our own juridical system, when at the same time it is endeavouring to substitute ours in Scotland for the purpose of superseding the Scotch: either ours may be bad, or theirs may be bad, or both may be bad; but it is scarcely less anomalous to send ours there, and bring theirs here, than to abolish the office of Judge of Great Session in Wales, and to establish the office of Judge in Ordinary, liable to precisely the same objections as those for which it abolished the former."

The origin of the bill is remarkable. We owe it to the small amount of the verdicts at the Lancaster Spring Assizes in 1826. Mr. Raines says,—

"I contend the fact has nothing to do with the question; and this, I think, cannot be better proved than by giving the Chancellor's own reason for asking the prothonotary to make out the list; he says, 'observing, upon one occasion, at the assizes in the county palatine of Lancaster, that the verdicts were *generally* UNUSUALLY LOW, I asked the prothonotary to make me out a list of the verdicts and the amount of them.' Need more be said on this point? The Chancellor himself has furnished us with his opinion of it as an average; and when that, together with the statement following of verdicts at York, is added to his reason for obtaining the list, I think its value in the argument for the bill will be easily estimated. He says of it, 'This is, perhaps, an extreme case, for in the whole course of my — unfortunately not very short — professional career, I have never heard of one similar to it, and possibly — nay, I dare say it is so — my noble and learned friend (Lord Tenterden), notwithstanding his extensive experience, will be unable to supply a parallel to it.'— I have myself obtained a list of verdicts, in cases tried at York, at the summer assizes, of 1829, the latest I could get, and it presents a very different result, to that produced by the Lord Chancellor.

* Sect. 67. 68. † Sect. 41. ‡ Sect. 47. § Sect. 15.

* Sect. 101.

At those assizes there were 179 cases entered for trial; of these 36 were withdrawn; 8 were made remanets; 2 were indictments; in 22 there were either nonsuits or verdicts for the defendants; in a nominal verdicts were taken, being in debt; 8 others were ejectments; 2 were referred to arbitration, the awards in which I have not been able to obtain, and in the remaining 93 there were verdicts for the plaintiffs.

"The total of these 93 verdicts amounted to the sum of 11,007*l.* 14*s.*, making an average of 118*l.*, and a fraction for each verdict. This, I think, is strong confirmation of the Chancellor's opinion, that his was 'an extreme case,' and that the generality of the verdicts of causes tried at the assizes are not so low as is generally supposed."

Mr. Raines does not omit to notice the improvements effected and proposed in the courts at Westminster, which will take away all pretence of necessity for the establishment of inferior courts; and he pays a deserved tribute to the general excellence of the system under which justice has hitherto been administered in this country, which system it is the object of the proposed measure to subvert.

"The venerable antiquity of our courts of common law and equity, and the universal approbation which their decisions in all ages have received, afford sufficient proof that there are some principles of real and intrinsic worth in their establishment, which render it at least doubtful if their jurisdiction can be materially impaired, without involving consequences of the utmost importance to the community. The wise institutions of our forefathers have been gradually changing and adapting themselves to the varying condition and necessities of the people; but the system yet retains the great leading features of their plan for the due administration of justice. It may be admitted that many errors and disadvantages have been engrafted upon it, and that there is now much which is capable of improvement; but the question is whether that improvement may not be more safely effected by simplifying the details, and removing the defects of the existing system, than by rashly hazarding the experiment which has no support in the habits, and is contrary to the genius of the people."

On the whole this is a valuable pamphlet: it contains some new points, and evinces that the farther the discussion is carried, the more indefensible will the proposed bill appear.

## PLEASANTRIES OF THE LAW REPORTS.

In Mr. Matthews's entertainment called "A Trip to America" he relates that a tall, grave, thin, old person was constantly following him, and asking him with great solemnity, "Pray, Mr. Matthews, what do you think of American fun?" I dare say that the readers of the Legal Observer will think that the connection between fun and the Law Reports is as preposterous, as between this old gentleman and fun in America. I intend, however, to undeceive them on this point: I am a joker by birth, and look upon every thing in the world as capable of affording fun. Life is altogether a joke, and law one of its subdivisions; and the Law Reports, if rightly understood, are, in fact, mere supplements to Joe Miller. I do not care what they are, ancient or modern, Coke or Vesey, Law or Equity, you may extract fun from them all. An apothecary views mankind merely as so many empty medicine bottles, which are to be filled as full as they can hold. Every man's mind is tinged by his occupation; and my occupation being to make jokes, it is of no consequence to me whether I take up Rabelais or the Term Reports. I shall, therefore, from time to time, produce a few samples of fun from the Law Reports. The next, I dare say, will be better than the present, which are not, by any means, the best of the sort. However, I have set down a few of them.

The rules as to the legal measure of abuse which you may give a person may be first mentioned.

It is actionable to call a counsellor "a daffy-down-dilly," 1 Rol. Ab. 55., if there be an averment that the words signify an ambidexter; or to say of an attorney, that "he hath no more law *than Mr. C.'s bull*," Sid. 327., S. C. 2 Keb. 202., even although Mr. C. actually have no bull; for if that be the case, as Keeling C. J. observed, "the scandal is the greater." And it is quite clear that to say that a lawyer has "no more law than a goose," is actionable, Sid. 127.; and the reporter adds a quære, Whether it be not actionable to say a lawyer "hath no more law than the man in the moon!"

So also to say to a man, "You enchanted my bull," Sid. 424., or "Thou art a witch," or that a person "bewitched my husband to death," Cro. Eliz. 312., is clearly actionable. Quære, Whether it be not also actionable to say to or of a young lady, "You enchanted me," or "She enchanted me," or, as the case may be, "She enchanted my brother, my dog," &c., or "She's a bewitching creature," or to put the exact point, "She's quite betwitched poor Tom."

On the other hand, you may say if you please of another, "That he is a great rogue, and deserves to be hanged as well as G. who was hanged at Newgate;" because this is a mere expression of opinion; and perhaps you might think that G. did not deserve hanging. T. Jones, 157. So also you may say of any Mr. Smith, that you know, "Mr. Smith struck his cook on the head with a cleaver, and cleaved his head; the one lay on the one side, and the other on the other;" because it is only to be *inferred* that thereby the cook of Mr. Smith died, and this in the reported case was not averred. Cro. Jac. 181. *A fortiori*, you may say, "Mr. Smith threw his wife into the Thames, and she never came up again;" or "Mr. Smith cut off Tom's head, and walked with it to Worcester;" because this is all inference; and his cook, wife, or Tom, as the case may be, for all that the Court knows, may be still alive.

Wills and testaments are a great source of fun. There is a case in 6 Vesey, p. 194., *Townley*

v. *Bedwell*, in which the Lord Chancellor (Eldon) held that the trust of real and personal estate by will, for the purpose of establishing a Botanical Garden, was void, for a rather singular reason, as it appears in the report, viz. because the testator expressed that "he trusted it would be a public benefit!" The Solicitor-General (Sir William Grant) and Mr. Romilly compared it to the case of a gift of a piece of land for the purpose of erecting monuments of the naval victories of this country. The *Lord Chancellor* said in that case the heir might *pull them down*, and in this he might destroy the garden; but his Lordship thought, upon the expression of the testator, that he trusted *it would be a public benefit*, he might venture to declare it void! The reason was, of course, that it was within the statutes of mortmain. In the case of *Moggridge* v. *Thackwell*, 7 Ves. 38., we are told of a maiden lady of the name of Ann Cam, who desires her trustee to dispose of the residue of the property "in recommending poor clergymen who have large families and good characters," and a reference was made to the Master by Lord Thurlow, to approve of the scheme.

In the case of *Isaac* v. *Gompertz*, cited 7 Ves. 61., Lord Thurlow declared an annuity given for the support and maintenance of the Jewish synagogue in *Magpie Alley*, to be void,—a highly proper decree. A similar fate was awarded to a bequest for the dissemination of *Baxter's Call to the Unconverted*. 7 Ves. 52.

Swinburne, part 4. sect. 6. art. 2., mentions a bequest of a legacy to a person, on condition of his drinking up all the water in the sea; and it was held, that, as this condition *could not be performed*, it was void. The condition *to go to Rome in a day*, which Blackstone mentions in his Commentaries as void, as impossible to be performed, may soon, perhaps, cease to be so, and consequently become good, if rail-roads are introduced upon the Continent.

In 1 Rol. Ab. 45. it appears that in the country, when men passed cattle, it is usual to say, "God bless them!" *otherwise they are taken for witches*. This reminds me of the salutation in Bohemia, where, if you meet a peasant, you pass for a heathen unless you say to him "Gesegnet sey der Herr!"* or, in case he salutes you thus, unless you answer, "In ewigkeit, Amen!" †

I shall soon be able to give a further specimen of this sort of pleasantry.

JEKYLL JUNIOR.

* "Blessed be the Lord!"

† "In eternity, Amen!"

## LIABILITY OF BAIL.

SIR,

IN my former communication I endeavoured to show that *Croft* v. *Johnson*, 5 Taunt. 319., did not warrant the rule for which Mr. Tidd cited that case as an authority, namely, that bail are not discharged by the plaintiff's taking a cognovit of their principal for the payment of the debt by instalments, if the latest instalment is payable within the time in which the plaintiff could have obtained judgment and execution, had he proceeded regularly in the action; and that such a rule had no existence under a judicial sanction, prior to the recent decision in *Roche* v. *Stevenson*. The rule, therefore, being new, is, it seems, a fair subject of discussion; and I propose to consider it, with reference to previous decisions and to recognised principles.

Some persons probably will come prejudiced to this discussion, by the idea that the question is one merely of practice, like the questions whether a declaration ought to be delivered or filed, or a plea to have the signature of counsel; and that if once decided, whichever way, it is best to abide by the decision. Nor is this prejudice undeserving of attention; for were the premises assumed true, I should be of the same opinion. And I will therefore begin by showing that questions relating to bail are not mere questions of usage, but involve general principles; and consequently the law is impaired as a system of jurisprudence, if an erroneous decision on this subject is persisted in. The cases to which I shall have occasion to refer, with this view, will also bear directly on the ultimate question under consideration.

By the practice of the courts, if a defendant becomes bankrupt and obtains his certificate before the bail are fixed, the bail are discharged *; because the certificate discharges the defendant from personal liability to the plaintiff, and consequently puts an end to the right which the bail had of keeping, or rendering the defendant. So, if a defendant succeeds to a peerage †, or becomes a member of the House of Commons ‡, or receives sentence of transportation for felony §, or is sent out of the kingdom under the alien act ‖, or dies ¶, before the bail are fixed, the bail are discharged, because the effect of each of those events is, to deprive the plaintiff either of the right or the power of keeping the defendant, and the bail of that of rendering him. This harmony of decisions in cases so different in their circumstances results from the recognition of the general principle, that bail, in common with other sureties, are discharged by any act which alters either their own rights in relation to their principal, or those of the plaintiff. The converse of two of the above cases, namely, that if it is not until after the bail are fixed that the defendant obtains his certificate **, or dies ††, the bail are not discharged, equally proves the agency of the

* Mannin v. Partridge, 14 East. 598. Johnson v. Lindsay, 1 Barn. & Cres. 247. Harmer v. Hagger, 1 Barn. & Ald. 332.

† Trinder v. Shirley, 1 Doug. 45.

‡ Langridge v. Flood, 1 Tidd's Practice, 152.

§ Wood v. Mitchell, 6 Term R. 247. Sharp v. Sheriff, 7 Term R. 226. Daniel v. Thomson, 15 East, 76. See also Robertson v. Paterson, 7 East, 403.

‖ Merrick v. Vaucher, 6 Term R. 50. Postell v. Williams, 7 Term. R. 517.

¶ Chandler v. Roberts, 1 Doug. 58.

** Cockerill v. Ouston, 1 Burr. 346. Woolly v. Cobbe, *id.* 245.

†† Rawlinson v. Gunston, 6 Term R. 284.

general principle stated; for, after the bail are fixed, an event which merely exempts their principal from a liability to be rendered does not affect them; as, upon being thus fixed, they ceased to have the right to render him.

In like manner, if the plaintiff proves under a commission against the defendant before his bail are fixed, they are discharged*, because proving under the commission is an election to resort to the defendant's estate, in lieu of proceeding against him personally; after which the plaintiff could not take him on a *ca. sa.*, nor, consequently, call on his bail to render him or keep him. In this, as in the other cases referred to, still the same principle prevails, that if the plaintiff loses his right to charge the defendant in custody, the correspondent right of the bail, which is derivative from that of the plaintiff, ceases; and the consequence of the termination of any of their rights is, the termination of their obligation also, or, in other words, their discharge.

Passing by other cases to the same effect, I will now proceed to state the principle which I conceive immediately bears on the rule and decision under consideration. If the plaintiff gives the defendant time, the bail are discharged†, as common sureties are when time is given by the creditor to their principal. This ground of their discharge was stated by *Gibbs* Ch. J.‡ in the following manner:—"The doctrine was first introduced in courts of equity, that if the creditor gives time to the original debtor, the surety is discharged. It was founded on this principle, that every surety has a right to come into a court of equity, and require to be permitted to sue in the name of the original debtor. If the creditor gives time to the original debtor, he thereby prevents the surety from using his name with effect. The courts of law have held, with respect to bail, that the bail are entitled to surrender the principal at any time, whenever the plaintiff himself would not be precluded from taking or proceeding against him. If the creditor gives time to the principal, the creditor cannot during that time take or proceed against him: neither during the same period can the bail, who are therefore discharged." Here, then, is a distinct recognition of the analogy existing between bail and other sureties, as well as of the principle, with an application of it to the case of bail, that any alteration in the rights of the creditor towards his debtor, induces a correspondent alteration in those of the surety; and that the alteration of the rights of the surety discharges him, unless he consented to it. The application of this principle to the case of *Roche* v. *Stevenson* I shall propose to elucidate in some future Number.

1. Inner Temple Lane. W. T.

* Linging v. Comyn, 2 Taunt. 246.

† Willison v. Whitaker, 7 Taunt. 53. Thackray v. Turnor, 1 J. B. Moore, 457.

‡ Melvill v. Glendinning, 7 Taunt. 126.

## TERMS AND RETURNS OF WRITS.

In a note to the above it is stated, p. 172. "The prolongation of Easter Term (under 1 W. 4. c. 70.), in case any of the days between the Thursday before and the Wednesday after Easter-day should have fallen during the term, is repealed."—1 W. 4. c. 3.

By 1 W. 4. c. 3. s. 1. so much of s. 6. of 1 W. 4. c. 70. as relates to the essoign and general return days of the term is repealed, and s. 3. of 1 W. 4. c. 3. enacts, that, in the event of any of the above days falling in Easter term, such days are to be deemed part of the term, although there are to be no sittings in banc on those days. This section is totally silent as to the latter part of s. 6. of 1 W. 4. c. 70., which directs, in the above event, that Easter term shall be prolonged, and the commencement of Trinity term postponed, and its continuance prolonged. The only variation in the two acts is, that the latter directs "that such intervening days are to be deemed part of the term*;" how then can it be said, that the arrangement as to the prolongation of the term is repealed? It certainly would appear, that the prolongation of Easter term, and the postponing the commencement of Trinity term, in the above event, will take place as stated in the latter part of s. 6. of 1 W. 4. c. 70., that part of the section remaining unrepealed by the amended act.

Temple, Jan. 20. 1831. T.

## ADMINISTRATION OF JUSTICE ACTS.

*To the Editor of the Legal Observer.*

Sir,

It has, I believe, hitherto been universally the rule of Parliament, as well as an admitted principle of common sense, that an Act of Parliament amending or repealing a former act, should bear a title, and be arranged and placed in the Statute Book, as of a Chapter or Caput, *subsequent* to the act so amended or repealed.

Had the Legislature this simple rule in view, when it declared that the act of 1 W. 4. c. 3. should amend the Act of 1 W. 4. c. 70.?

I am, Sir,
Your obedient servant,

City, Jan. 18. 1831. G. R. F.

The Act "For the better Administration of Justice" having passed in the last session, which commenced in the reign of the late king, ought to be entitled 11 G. 4. & 1 W. 4. c. 70. The objection of our Correspondent would then be removed.—Ed.

* As the intervening days (beginning on Good Friday and ending with Easter Tuesday) are to be deemed part of the Term, and *as the Term is limited to a certain number of days*, it must surely follow that the contingent prolongation is at an end.—Ed.

## PARLIAMENTARY NOTICES OF IMPROVEMENTS IN THE LAW, &c.

### LORD TENTERDEN'S BILLS.

THE *Arbitration* Bill is appointed to be read a second time in the House of Commons on Tuesday the 15th February.

The *Interpleader* Bill, the *Witnesses' Examination* Bill, and the *Prohibition* and *Mandamus* Bill, will be taken into consideration in committee on Monday the 21st February.

### GENERAL REGISTRY AND LAWS OF REAL PROPERTY.

Mr. Campbell's *Register for Deeds* Bill is to be read a second time on Tuesday the 1st March.

He has also given notices of motion for leave to bring in the following Bills, but no particular day has been fixed:—

1. To Amend the Law respecting *Inheritance* and *Dower*, and to allow Parents to succeed as Heirs to their Children; and collateral Relations to succeed as Heirs to each other, though of the Half-blood.

2. To Amend the Law respecting *Dower* and *Curtesy*.

3. To abolish *Fines* and *Recoveries*, and to substitute other Assurances in lieu thereof.

4. To Amend the Law regarding *Prescription* and *Limitation* of Actions respecting Real Property.

### REFORM IN CHANCERY AND EXCHEQUER.

The motions of Mr. Spence are as follow:—

1. On Thursday 24th February, for a Select Committee to enquire into the several Sums of Money appearing, by the Returns presented to the House in the last Session, to be received in the Offices of the Masters of the High Court of Chancery for the Business transacted there; and to ascertain when and by what Authority the Payment of such Sums of Money, and each of them, was established.

2. After the Easter recess, to resolve as follows:—

That the Records be kept in one place.

That the Practice be simplified, and reduced to a certain System.

The Form and Mode of Process altered.

To facilitate the taking Answers, Pleas, and Affidavits.

For the more effectual taking of Evidence.

To reduce the Expense and Delay of Decrees.

To regulate Proceedings before the Master.

That Officers be appointed to take Accounts.

That the Public Office be abolished.

The Masters, in certain Cases, to sit in public, and to determine Interlocutory Matters.

To abolish Hourly Warrants, Copy Money, unnecessary Recitals in Reports, and to diminish Expense and increase Despatch.

That Officers be appointed to take Accounts, Answers, Evidence, &c. in each County.

That a Broker be appointed.

The Equity Jurisdiction of *Exchequer* to be abolished.

The Chief Baron to be a Judge in Chancery.

That the Practice of both Courts be assimilated.

That a Court of Appeal in Chancery be constituted.

### INNS OF COURT.

Mr. Harvey has given notice of motion for an address to his Majesty, to direct the Commissioners appointed to examine into the state of the law, to enquire forthwith into the powers exercised by the four Inns of Court, to admit or reject persons who claim to become members of such inns, or, being members, claim to be called to the bar.

### PAROCHIAL REGISTRIES.

Mr. Wilks has given notice for a Select Committee, to consider the laws and state of the baptismal and other parochial registries in England and Wales.

### CODE OF LAW.

Mr. O'Connell intends to move for an address to his Majesty, that he may cause measures to be taken to lay before the House a draft or drafts of an all-comprehensive code of law and procedure, either in the entire or in separate parts.

### IRISH BAR.—EXAMINATION OF WITNESSES.

Mr. O'Connell has given notice of a motion, that the practice of examining witnesses out of court by crown counsel in Ireland, is one derogatory to the dignity of the Irish bar, and which may prove highly detrimental to the due administration of justice, and ought to be discontinued.

### PRIVATE BILLS.

The last day for *receiving Petitions* will be Friday, the 25th February.

Private Bills must be *read the first time*, on Monday, 21st March.

The *Reports* of private Bills are to be made by the 9th May.

## MOTIONS IN CHANCERY.

[FROM A CORRESPONDENT.]

THERE has been much discussion during the last week among the counsel in the Court of Chancery, respecting the present practice of the King's counsel and the senior barristers behind the bar, having the privilege of making *all* their motions before the junior barristers can make any. Different modes have been proposed for remedying the alleged grievance, and that which seems the most popular is, that no counsel shall be permitted to make more than two motions consecutively. This will alleviate but not cure the evil; for many junior barristers must wait a long time indeed before it comes to their turn to move. The only effectual and complete cure for it is, that before a notice of motion is served, it shall be entered in a list at the register's office, and each motion be called on for hearing according to its entry; and if a

counsel is not present in support of it when it is called on, or he should choose to postpone it by reason of the absence of counsel who may be instructed to oppose it, then that it should be put at the bottom of the list, and called on in its turn a second time; and if counsel should not then appear in support of it, that it should be struck out of the list. By this arrangement, a suitor would be sure of being heard in his turn, without being obliged to deliver a brief to a King's counsel, in order to obtain an early hearing.

The present mode of entering petitions in causes, bankruptcy and lunacy in lists, and hearing them according to their order therein, shows that the proposed plan is practicable; but there seems great reason to fear that the King's counsel and senior barristers will not consent to give up their present right of pre-audience. Lord *Eldon* attempted something of this kind by an order dated the 7th July, 1824, but the "Sons of Zeruiah" were too strong for him, and the plan was pursued so far only as respected motions of which notices had then been given, and did not extend to future motions.

As far as regards solicitors, nothing can be more inconvenient than the present practice; for it is impossible for them to form the most distant conjecture when a motion will come on to be heard; and the consequence is, that they must be in constant attendance in court from day to day, and are not able to be absent for a moment, lest their particular motion should come on while they are out of court. The plan of allowing each counsel to make two motions a piece does not appear to place solicitors in any better situation, for they have no perfect knowledge of the relative seniority of counsel (at least of those behind the bar); and if they did know this, they could not always be certain that their motion would be one of the two which their respective counsel would make; whereas if a list were made, there would be a much nearer approach to certainty both for suitors, counsel, and solicitors.

## SUPERIOR COURTS.

DEVISE — VENDOR AND PURCHASER — COSTS.

A bill was filed by residuary legatees against the executors and trustees of a will, praying an account of the personal estate received, and that the residue might be ascertained. William Waight, deceased, had (amongst other things) bequeathed the residue of his personal estate to the plaintiffs and to some of the defendants, and by a codicil had devised two copyhold estates to another defendant, Robert Waight, upon condition that he should, within six months after his disease, pay to his executors the sum of 400*l.*, to be divided with the rest of his property; and that another estate should be sold after his decease, as soon as conveniently might be, the refusal of it, at a fair valuation to be made by two indifferent persons, being first given to the said Robert Waight. It further appeared, that the testator had in his lifetime contracted for the purchase of an estate, the title of which he had accepted. The cause now came on, and was twice argued, on the 26th and 28th Jan., on further direction, and the following points arose: — 1st, The Master having reported that one of the copyhold estates devised to the defendant, Robert Waight, was bound by the marriage settlement of the father of the testator, the question was, whether the defendant, Robert Waight, was bound to pay the whole of the 400*l.*, or only a proportional part thereof. 2dly, The Master having reported that the estate which the testator had directed to be valued, had been valued by two valuers, the one appointed by the executor and defendant, Barnes, and the other by the defendant, Robert Waight, the question was, whether the residuary legatees were bound by this valuation, to which they were not parties. 3dly, Whether the defendant, Robert Waight, having been in possession of the estate, was to pay a rent, to be ascertained by the Master, or interest after the rate of 4*l.* per cent. 4thly, The defendant, Robert Waight, being entitled as the heir of the testator to the estate which he had contracted to purchase, and to have the purchase money paid out of the personal estate, the question was, whether he was also entitled to have the expense of the conveyance thereof paid out of the said personal estate, or whether he must pay it. 5thly, The defendant, Robert Waight, having taken a separate report as to the acceptance of the title by the testator, the question was, whether he should pay the costs of that report, or whether the costs should come out of the general fund.

The *Master of the Rolls*, in the course of the argument, gave his opinion to the following effect: — As to the first point, he thought that the defendant, R. Waight, was bound to pay the whole 400*l.*, as it appeared that the testator's bounty to the residuary legatees amounted to that sum; and it could not be inferred from the codicil, that it was not his intention that they should not have it at all events.

As to the second point, he thought the words of the codicil gave the executors a power of sale, and also the power of making a valuation, and that the residuary legatees were bound by the valuation already made. As to the third point, he thought that R. Waight should pay interest at 4*l.* per cent. on the sum at which the estate had been valued. As to the fourth point, he thought that the expenses of the conveyance should fall on the heir, and not on the personal estate of the testator. As to the fifth point, he thought that the bare expense of the separate report, but not of the enquiry, should be paid by the defendant, Robert Waight. — *Waight and others* v. *Barnes and others*, *H. T.* 1831. *M. R.*

LAND-TAX.—LEASE.

Lord *Tenterden* C. J. delivered judgment in the case of Doe d. Bishop of Rochester v. Bridges. In the year 1794, the then Bishop of Rochester granted one of the family of the Earl of Romney a lease for lives of lands belonging to the see. That lease was surrendered in the year 1811 by deed under seal, and in lieu of it a lease of a similar description for other lives was granted. The new lease made no mention of the land-tax redeemed; nor was there any reservation of additional rent in respect of land-tax reserved, pursuant to the land-tax act of the 52 G. 3., which enacts, that when bishops sell a portion of the church lands for the redemption of the land-tax, the existing lessees shall pay an additional rent equivalent to the amount, and that in all future leases the additional payment in respect of land-tax redeemed shall be *expressly* reserved to the bishop. The additional rent was, in fact, paid by the lessee up to the year 1827, when the present bishop succeeded to the see. The defendant then had notice that the bishop would exercise his right of avoiding the lease, as not having been granted in conformity with the provisions of the act of parliament. The present action of ejectment was afterwards brought; and the questions for the opinion of the Court upon the special case, after a trial at the assizes, were — first, whether the lease of 1811 was a valid lease; and if not, then, secondly, whether the lease of 1794 was revived. If the second lease was valid, or if the first lease was revived on the avoidance of the second, in either of these cases, the verdict was to be entered for the defendant; but if not, then the lessor of the plaintiff was to recover. The opinion of the Court,—an opinion which Lord *Tenterden* said their Lordships had formed with some reluctance,—was, that the verdict must be entered for the lessor of the plaintiff. His Lordship, adverting to the act of parliament above alluded to, said that that act had expressly directed, that in all future leases the additional rent payable in respect of land-tax should be reserved *in terms*. It would, perhaps, have been better if the legislature had directed generally that the additional rent should be paid by the lessees, whether reserved in the lease or not; but that was not the mode adopted, and the Court were bound to deal with the act of parliament as they found it. Their Lordships were of opinion, then, that although the lease of 1811 was good as against the incumbent who made it, it was avoidable by his successor. It was true the additional rent had been paid, though not reserved; and it was probable that the lessee would have continued to pay it to the subsequent incumbents, but the payment and acceptance would have been a mere voluntary transaction, and the bishop had a right to avoid the lease if he thought proper. The next question was, whether the lease of 1794 was revived; and the Court were of opinion that it was not. The surrender, which was by deed under seal, was a complete and unconditional surrender of the old lease; and the new lease was made in terms exactly conformable with those of the surrender.—*Doe d. Bishop of Rochester* v. *Bridges*, *K. B. H. T.* 1831.

ARREST OF A CLERGYMAN.

*Peake* Serjt. obtained a rule, calling on the plaintiff and his attorney to show cause why the bail-bond should not be given up to be cancelled, and all subsequent proceedings set aside for irregularity, with costs, on the ground that the defendant, who is a clergyman, had been arrested on Christmas-day, in Baker-street Chapel, Portman-square, just as he was about to celebrate divine service, contrary to the provisions of the 9 *G.* 4. c. 31. s. 23., which makes it a misdemeanor to arrest a clergyman while in the act of celebrating divine service in any church or chapel, or while going to perform or returning from performing the same.

*Wilde* Serjt. showed cause. He read the affidavit of his client's attorney, which stated, that the defendant having kept out of the way for some time to avoid arrest, he directed the sheriff's officer, on the 20th of December, to arrest him going to or returning from the chapel in question, but did not tell him to do so on Christmas-day; but he admitted that he had sent for the officer on Christmas-eve, for the purpose of instructing him to arrest the defendant on his way to or from the chapel on the following morning, but the officer did not come to him until after the arrest had actually taken place. Neither the plaintiff nor his attorney was answerable for the conduct of the officer in making this arrest in the chapel; and that, although the process might be set aside, yet they ought not to be visited with the costs. In fact, it was against the sheriff, if at all, the application ought to have been made.

*Peake* Serjt. insisted that, on the attorney's own showing, he ought to be held answerable for this most indecent proceeding; because he admitted that he had given instructions to the officer on the 20th to arrest the defendant when he went to the chapel, and he did not pretend to say he had made any exception in favour of Christmas-day; and besides, the attorney further admitted, that if the officer had called on him on the 24th, he would have directed him to arrest the defendant either going to or returning from the chapel on Christmas-day.

The *Court* were of opinion that the process ought to be set aside; but as it was not clearly shown that the arrest in the chapel on Christmas-day had taken place by the attorney's directions, three of their Lordships thought (*Park* J. differing from the rest of the Court on the question of costs) that the rule ought to be made absolute without costs.—*Goddard* v. *Harris*, *Court of C. P.*

---

BUSINESS OF THE COURT OF EXCHEQUER.

The *Lord Chief Baron* informed the Bar that the subject of justifying bail at chambers had been duly considered by the Judges; and they were of opinion, that after the present term bail must be justified in Court, and could not be justified at chambers. His Lordship also desired the clerk of the Court to read the following order:—

"It is ordered, that from and after the present term, the sitting day at *Nisi Prius* at Guildhall, in and for the city of London, shall be the 2d day after every term; and that such sitting shall be adjourned until such day as the Court shall then

direct. And further, that on every notice of trial hereafter to be given for the sittings after any term to be holden at the Guildhall, it shall be specified whether the case is intended to be tried on the first day of such sittings, or at the adjournment day; and that in every case in which such notice shall specify that the cause is to be tried at the adjournment day, it shall be sufficient to give such notice eight days before the first day of the sittings after term, if the defendant shall reside above forty miles from the city of London; and four days before the first day, if the defendant shall reside within that distance." —*Excheq. H. T.* 1831.

## MINOR CORRESPONDENCE.

B. A. informs A. B.* that a defendant who is ill in the country must pay a Baron of the Exchequer or a Master in Chancery sundry guineas for attending to take his answer to a bill filed in the Court of Exchequer or Chancery, unless the defendant's abode be fifteen miles from London as respects the Exchequer suit, and 20 miles as respects the chancery suit; in either of which cases the answer may be sworn before any two men of the lowest degree.

The case put by E. G. of an injunction on an attachment for contempt, because an office copy of the bill could not be obtained by reason of the Christmas holidays, shows that there ought not to be any holidays at the Six Clerk's Office, except those which are kept by the Government offices.

L. M.'s supposed case of the necessity of a *private* seal for a commission of bankrupt, and a *journey* into Westmorland at the end of the month of December, if it existed in reality, would be a case of great hardship; and to prevent its occurrence, the Great Seal, during the Chancellor's absence from town, might be deposited with the *Master of the Rolls* or *Vice Chancellor;* and in case of their absence, with a Master in Chancery (one of whom is required by his attendance at the public office to be always in town); for which course there are the following precedents to be found in "*The History of the Chancery, relating to the Judicial Power of that Court and the Rights of the Masters:*" —

"11 E. 1. My Lord of *Bath*, Chancellor of England, was, by the advice of the king's council, deputed to go over the sea with my Lord of *Gloucester* and others of the king's councellors; at that time, therefore, for the weal of the king and his realms, and that the execution of the king's laws should not be letted for his absence, a privy seal was ordered to be made out to deliver the king's Great Seal unto the Clerk of the Rolls, charging him to occupy it in the execution of all things of right and course of conscience until the returning of the said Chancellor. — In the 6th of E. 3. the Chancellor *Bourcher* appointed the Masters of the Chancery to attend the sealing of writs and patents. — Circa 15 E. 3. *Bourcher* Chancellor went to the king at *Norwich*, and left the seal with one of his clerks, under the seal of two Masters of the Chancery, who in his absence sealed with it at the lodging of one of the Masters first, and after at Westminster. — *Waller* Custos Rotulor. had the seal until the Chancellor went to York. — 49 E. 3. *Thorpe* Chancellor left the seal with four Masters. — *Burstall* Custos Rotulor. *Ravensore* Clerk of the Hanaper, and *Newenham*, were custodes sigilli in the last year of Edw. III. — *Waltham* Custos Rotulor. together with the said *Ravensore* and *Newenham*, were custodes sigilli, when *Michael de la Pool*, Earl of *Suffolk*, temp. R. 2. went to France on the business of the state. The Chancellor staid not long abroad, and on his return took a journey to Hull, and *Waltham* was solely entrusted with the seal; — and in the 16th of the same reign, *Burstall* and *Ravensore* were made keepers *ad sigilland' quod est de cursu Cancellar' et quod pertinet a communem legem.*"

These are stated to be "a few instances out of many that might be put to show how the Master of the Rolls and the Masters in Chancery were from time to time equally employed and honoured with the keeping of the seal;" to which may be added, that they are well worthy of imitation at this day, as calculated to facilitate and expedite justice, and avoid great and unnecessary expense.

But the best way of avoiding the expense of both private seals and journeys into the country to obtain them, and at the same time of facilitating and expediting the issuing of commissions, would be to pass an act of parliament substituting for the Great Seal a seal to be used for commissions of bankrupt, to be kept by the secretary of bankrupts as an open and public seal, and affixed on production of the Chancellor's *fiat*, and which, in cases of emergency, the Master of the Rolls and Vice Chancellor should have the power of granting at all times, or at least during the Chancellor's absence. There are some cases which will not admit of the delay of sending into Westmorland, or even a much shorter distance; as where a person who has committed an act of bankruptcy is on the point of removing his property out of the kingdom, or where an extent for a Crown debt is apprehended.

E. C. P. informs "an Articled Clerk and a Subscriber to our useful Publication," that he may be entered as a *Student of an Inn of Court*, although he is articled to a solicitor; and he may thus, whilst acquiring useful knowledge in a solicitor's office, save time in attaining his object of being called to the bar; but as no one can be called who has not ceased to *practise* as a solicitor for two years, we presume the clerk must disengage himself of his articles an equal length of time.

S. P. suggests that there should be a Court of Appeal in matters of practice; otherwise the practice of the Court of King's Bench, grounded on well-considered decisions of the whole Court, will be overturned by the decisions of a single Judge.

* See "Minor Correspondence" in No. XII.

# The Legal Observer.

VOL. I. SATURDAY, FEBRUARY 12. 1831. No. XV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## ON THE PROPOSED CHANGE IN THE ADMINISTRATION OF THE BANKRUPT LAWS.

PUBLIC attention is now anxiously fixed on the change about to be effected in the administration of the bankrupt laws. The present system always appeared to us attended with so little benefit, and open to so many striking objections, that we are surprised that it has been so long tolerated. The persons who were appointed Commissioners, the mode of appointing them, and the effects of their appointment, were all so open to censure, — their faults had been so frequently pointed out, and so insufficiently defended, that the existence of the system until the year 1831 appears not a little remarkable. It is now, however, to be done away; the day of retribution has arrived; and the universal feeling seems to be, that any change must be for the better. There is hardly a voice raised in the defence of the present system: and while several Commissioners have stepped forward to point out the abuses of the present system, no one of them has been sufficiently bold to defend or attempt to justify them. With the exception of one small publication,* which is too insignificant to claim a separate notice, it is somewhat strange that no writer or pamphleteer has taken up the

* The work to which we allude is entitled "*A Few Hints on the Consideration of the System of Bankruptcy, as administered by the Commissioners.*"

This work is of very humble pretensions, and is so confused in style as to be nearly unintelligible. We extract the best portion of it we can find, which is only serviceable as showing how little can be urged in defence of the existing system.

"The advantage of the present system is, — that more men of character are obtained, with the advantage of legal knowledge and habits of business, than could be by any other means; by going through with the business they ascertain the objects of the parties; and do, when their attention is called to the subject by honest independent men, take care that justice is done.

"Three Commissioners are always better than one. The Commissioners are frequently called upon to determine very difficult matters of fact and of law — and to act both as judges and jury. They may be wrong sometimes, but not so frequently as the Judges sitting at Nisi Prius.

"The Insolvent Court can only be considered a court to punish a dishonest debtor, and not to get at his property; and any man of business must, upon reflection, be convinced that a public court of justice is not a fit place to administer a bankrupt's concern, where secrecy and despatch are necessary to secure his property, and divide it amongst the creditors entitled to it.

"A court would lead to considerable more expense; and, being placed in few hands, would be more likely to be neglected than when so many men of character as Commissioners are engaged. The great evil is — that the Commissioners attempt to get through more business at a time than it is possible for them to do. The Chancellor can remedy this.

"What would a public court do with a merchant's estate, or any estate where questions of law, and of fact, are so blended, that long and patient investigation is necessary to arrive at any conclusion; and where the bankrupt and his estate are so mixed up with his creditors and other persons, that property could not be got at without an issue upon every case.

"What can be better than an examination of witnesses before three independent men, who are able and do decide as well as any three Judges that can be found. Why do the courts of law refer to a barrister of the court matters of this nature, but because they know it would be useless to attempt it in public: and will any person say, that an award is equal to a decision of three Commissioners?

A public court would produce examiners, and parties who would be compelled to take up a case in parts, and who therefore could not pursue a subject as the Commissioners at present do, with a knowledge of the bankrupt and his concerns, and the parties connected with him.

"It is not an uncommon thing for the solicitor — the agent or accountant, as he is called — and the bankrupt — to get up a commission. First, by the accountant trying composition

gauntlet, and espoused the cause of the present Commissioners; and no one has ever defended them in Parliament but those directly interested in their preservation. There appears but one feeling on the subject; there are therefore no fallacies to overthrow; and the only matter for consideration, with the exception of one topic, is, What is the best mode of effecting the proposed change?

This we shall discuss in the present article: but we are anxious, first, to say a few words on the only topic which remains to be discussed relating to the old system; we mean, the subject of compensation to the present Commissioners. These gentlemen are all professional persons; most of them barristers, some few of them solicitors*; but all of them have more or less sacrificed their other professional engagements to attend to the duties imposed on them: these duties they have frequently discharged incompetently, but still they have discharged them on the whole to the best of their ability: they, of course, cannot be blamed for accepting their appointments; the persons who appointed them, the government which tolerated the system, can only with justice be censured. For these reasons, then, it appears to us, that to deprive them of their commissionerships, and give them no compensation whatsoever for offices which they accepted on the understanding that they were to hold them so long as they pleased,—this, we confess, appears to be a manifest act of injustice. We can conceive it to be right to abolish a mere sinecure office and allow its holder no compensation whatsoever; but we see no right the legislature has to induce a man to take the duties of an active office on the understanding that he is to hold it for life, and then to turn him off without any thing in exchange. There are several rumours afloat as to this subject. It is said by some, that no compensation whatever will be given; by others, that each Commissioner will have a compensation of 200*l.* a-year allowed him; and there is a third rumour, that this compensation will be given to no Commissioner appointed by Lord Lyndhurst. The first of these we have already considered. The third we do not believe for one moment; these last mentioned Commissioners did not accept their offices on an understanding different from their seniors, and we cannot think that the present Chancellor would propose any scheme so illiberal towards his predecessor. The second proposal appears also open to objection. The sum is too large. We have heard Commissioners frequently declare, that their offices were hardly worth this sum. We think that they should be well satisfied if they obtained one half of this sum by way of compensation. A more effectual plan, however, than this may be proposed. Whatever the substituted system may be, let the Commissioners be considered in effecting it: their services must be found to be valuable. Amongst the whole seventy-five Commissioners, five or six may be found who will probably make the most competent judges that can be found: other necessary officers must be appointed; let the offer of these situations be first made to the present Commissioners; if they accept them, the expenses of compensation will be saved; if they refuse them, there will be great justice in withholding it. To such Commissioners as such offer shall not be made to, moderate compensation should be awarded.

We shall now consider the projects which have been proposed to be substituted in the place of the present system. We are only aware of two: the first is, to separate the jurisdiction over bankruptcy entirely from the Great Seal, and to constitute an independent court, which shall have cognizance in all matters relating to this subject, with

---

with the creditors; and the deed by which this is to be effected being the act of bankruptcy. This commission is then proceeded with by the solicitor who has prepared the deed; and if the messenger can be prevailed upon to assist the parties, by employing this agent to *act for him*, matters go on pleasantly enough. Probably a provisional assignment is procured, and the business is conducted as before. If the bankrupt and his party can outvote the other creditors, the assignees have no power that can controul them; unless an investigation take place before the Commissioners, by some determined opposition of the creditors, and the officer who ought to have charge of the property giving an account of his conduct.

"Now under such a commission as this, in all probability the bankrupt has given fraudulent preferences of his property — debts have been proved or attempted to be proved upon fictitious debts — questions of set-off may have to be disposed of — questions of mortgage — of lien — debts upon bills without consideration, &c. &c. and numerous other matters. After this the bankrupt has to pass his last examination, and give an account of his property, or how he has disposed of it — which the Commissioners, with a perfect knowledge of all that has passed before them, are the only competent persons to decide.

"There are nearly 10,000 meetings holden yearly under the London commissions, which a public court would find it difficult to dispose of."†

* The solicitors were all appointed by Lord Eldon: Lord Lyndhurst always declined to make any other but a barrister a Commissioner of Bankrupts.

† See a report of the meeting in the City, on the subject of the Bankrupt Commissioners, in the SUPPLEMENT, page 8.

an appeal to the House of Lords; the other is, to abolish the present lists of commissioners, and to appoint five or six fresh commissioners, who shall sit constantly during the whole year, and from whom there shall be an appeal, as at present, to the Lord Chancellor.

Of these two we greatly prefer the former. The latter plan appears to us to be open to many of the objections which are made to the present system, without its advantages of detail. It will be almost impossible for five or six men, sitting in a public court, to wade through long accounts, or master the proof of debts item by item. The business will therefore be probably conducted with less ability than at present; and the appeals to the Lord Chancellor will thus be more frequent than they are at present. The arrears of the Court of Chancery by this plan will be increased, instead of being diminished.

The former plan is to constitute a distinct court, to be called "the High Court of Bankruptcy." The judges to be first selected should be the most eminent of the present Commissioners; and the place both in the salary and in the importance of the office, should be made valuable and conspicuous. Three Judges would probably be sufficient, together with five *Masters in Bankruptcy*, to whom all matters of account and other details which could not be considered conveniently in court, might be referred. There should be but one appeal from this court which might be to the equity side of the Exchequer, or to the House of Lords. This last plan would entirely relieve the Court of Chancery from one great *drag* upon its utility. It can in fact never be an effective court until this great source of delay to its other business be diverted into other channels.

We have thus taken a hasty view of the existing state of this important question. We await the statement of the Lord Chancellor on the subject with great anxiety; and on learning his plan, we shall take the liberty of discussing it at length.

---

## TO THE LORD CHANCELLOR,

ON HIS PROJECT FOR ESTABLISHING LOCAL COURTS.

### LETTER III.*

*Objections to the Details of the Measure.*

MY LORD,

I SHALL now address myself to the details of your Lordship's measure, and I hope to be able to compress all my most important objections to it into the present letter. It appears to me that, even if the principle of the measure were good, if it were suitable to England and the present times, that as it now stands it cannot be carried into practical operation. I am willing to admit that no better plan can be devised. It may be true, that however imperfect this measure is, it is less open to objection than any other that has been, or can be, proposed; but I am anxious to impress upon your Lordship that the bill, as it is now presented to the House of Lords, cannot effect the objects which you desire. These objects are simply as follow: — You allege that the superior courts are at present so overburdened by business, that the judges are unable properly to attend to their duties; that justice is deferred, if not altogether denied, by the unfrequent holding of the courts in the provinces of England; that the system of appeals is ruinous and perplexing; that some plan must be devised by which causes may more easily and speedily be tried: and you propose a plan for establishing local judicatures throughout the country, which will, in your opinion, remedy these evils. If *it does not remedy these evils*, it can, of course, have no merit whatever. If justice cannot be obtained more speedily by its means, its inutility will at once be admitted. Permit me then, my Lord, to examine the details of the bill with this view; as I hope to show, that even in these points (which seem in the argument of the propriety of the measure to have been assumed), the plan which your Lordship proposes will place the suitor in a worse situation than he stands in at present. I have already hinted at the incongruous and extraordinary duties which your Lordship's local judges will have to perform. (*ante*, p. 146.) I will now particularise them. Every local judge appointed by your Lordship must fulfil the functions of nine distinct judges, that is to say, 1. Judge in Ordinary's Court; 2. Judge in Ordinary's Small Debt Court; 3. Judge in Ordinary's Legacy Court; 4. Judges in Ordinary's Arbitration Court; 5. Judge in Ordinary's Reconcilement Court; 6. Judge in Court of *Oyer and Terminer*; 7. Judge in Court of Quarter Sessions; 8. Judge in Court of Gaol Delivery; and 9. Judge in Assize Court sitting to hear Appeals from himself.

Now, my Lord, is not a smile necessarily provoked by this list of offices? Does not the absurdity of this part of the plan flash on every person's mind capable of considering it with attention? Can it be carried into practice? Imagine for a moment that

* See the two former letters, *ante*, p. 145 and 177.

the bill has become an act, and is in full operation throughout the country. Clothe these ideal judges with flesh and substance, and then imagine the drollery of these fifty judges assuming, harlequin-like, nine different characters in the course of a day. How are they to be distinguished? How are they to be addressed? A suitor must first ascertain in what character they are pleased to appear, before he can satisfactorily apply to them. Indeed, although this part of the subject can with difficulty be treated gravely, it appears to me to present a formidable difficulty to the practical operation of the plan.

If the duties of the judges are unlimited, so also are their powers. I shall not go through these in detail. It will be sufficient to say, that they have at least all the powers of the judges of the superior courts with infinitely less control upon the exercise of them. But I shall advert to two peculiar kinds of authorities that are intrusted by your Lordship's bill to the judges whom it will call into existence, which appear to me of a very dangerous and extraordinary nature. 1. The power given to the judges (s. 80.) to send all doubtful cases to superior courts of law and equity. 2. The power to the judges (s. 27.) to *recommend* the parties to have their causes tried by him, and not by a jury.

1. We must, my Lord, take men as they are, and I fear he must think far too highly of human nature, who supposes that unlimited power given to public functionaries will not be frequently abused. I will ask your Lordship, then, whether this power of sending a cause to a superior court, may not be frequently abused? I might put a hundred cases in which this would be probable; but I have another question to ask, which may perhaps be more pertinent. Will not this power defeat the object of your Lordship's bill? That object, if it have one, is to remove, or at least to lighten, the business of the superior courts, not to throw upon it the burden of deciding all the most difficult cases which occur throughout the kingdom. According to this clause, a judge may force the parties into the superior courts; though the object of your bill is to relieve them from the necessity of appealing to them. You assert, my Lord, that the expense and delay of the superior courts is so great, that people prefer leaving their injuries unredressed, rather than apply to them; and as a remedy for this alleged evil, you bring in a measure which forces them, whether they will or not, into those very courts, with the additional expense and delay of having had their causes first tried by the inferior court. By your bill, the discretion is given to the judge, not to the parties: whenever he sees any difficulty (and how many will he not see?) he may send the case either to a court of law or of equity! He may say, "You have chosen to apply to me for cheap law, — I am unable to give it; but I'll not let you off; I must satisfy my mind by taking the opinion of the superior court: and although you might never have gone there yourselves, yet now go you shall for my satisfaction!" This power will be intrusted to every local judge to be appointed by your Lordship's bill. It is no answer to this to say that the power will not be so exercised. *It may be thus exercised*, and will too, in all probability; and this is quite sufficient for my argument that the bill as it stands at present cannot pass.

2. Then comes the power of dispensing with a jury. The judge may *recommend* the parties to dispense with a jury! We know what weight a recommendation of this nature has. We see a similar recommendation by a judge, constantly given to parties to go before an arbitrator, and we know the effect too well. It generally forces the parties before an arbitrator, and often contrary to their better opinion. A similar effect would attend this other recommendation. The parties would frequently, if the recommendation came from the judge, be forced to dispense with a jury. This bill is, in fact, the first blow aimed at trial by jury. It is a covert attack upon this institution, which we are not as yet prepared to abandon. The measure sanctioned by your Lordship will thus intrust powers the most unusual and extraordinary into the hands of these local judges; powers intrusted to no other judges in the country; powers which would be dangerous in the hands of the learned persons who preside in the superior courts, controlled as they are by public opinion, and guarded in every quarter; but which in the hands of inferior men in distant parts of the kingdom, unawed by the press, unfettered by direct observation, and uninfluenced by superior abilities, might be employed as a constant engine of oppression and injustice.

Permit me next, my Lord, to enquire a little into the other details of the plan. Notwithstanding that the judges are overburdened with duties, as has before been shown, they have the further difficulty thrown upon them of having to dispose of their business in three different methods, according to the amount to which it relates. Thus, suits of 5*l.* are to be tried in one

way, suits of 10*l.* in another, and suits of 100*l.* in a third. Then again the judge has the duties of a little circuit to attend, (a circuit, by the bye, which no respectable barrister can follow,) a circuit which seems to have all the defects, and none of the advantages of the existing circuits. And here it will be proper to reiterate an objection which has been made by all persons who have considered the bill. It is this, that instead of administering justice "at every man's own door," &c. in many places it will be *less frequently administered than at present.* Unless I had read the bill I confess I could not have believed it; but the fact is so. In one of the counties specified (Kent) the number of towns to be visited by the judge in the course of the year is nine (ss. 2. & 3.); to one of these he is to go four times a year, to three of them twice a year, to *the other five, only once a year*, so that these five towns will be worse off than before the change, as they had, according to the existing arrangement of the circuits, at least an administration of justice *twice a year.* This, then, is the happy plan for the supply of frequent and speedy justice! It is to be a sort of annual, raised from an inferior soil, and producing a bad and bitter fruit. If your Lordship's measure has not expedition in it; if it does not effect the objects which it is assumed to effect; if it does not redress the alleged evils of the delay of the superior courts, what is its merit? How can it be defended for one moment? I may here also allude to another difficulty in this part of the subject. The bill must assume that both the parties live *in the same place;* or the advantage of "bringing justice home to every one's own door" does not apply. Now this is notoriously not the case. In many cases the parties live far asunder, and it is obviously much more generally convenient for them to come to some central spot, than it would be for them to come to one that was not central. Thus it has been shown, I think, that the *injustice* which will be administered by the bill, will be on the average less speedy than at present.

Take any portion of the details of the bill, and it will be seen that they are pregnant with evil. Thus, by way of expediting business I suppose, a party in any of the different courts may have 46 days' delay, if he chooses, before the cause comes on for trial (ss. 16, 17 & 18), a longer period than is now allowed in the courts of common law. The payment of judges and other officers of the court by fees has constantly been declared to be bad in principle and worse in practice. How, according to your Lordship's measure, are the judges and officers to be paid? In a great measure *by these very fees.*

1500*l.* to judge, and 500*l.* *to be made up* BY FEES.

400*l.* to registrar, and 300*l.* BY FEES.

100*l.* to clerk and 100*l.* BY FEES.

Judges, registrars, and clerks all paid by fees! all the officers of the court having a direct interest against the suitor! These persons must not be men but angels, to resist all these accumulated temptations! Unfortunately, my Lord, for your own bill, you have been endeavouring to prove all your life, and have established, that irresponsible power will be abused; that in particular, local judges are not immaculate; that they have not answered and cannot answer; and that to pay judicial officers in a manner which will make it their interest to delay rather than to expedite business, or, in other words, to pay them by fees, is to poison the very sources of justice. This, my Lord, you have proved to the conviction of all, and your own arguments form the great obstacle to the passing of your own measure.

In the same manner, my Lord, you have, in my judgment, retained all that was evil in the present system of administering justice, and to have linked it all together. All that is at once bad and inapplicable to giving the measure a chance of success seems collected in your Lordship's bill; and it appears to be for this reason only that you retain the cumbrous system of special pleading in a court where it will be perfectly useless.

A word now, my Lord, on another most important part of your Lordship's measure. There are three appeals contemplated by the bill, independent of the power before alluded to, which the judges have to force the parties to appeal to the courts in Westminster Hall. 1. An appeal from the judge in his character of arbitrator, to himself as judge in ordinary. 2. An appeal from a judge in ordinary charging a jury, to himself without a jury. 3. An appeal from him to a judge of *nisi prius* at the next assizes, or in some cases to the courts of Westminster Hall in the first instance. Now, my Lord, permit me to say that with this chance of appeal hanging over them, people will not enter these courts. It will be merely adding expense to expense. You cannot force suitors to try their causes before inferior men; and although they might be content to do so in some instances, if the expense were limited, yet they will never do so while under the present bill it is unlimited. In this, as in

other instances, the plan seems to defeat itself.

It is useless to call this a new measure; it is an old measure in a new and worse shape, *which has already failed in every country in Europe.* Local courts have fallen into desuetude* because they do not suit the present period, and for no other reason. It is merely human nature to prefer the opinion and judgment of a man whom he does not know, rather than one with whom he is familiar. I repeat, with perfect confidence, that wherever any approach to your Lordship's measure has been tried, it has failed.

The expense of your Lordship's plan I do not particularly dwell upon; I admit, if it had a reasonable chance of being effectual, this is not entitled to very great consideration. But it must be remembered that the expense is very considerable and that it will form a constant burden upon the country; and be continually increased by pensions and retired allowances. But if the expense, in the opinion of many, is to be entertained, even on the presumption that the bill would be effectual, will it not be intolerable if it entails a positive evil upon the country? particularly at a time when three new judges have been appointed, with large salaries, to meet the increased business of the courts.

The plan of trying the measure in two counties only appears to me very fallacious. It has been shown that in those selected the measure cannot be fairly proved†; but if I allow this, it appears to me that the plan is still very-likely to deceive. It may be possible to select *two* men who are perfectly fit for the situation of local judges; and this great objection may in this instance be removed. The establishment of two local courts cannot, of course, have the injurious effect on the profession which I pointed out in my second letter. The measure, in fact, cannot be tried until it is in full operation. Its good or its evil cannot be ascertained by applying it to two counties. It must be opposed in the threshold and not be permitted to take root in the country.

I have not, my Lord, by any means exhausted the objections which have suggested themselves to my mind on the consideration of your Lordship's measure. I have, however, seen no answer to those which I have imperfectly urged; and when I find them refuted I shall be prepared to state others. In the mean time, with the greatest respect,

I have the honour to be,
My Lord,
Your Lordship's most humble Servant,
A BARRISTER.

* See *ante*, p. 105.

† See *ante*, p. 105. 121.—Ed. *L. O.*

## DISTRICT REGISTRY.

*To the Editor of the Legal Observer.*

SIR,

I HAVE, during a period of two months, hoped to see something advanced in the Legal Observer either in the shape of argument or remark, with reference to the propriety of establishing a DISTRICT or local, in contradistinction and in preference to a METROPOLITAN register, as suggested by the real property commissioners, and having been disappointed, I have taken the liberty of forwarding to you in their crude and ill arranged state the thoughts that have suggested themselves to me during this present morning whilst reflecting on the comparative advantages of a local or metropolitan register. I hesitate not in giving the former a preference, because I conceive both authority and argument are in its favour; for if we examine the long interval of time which elapsed between the suggestion of a general register by that profound real property lawyer Lord *Hale*, in 1652, and the year 1816, when Mr. Serjeant *Onslow* introduced a bill into the House of Commons for the purpose of establishing a general register, we shall find a district register had uniformly the preference given it by all writers on the subject. In addition to this authority we have the opinions of Messrs. *Butler* and *Humphries*, which, united with those of nearly all professional men in the country, and the majority of those of the profession in town, who have been examined by the real property commissioners (*see the last real property commissioners' report*), form a perfect host of authority in favour of a district register. District registers have been adopted by foreign countries because they are less expensive to individuals, and occasion less delay than a metropolitan register;—that they are less expensive to individuals, is, I believe, universally admitted;—that they occasion less delay will surely not be doubted, when we consider the vast number of places and villages in England and Wales, through or near which a public conveyance is rarely if ever seen to run. Under the head "*expense*" in their last report the commissioners appear to me to have made reference, not to

the rule, but to the exception to the rule; for at the conclusion of the second long paragraph they express themselves thus, "It is only in transactions of very small amount that these expenses (alluding to the expenses of registering) would be at all felt." Now, sir, I would ask the commissioners if purchases of small amount do not far exceed in number those of large amount? and refer them for a proof of the affirmation to the stamp office returns; — if this be the case, surely the welfare and convenience of so numerous and respectable a body of men, as the yeomanry and the merchants of second degree in this country ought not to be neglected, forming as they do the bulwark of old England. Granting, for the sake of argument, that a district register would in a trifling degree be more expensive to the country at large but less so to the small landholders than a metropolitan register, which ought we to choose? The former, certainly, inasmuch as that would on the whole be the least oppressive to all. It is supposed that about 240 deeds will require registering daily if a metropolitan register be established; and the commissioners state that the number will *gradually increase:* what then must be the dimensions of the structure required for the deposit of the deeds? — I presume an area as large as Lincoln's Inn Fields would not be considered too spacious, since the Register Office in Dublin, which is not thought too large, and where only 90,000 deeds are annually registered, is larger than Lincoln's Inn Hall. Another difficulty presents itself, viz. where is a plot of ground sufficiently central and of adequate extent to be procured? and when obtained, what will be the price of it? I sincerely hope this projected leviathan may excite at a future day as much admiration as it now elicits surprise: — only think of 300 deeds daily and 1,000,000 annually registered, and at length too!! Perhaps some of your learned contributors will inform us how the entry of so many deeds is to be effected in one day; whether several clerks are to write in the same book at one and the same moment, or whether in different books; and if the latter, how is the delay to be remedied which will arise to parties who are anxious to consult the register whilst the books are being bound; for persons will *hourly* require a knowledge of the deeds transmitted for registry.

I can discover little objection to a local register of small divisions, accompanied with a controlling and superintending head, similar in plan to the Stamp or General Post Office in town, and embracing both concentration and distribution as perfectly as they do. In the event of the adoption of such a system, the individual presiding over it in town could settle and regulate the practice in the branch establishments from time to time as occasion required, and receive indexes from the country, to which reference might be made at a very trifling expense, and with the greatest facility, by the agents in town. No objection, I imagine, would exist to solicitors acting as registrars in the country, subject to some of the qualifications and regulations proposed by the commissioners. In the event of a metropolitan register being established, the same learned contributor will probably inform us who is to be held responsible for the searching of the register; and whether fees are to be paid both to the solicitor in the country and his agent in town, in respect to transactions of minor importance, and in which the agent in town *now* is never either consulted or concerned. I am supposing government would not be made responsible for the laches or neglect of the clerks, which I think very probable, notwithstanding the suggestions of the learned commissioners. Should any professional gentleman choose to answer these few general remarks, and at the same time inform me why the commissioners have omitted to consider the details of a district register, and have treated its advocates thus contumeliously, I will, if present occupations permit, endeavour to reply to him in one of your future numbers of the Legal Observer.

LEGULEIUS.

*Inner Temple, Jan.* 13. 1831.

## REVIEW.

*A Review of the Objections taken by "an Observer" and by Mr. Raines to the Lord Chancellor's Bill, for the Establishment of Courts of Local Jurisdiction. With a brief Account of the Local Courts of France; and an Appendix, containing a Copy of the Bill.* By Michael J. Quin, Esq. of Lincoln's Inn, Barrister at Law. London. 1831. Henry Butterworth, 7. Fleet Street.

THE larger portion of this pamphlet consists of a reprint of the Bill of the Lord Chancellor, the substance of which we gave in three pages of our first number. (pp. 9—11.) It was useless, therefore, to reprint it. The other, and we are afraid, we must say, less valuable portion consists of Mr. Quin's observations upon the bill. Indeed, after at-

tentively reading them, and giving the learned author great credit for his fancy and originality in calling "the history of vaccination" "that real reformer and beautifier of the human race," p. 1.; in saying, that the reform in the laws is "an Augean labour;" and (pursuing his own savoury metaphor) observing, "that there can be no harm in cleansing the stalls in which the goats are kept, leaving to the commissioners (of common law) the care of those occupied by the the oxen," p. 20; after having been satised of his inability as a translator, by his extract from the "Institutions Judiciaires," of M. Rey, whom he amusingly distinguishes as "M. Rey of Grenoble," p. 6.; we say, after doing all this, we were not at all convinced by the reasoning of Mr. Quin that this measure is a proper one.

If the Bill for the introduction of Local Courts should pass, we find it is Mr. Quin's intention to send to the press a Manual of Practice for those Courts, "most of the materials of which he has already collected and arranged." The Practice is ready, if the Courts are not! The writing the Practice of a Court before it is established appeared to us a little amusing; a sort of legal putting the-cart-before-the-horse; a forensic Hibernicism. It reminded us a little of the married lady who bought a brass plate with the name of Jones upon it, because if she were left a widow and married a gentleman of that name it would be so very handy! But let this pass; and let us see how Mr. Quin supports his side of the question. With reference to the objection made to the Lord Chancellor's measure, that it is unsuited to England, Mr. Quin argues in a very inconclusive manner. "When we talk of the genius of a people, we naturally go back to the practice of their ancestors, in order to discover, as far as we can, what that genius is with reference to any particular branch of their institution;" and he continues thus —

"But if we may believe the authorities upon the subject, the ancient Germans, from whom the Franks, as well as the English, are said to derive their origin, were long accustomed to have the usual acts of government, comprising those of a judicial character, performed by the mass of freemen assembled under the presidency of elective chieftains, though, in civil cases, the magistrates sometimes decided without popular assistance. The Germans had frequently recourse to arbitrators of their own choice, and it was a rule, that no matters in litigation between private parties should be brought before the people or the magistrate, unless it was found impossible to agree upon a choice of arbitrators."

So that according to Mr. Quin it is quite sufficient to establish that our Saxon ancestors had a particular institution to prove that it will suit England exactly. Now Cæsar tells us that our ancestors had their wives in common*; this is not, however, precisely according to an Englishman's present taste. This argument cannot be gravely treated.

Mr. Quin then goes to France: before the Revolution and the institution of local courts, he says, "the judicial seats were an affair of property, and saleable like any other patrimony," p. 8. He then goes on to say, that the judicial grievances of France were removed by the law of the 24th of August, 1790.

"The cumbrous scaffolding of distinct jurisdictions was prostrated; hereditary magistracy was abolished; the clergy were altogether most properly deprived of ecclesiastical jurisdiction in temporal affairs; the sale of judicial offices was suppressed; the jury was introduced, or rather restored, although confined at first to criminal procedure, and justice was literally brought home to every man's door, by a well-organized system of administration, which, for its simplicity and efficacy, and its attention to the interests of the peopie at large, almost deserves to be called patriarchal."

Now all we have to say upon this is, that it may be all very true, but it has no application to the present question. "Judicial seats" are not "saleable" in this country. "The cumbrous scaffolding of distinct jurisdictions," would be set up instead of being prostrated by the Lord Chancellor's bill: the trial by jury already exists. The climax of the learned author may be a very pretty climax, but we do not see its application.

The author then gives us a very incorrect account of the local jurisdiction of France; in fact, however valuable these institutions may be, even according to Mr. Q.'s statement they totally differ from Lord Brougham's plan. It were easy to show this; but the author, we are persuaded, would himself admit it.

Mr. Quin next gives us the details of the Chancellor's able speech on the subject, the necessity of which we do not see, as they have been frequently before the public in many other works.

The work then combats certain arguments used by the "Observer," and Mr. Raines, whose judicious pamphlet was noticed in our last number. Mr. Quin feels so strongly the evil of a Judge always remaining in the same town, that he himself proposes "to

* "Uxores habent deni duodenique inter se communes, et maximè fratres cum fratribus et parentes cum liberis." Cæs. Com. lib. v.

get rid of it by a clause in the bill directing the Judges in ordinary to change their circuits every two years, *or oftener*, if necessary!" He does not tell us, how this is to be done, nor does he enter into the calculation of the number of Judges, who would think the county of Rutland the field in which they could best serve their country.

Mr. Quin's present opinion of the bar, and the effect of the bill upon it, is quite amusing. Its great benefit, according to him, would be the introduction of the Irish school of eloquence into this country.

"At present," he says, "a barrister who aspires to eminence in his profession must, for three or four years, at least, loose all recollection of those studies which enlarge and embellish the mind, in order to imbibe the technicalities of our mechanical system of special pleading. For many years after he is called to the bar he may be in active business, without having an opportunity of even once addressing a jury. In Ireland, the practice is different; the junior for the plaintiff there being uniformly charged with the duty of replying to evidence. But before a junior, in England, can expect to be placed in a similar situation he must have dispossessed himself of the spirit of eloquence, if ever it visited his intellect, and have forgotten not only the graces of elocution, but even the common proprieties of diction. Experience may, afterwards, provide him with the common-places which we daily hear in our courts of justice; but, unless his be a bold, as well as a gifted mind, beyond a tame mediocrity he never can ascend. The new courts, on the contrary, are, in no respect, calculated to stupify and degrade the intelligence that has once frequented the haunts of the academy, and drank of the sacred fountains of ancient poetry and eloquence."

The *beau ideal* of Mr. Quin's court of justice appears to be a debating club. The preamble of the bill, according to him, should run, "for the encouragement of long speeches, metaphors, and classical imagery," be it enacted, &c. We confess we are not of his opinion. The juniors have ample opportunities at sessions for declaiming to their heart's content. The love of true eloquence has not declined, God forbid! but sonorous nonsense is no longer effective.

We have now gone through the few arguments used by Mr. Quin. They appear to us to be very unsatisfactory; we are willing, however, to ascribe them rather to the badness of the cause than its defender; and we do not see any thing in the pamphlet either to make us change our opinion, or to prevent us from assuring our readers that we shall soon have to congratulate them on the defeat or withdrawal of the bill for the establishment of Local Courts.

## EXPENSE OF LAW PROCEEDINGS.

### FEES OF SEARCHING FOR JUDGMENTS, &c.

Sir,

At a time when the expense of law proceedings is a favourite topic, and the uninformed and the prejudiced pour out the "vials of wrath" upon the devoted heads of professional men, every attempt to show where abuses exist, or to point out how, without injustice to any one, expense may be diminished, must prove of some service; even if it extend no further than to show the true state of the case, and exonerate the lawyer from the unfounded aspersions so liberally dealt out against him. I have, therefore, to crave your attention to the following remarks on one unjustifiable source of expense; and, I think, you will agree with me that it ought to be remedied without delay.

In many instances,—in the investigation of titles particularly,—it becomes necessary to search for judgments at the offices where they are registered, often for so long a period as twenty years. For so doing the attorney is charged 4*d.* per term; which, in long searches, amounts to a considerable sum. And for what is this demanded? The most zealous defender of existing abuses could furnish no just ground for the charge. The attorney has all the labour, all the responsibility; nay, so far is this carried, that he is even obliged to reach down the books from the shelf. If the officers made the searches, and were responsible in case of error or negligence, and if the offices in question were supported by means of the sums so paid, *and by their means only*, I admit that no objection could be made to a reasonable remuneration. But let it be remembered, *that the entry of these judgments has been amply paid for before;* namely, at the signing of them. Surely it cannot be thought too much to allow *the attorney* the privilege of having recourse, without a fee, to documents for the existence and preservation of which he has previously paid. In the Prerogative Office, proctors are allowed to search for and examine wills, &c., free from charge: a similar permission should be extended to attorneys in the Common Law offices.

I have instanced searches for judgments, because I believe they more frequently occur in practice, and are more productive of expense, than searches for other information. These last, however, are not the less subject to the foregoing remarks, and an alteration is equally needed. Every professional man, who considers the various fees which he is obliged to pay during the progress of business, and for which little or nothing is done by the officers, will be clearly convinced that, by a right application of the "besom of destruction," great practical good would result to the profession and the public,—very unlike that which it is pretended to accomplish by the wild, imaginative theorist, who

"Leads to bewilder, and dazzles to blind."

All that need be remedied, lies, comparatively, in a nut-shell; but few things are begun at the right end.

Should you deem this worthy of insertion in

your useful hebdomadal, I shall take an early opportunity of resuming the subject;

And remain, Sir,
Yours most obediently,
F. W. G.

## PUBLICATIONS ON REGISTERING DEEDS OF LAND.

As the subject of compulsory registration of conveyances is undergoing much public discussion, and is of considerable importance in connection with the real property of the country, it may be useful to remind those who feel interested in the question, that it has been repeatedly agitated in England for the space of nearly two hundred years. This fact will appear from the following account of old treatises expressly written at different periods for and against the measure. They should be perused, to ascertain the opinions of men of other days, and their theories and reasons compared with those which are now propounded. A contrariety of opinion has ever existed on this subject; and when it shall have been again fairly and impartially canvassed, we do not know that men's judgments will approximate nearer to unanimity than heretofore.

1. Propositions for recording and registering of Deeds and Conveyances, &c. by Wm. Leach. 4to. 1651.

2. Reasons against the Bill for County Registers of Wills and Administrations, and preventing Delay in Chancery and Common Law, with Tables of Fees and short Forms of Declarations, &c. 4to. 1653.

3. Seasonable Proposals to the Nation concerning a Register of Estates in this Kingdom. 4to. 1669.

4. The pretended Perspective Glass; or, some Reasons of many more that might be offered against the purposed Registering Reformation. 4to. 1671.

5. Reasons and Proposals for a Registery or Remembrancer of all Deeds and Incumbrances of real Estates to be had in every County, as well for Sellers and Borrowers, as Purchasers and Lenders, &c. by John Philpot. 4to. 1671.

6. Reforming Registry; or a Representation of the very many Mischiefs and Inconveniences which will unavoidably happen by the needless, chargeable, and destructive Way of Registers, proposed to be erected in every County of England and Wales, for recording of all Deeds, Evidences, Mortgages, and whatsoever may incumber the Sale or Settlement of Lands not being Copyholds, &c. by Fab. Phillips. 4to. 1662 and 1671.

7. Treatise, shewing how useful, safe, reasonable, and beneficial, the inrolling and registering of all Conveyances of Lands may be to the Inhabitants of this Kingdom, by Sir Matt. Hale. 4to. 1694, reprinted 8vo. To which is prefixed the Draught of an Act for a County Register by the Lords Commissioners Whitelock and Lisle, Lord Chief Baron Lane, &c. and is intitled Two Tracts on the Benefit of registering Deeds, &c. 1756.

8. Proposal for erecting County Registers for Freehold Lands, by E. B. 1697.

9. Instructions for registering Deeds, Conveyances, Wills, and other Incumbrances affecting Estates in the County of Middlesex, with Precedents of Memorials of every Kind, by Wm. Rigge. 8vo. 1778.

10. Impartial Thoughts upon the beneficial Consequences of enrolling all Deeds, Wills, and Codicils, affecting Lands, throughout England and Wales, including a Draught of a Bill proposed to be brought into Parliament for that Purpose, by Fra. Plowden. 8vo. 1789.

11. Observations on the Statutes for registering Deeds, with a Collection of Cases upon those Statutes, with Instructions, Precedents, &c., by John Rigge. 8vo. 1798.

12. Observations on the amended Bill now depending in the House of Commons for the registering and securing of Charitable Donations for the Benefit of Poor Persons in England, by A. Highmore. 8vo. 1809.

13. Letter to Wm. Wilberforce, Esq. M. P., relative to the Second Bill introduced by him to the House of Commons, and ordered to be printed 19th February, 1810, for registering Charitable Donations, by A. Highmore. 8vo. 1810.

14. Essay on registering Titles of Land, by John Asgill. Reprinted in State Tracts, William 3d, v. 2. 693.

15. Treatise concerning Registers to be made of Estates, Bonds, Bills, &c. with Reasons against such Registers, by the Hon. Will. Pierrepoint. In Harleian Miscellany, vol. iii. 305. R.

## SUPERIOR COURTS.

### ROLLS COURT.

All Issues for Trial from this Court will be sent to the Exchequer.

### KING'S BENCH.

#### BRIBERY.

The Attorney-General showed cause against a rule which had been obtained in Michaelmas Term for leave to file a criminal information against Edward Steward, Esq., and four other gentlemen connected with the city of Norwich, for a conspiracy by bribery and corruption to procure the election of Mr. Steward to the office of alderman of Norwich. The question for the Court was, whether upon the affidavit of a party, who on his own showing was a guilty participator in the act complained of, their Lordships would interpose its authority by criminal information. The learned counsel submitted that they ought not so to interpose, but that the parties ought to be sent with their complaint before the ordinary tribunal.

*Kelly*, on the same side, cited the King v. Peach, 1 *Bur.* 548., which was a charge of conspiracy to cheat at a foot-race, and in which the Court decided, that the parties being a set

of infamous cheats, they ought not to interpose in behalf of one cheat against another.

*Sir James Scarlett* in support of the rule, said, The only question was, Whether upon the affidavit of Lamb, the person who had received the bribe, the rule for a criminal information ought to be made absolute? The Court were aware that it was most difficult to detect offences of this kind. These things were generally done in secret; and unless the participator was allowed to come forward as a witness, to prove the fact, it would very rarely be brought home to the parties. Here the participator had given a detail of the circumstances, none of which were denied, and therefore they must be taken as true.

*Lord Tenterden* C. J. said, The Court were of opinion that the rule ought to be made absolute. There was a great difference between the case of The King v. Peach, and the present. In the present case the offence was of a public nature; in The King v. Peach it was a private cheat or fraud, and all the individuals there stood on the same footing. The offence, in the present case, was one against the public policy and justice of the country, as affecting the magisterial office. That, therefore, was an important distinction; and although the application was supported solely by the affidavit of the person receiving the bribe, the Court could not, unless they saw reason to discredit that affidavit, say that they ought not, on that account, to interfere. — *The King* v. *Steward, Esq. and others. K. B. H. T.* 1831.

---

RATEABILITY OF GRAY'S INN.

The Court refused an application for a new trial on the ground of misdirection by Lord *Tenterden*, in a cause, in which the question was, whether the Society of Gray's Inn was liable to the poor's rate of the parish of St. Andrew's, Holborn, in which, Gray's Inn is locally situated. The jury by their verdict found that it was not so liable. The alleged misdirection was, that his Lordship had in his observations attached too much weight to certain parts of the plaintiff's evidence.—*Selby* v. *Bardons and another, K. B. H. T.* 1831.

---

ATTORNEY'S EXPENSES.

In an action to recover a sum of six guineas for the attendance of the plaintiff, an attorney, upon a *subpœna duces tecum* in the Court of Common Pleas, in a case wherein the defendant was a party, after service of the process, application was made to the Court to stay proceedings on payment of the six guineas. The Court made the rule absolute, on condition of the defendant paying that amount and all costs incurred by the plaintiff. The money not being paid, the cause proceeded to trial, and the plaintiff was nonsuited. A rule to set aside the nonsuit was granted on two grounds: first, that an attorney could maintain an action for his loss of time in attending as a witness; and, secondly, that the application to stay the proceedings on payment of the six guineas was a promise of the defendant to pay. After cause had been shown, and the Court had taken time to consider the case,*

Lord *Tenterden* C. J. stated that he and his learned brothers had conferred with the other Judges, and they were of opinion, that an attorney had no right of action for his loss of time in attending as a witness, although he was entitled to recover his expenses. The application to stay proceedings could make no difference, as the promise was without consideration. — *Rule discharged.* — *Collins* v. *Godefroy, K. B. H.*, 1831.

---

ERRATUM. — *Practice.*

In page 206. of this work, which is to be found in No. 13., some obscurity appears to have been found in our report from the King's Bench, under the head of "Practice," in consequence of the printer omitting the word "absolutely." It is by the case decided to have been an irregularity, "that the declaration was filed, and notice thereof given, before common bail had been filed." On reference to the papers in the case, we find that the declaration had been filed *absolutely*, and therefore was an irregularity, † unless the defendant were an attorney or a prisoner,‡ although if it had been filed *de bene esse*, it would have been none. § It certainly would have been clearer if the word "absolutely" had been printed after the word "filed;" but although we had perceived the omission, we did not think it necessary to notice it in our last Number, as when one speaks of "filing a declaration," without any words of qualification, one is understood to mean "absolutely." As some of our correspondents did not think it sufficiently clear, we are happy to avail ourselves of their suggestion, and remove what seemed to them an obscurity.

---

HUSBAND AND WIFE — ALIMONY.

In an action against a husband for necessaries supplied to his wife while separated from him, the defence set up was, that the defendant had paid to his wife a sum in the nature of alimony, which he had been ordered to pay to her by the decree of an ecclesiastical Court, in a suit between them. The fact of payment by the defendant was proved. It appeared, however, that the cause had been removed from the Court which ordered the payment of alimony, to a Court of appeal; and no fresh order for payment of alimony had been made by the Court of appeal, nor had such an order become necessary, as the defendant had continued voluntarily to pay the sum ordered by the Court below. On the part of the plaintiff, it was contended, that as the defendant was not bound to pay the alimony, until a fresh order was made by the Court of appeal, the payment could not be considered as a payment under the order of a Court of competent jurisdic-

---

* *Vide Lopes* v. *De Tastet*, 7 Moore, 120.; *Willis* v. *Peckham*, 4 Moore, 300.; 1 B. & B. 515. S. C.

† 2 Chit. R. 165.

‡ 1 Tidd. Pr. p. 419.

§ *Ibid.*

tion, and therefore did not protect the defendant against the present action. Taking this to be a sound proposition of law, the plaintiff proposed to give evidence for the purpose of showing that, by reason of a change in the defendant's circumstances, the sum allowed his wife in obedience to the order of the Court was too small with reference to his means. Lord *Tenterden* C. J., who tried the cause, being of opinion that the payment must be considered, for this purpose, as a payment made by order of a competent authority, nonsuited the plaintiff.

*Gurney* applied for a rule to show cause why the nonsuit should not be set aside. He contended, that as the defendant could not be bound to pay the money without the order of the Court of appeal, and as the Court below had no longer any jurisdiction in the cause, the payment could not rank higher than a voluntary payment, and therefore that the evidence he had tendered was admissible. He cited *Hodgkinson and another* v. *Fletcher*, 4 Camp. 70.

The *Court* was of opinion, that the present was a case materially distinguishable from that cited from 4 Campbell. The payment must be taken to have been made under the decree of a Court of competent jurisdiction, and therefore the defendant was protected by it. The nonsuit was consequently right. — *Rule refused.* — *Wilson* v. *Carmichael Smith*, *K. B. H. T.* 1831.

---

LANDLORD AND TENANT.

*Debt* for double rent, under the 11 Geo. 2. c. 19. s. 18. On a special case, the question was, whether the defendant was liable to double rent for a time which had elapsed after he had left possession of the premises, without having determined the tenancy by notice.

*F. Pollock* appeared for the plaintiff. *Cross* Serjt. for the defendant.

The *Court* were of opinion, that to whatever remedy the landlord might be entitled in the form of an action for mesne profits, he was not entitled under this statute to double rent for a time during which the defendant did not occupy the premises. — *Judgment for the defendant.* — *Booth* v. *M'Farlane*, *K. B.* 1831.

---

AGENCY BILLS.

*Sandys and Sons* v. *Hornby*, Gentleman.

This was an action brought by the plaintiffs to recover against the defendant, an attorney at Portsmouth, the balance of an account for work and labour done by them as his agents.

The plaintiffs having proved their case,

Mr. *Richards*, counsel for the defendant, submitted that the plaintiffs must be nonsuited, and cited the stat. 3 James 1., and the recent case of *Baxter et al.* v. *Wilton*.

Mr. *Smirke*, plaintiffs' counsel, was stopped by Lord *Tenterden*, who said that case was totally different from the present, as there the charges were in full; but that it had been decided, over and over again, that agency bills need not be signed. With respect to the statute 3 James 1. c. 7., which enacts, "That all attornies and solicitors shall give a true bill unto their masters and clients, or their assigns, of all charges concerning the suits which they have for them, subscribed with their own hand and name;" it never could be considered that that applied as between attorney and agent.

---

SHERIFF'S RETURN OF "LANGUIDUS."

*Jeremy* showed cause against a rule calling on the Sheriff of Berkshire to show cause why his return to a writ of *latitat* should not be quashed. The return was, that he had gone to the lodgings of the defendant, on the 5th of August; that the lodging consisted of but one room; that the defendant was then confined to his bed with illness; that he took him into custody; that he received a certificate of his illness from the medical man attending him, which declared him to be so ill that it would be dangerous to his life to remove him; that on this statement he relinquished the custody of the defendant's body; that he went, a second time, on the 7th of August, when he found that the defendant had removed himself out of the bailiwick. He submitted that it was clear from all the authorities that "*languidus*" was a good return. It appeared on the face of this return, that the defendant was so sick, that the Sheriff would not keep him in custody for fear of the dangerous consequences of removal. That rendered the return sufficient. He cited *Cavenagh* v. *Collett*,* and *Baker* v. *Davenport*,† in support of his argument.

*Steer*, in support of the rule, contended that it was the duty of the Sheriff to keep a defendant in custody, although he might not have him in Court at the return of the writ. He had no right to let him escape, as in the present instance he had. If it were true, that the medical man told him that the removal of the defendant from his lodging would be the cause of peril to him, it was not therefore true, that it would have been the cause of peril that the officer should remain there, and keep him in custody. He certainly ought not to have allowed him to remain two days out of custody. In both the cases cited by the other side, the return stated the illness of the defendant at the return of the writ. Here it was not stated how long the illness lasted, and, therefore, it was quite distinguishable from them.

*J. Parke* J. The return here does not account for the defendant up to the period when the return is made. Now, all returns of "*languidus*" are excuses, not for not taking and keeping the defendant in custody, but for not having him in Court at the return of the writ Therefore, the illness of the defendant stated in the return is no excuse for not keeping him in custody. But, supposing it was an excuse for not keeping him in custody, yet it was no excuse for not going at an earlier period. Certainly the officer ought to have gone there as soon as it might be reasonably supposed the defendant

---

* 8 D. & R. 606.
† 4 B. & A. 279.

could be removed with safety. The return must therefore be quashed.—*Rule absolute.*—*Perkins* v. *Meacher*, *K. B. H. T.* 1831.

---

OLD WARRANT OF ATTORNEY.

Judgment on an old warrant of attorney was allowed to be entered up, where the proof of the party being alive within the term was, that a letter dated on a day in term was received by post from him. *Parke* J. *K. B. H. T.* 1831.

---

VICE CHANCELLOR'S COURT.

DEFENDANT OUT OF THE JURISDICTION.

In the case of a bill of interpleader against several defendants, one of them, who was interested in the subject matter of the suit, was out of the jurisdiction of the court. The plaintiffs and the other defendants signed an admission that the remaining defendant was out of the jurisdiction. But the *Vice Chancellor* held that such admission was insufficient, and he required evidence to be given of the fact. *Farren* v. *Isaac.* Hil. T. 1831.

---

CONSISTORY COURT.

CONDONATION.

Dr. Lushington pronounced sentence. After detailing the suit, as instituted originally by Mr. William Bramwell against Fanny his wife, for restitution of conjugal rights, which had been met by a suit of divorce, on the ground of adultery and cruelty, alleged by Mrs. Bramwell against her husband, he proceeded to observe, that though there had been great familiarity and intimacy between Mr. Bramwell and Elizabeth Jeffery from the year 1821; and although there was sufficient room for suspicion, in his placing a young woman of 26 or 27, who had been in his service, in charge of the Castle Inn, Tunbridge, to which he was in the habit of resorting; yet up to a certain period his conduct might be explained in a manner consistent with innocent intentions. But the motive assigned for his resorting there, namely, business, offered no excuse for the improper familiarities which had passed between him and Elizabeth Jeffery, and which were accompanied by circumstances demonstrative of a criminal attachment. In the paper in which Mr. Bramwell pledged himself in the most solemn manner to abandon his connection with Elizabeth Jeffery, the term *connection* must have one of two meanings; either it was an admission of the adultery, or not. If it was not an admission, it would be difficult to say that the adultery had been condoned at all. Taking the correspondence in conjunction with the familiarities which had been proved, and the whole conduct of the parties, he was of opinion that adultery had been consummated between the parties. Upon this a condonation followed; but this was always a conditional pardon, providing there was no repetition of the improper conduct, and the wife possessed a perfect knowledge of all the offences she pardoned. Now it was not difficult to show that Mrs. Bramwell was not then aware of the circumstances which came to her knowledge in the letter of the 10th of May, and that, in fact, she was not cognisant of the adultery at all. But, supposing the condonation complete, what was the subsequent conduct of the husband. He undertook to separate himself entirely from Jeffery, and never, "if possible," to carry on the least correspondence with her. Shortly after, however, she clandestinely returned to the Castle Inn, was kept concealed there in a bedroom, and this fact was desired by Mr. Bramwell to be concealed from his wife. If these meetings were for the purpose, as it had been alleged, of settling accounts, it was the duty of Mr. Bramwell to have communicated the fact to his wife, and to have had a third person present. But there was a subsequent return of Miss Jeffery to the Castle Inn; and if the court was to come to a conclusion on that point, what could it conclude but that Mr. Bramwell brought her there himself? and where there was so much clandestinity and fraud, guilty intentions must be inferred. He (Dr. Lushington) was satisfied that adultery had been committed before May 26th; that it was repeated subsequently, and that the condonation was no bar to the suit of the wife. —*Bramwell* v. *Bramwell. Consistory Court of Rochester.*

---

MOTIONS IN CHANCERY.

Referring to the communication in our last number on this subject, we subjoin the late Lord Chancellor's order:—

"Whereas it may greatly tend to the convenience of suitors that the following regulations respecting motions should be adopted, I do therefore order, that the solicitors in the different causes in which the notices of motion to be made before me have been already given, and in which notices of such motion shall be given, prior to the First Seal, do deliver to the Registrar the dates of all such notices, and the names of the parties to the cause or causes in which such notices have been or shall be given; and that the Registrar do make up a paper or list of such notices, according to their dates; and that of such paper or list a copy shall be hung up in Lincoln's Inn Hall, and at the Registrar's office. And I do hereby order, that the motions to which such notices relate shall be called on and heard in order, according to the dates thereof.

"And in case any party does not attend by counsel when the motions are called on according to the dates, such motions shall be heard *ex parte*, or dismissed, according as the non-attendance of the party may require.

"And if neither party appears when a motion is called on according to its date, and a motion is heard junior in the date of the notice given to the notice of motion which is so called on without attendance, no motion, the notice of which is prior in date to a motion heard, shall be again called on until the several motions, the notices of which are of a date subsequent to that of the notice of the motion heard, shall be gone through.

"ELDON C."

POWER OF A JUDGE AT CHAMBERS.

*To the Editor of the Legal Observer.*

Sir,

I BEG to direct your attention to a point on which contrary opinions seem to be entertained by the Judges of the King's Bench and Common Pleas. The question is the following: — Has a Judge at chambers power to refuse a summons *with costs*? Mr. Justice *Gaselee* last week rejected a summons of mine with costs; and when I submitted that he had not the power to do so, his Lordship referred me to the Court. I have since ascertained that other Judges of the Common Pleas have occasionally held that they do possess this power, though how derived I cannot discover. It is within my own experience that Mr. Justice *Bayley* and Mr. Justice *James Parke* have refused such applications, distinctly stating that they *could not* grant them. On a recent occasion, in particular, I heard Mr. Justice *James Parke* refuse costs, where it was urged that the 1 W. 4. c. 70., commonly called "The Administration of Justice Act," authorised the decision; but his Lordship stated it did not. Perhaps, sir, as the point is one, though not of the highest importance, yet of constant occurrence, you will oblige your subscribers by devoting a few lines to the discussion, by which you will much oblige,

Sir,

Your obedient humble servant.

Gray's Inn, Jan. 25. 1831. J. J. R.

*** We can say nothing further on this subject, than that it is one which ought to be settled by the Judges of the several Courts, who are authorised to make rules for assimilating the practice. Our correspondent seems to apprehend some danger in authorising a single Judge to award costs. To have the power of doing so, without appeal to the Court, would certainly be objectionable. — ED.

## MINOR CORRESPONDENCE.

LIFE INSURANCE.

IN an article in No. 7. of The Legal Observer, under the head of "The Law regarding Life Insurance," reference is made to the case of *Godsal* v. *Boldero*, in which it is laid down that, "if the debt be in any way paid, the insured cannot recover upon the policy; as in the case of an attempt to recover upon a policy effected upon the life of Mr. Pitt, whose debts were paid by parliament."

I would wish to be favoured with your opinion, whether in such a case an action might not be successfully maintained against the insurer for a return of the premiums, as in the case of Marine Insurances, where the underwriter has not run the risk insured against. I am not aware that the question has ever been raised.

E. T.

*** In the case here put, risk is incurred until the debts are paid. — ED.

BANKRUPTCY — THIRD COMMISSION.

In the Number above mentioned, two cases are reported to have been decided in the court of King's Bench, of *Ibberson* v. *Dicas*, and *Robinson* v. *Dicas*, as to indemnifying the Sheriff.

The opinion expressed by Mr. J. *Littledale*, that the statute 6 Geo. 4. c. 16. § 127. did not vest the goods of the defendant in the assignees under the second commission, seems to be at variance with the decision of the Court of King's Bench, in *Fowler* v. *Coster*, 1 Lloyd & Welsby's Merc. Rep. 203., in which it was held that a third commission, the bankrupt not having paid 15*s.* in the pound under the second, was an absolute nullity; because the statute 6 Geo. 4. vested the bankrupt's future effects in the assignees under the second commission, and therefore there was nothing for the third commission to work upon.

E. T.

B. J. S. observes, there is a great inconvenience to the profession arising from attorneys residing at distances from the law offices: for instance, at Stepney, Rotherhithe, Kennington, &c. "If (he says) I have a summons to serve, I am obliged to send a clerk perhaps three or four miles for the purpose, and for which I am only allowed two or three shillings. A few months since I enclosed an appointment to tax (on an order to stay proceedings) in a letter, and sent it by the two-penny post, paying postage, and the attorney refused to attend. If the Court would not compel attorneys living off the stones to have an office or agent within a mile of the Temple, they should be compelled to accept service by the two-penny post. By the Exchequer practice, the *former* is the rule of that Court."

ANSWERS TO QUERIES.*

1st. B. having the freehold devised to him by the will of A. (he allowing C. the clear profits), which I should consider to be a charge on the estate for the clear profits, B. cannot commit waste by cutting down the trees and selling them without accounting to C.: but if he were the absolute tenant in fee simple, *without any incumbrance or charge* on the estate, he might then commit waste, as having no person to whom he is accountable.

2d. It appears by the words of the act (6 Geo. 4. c. 16. § 72.) "that if the bankrupt, by the consent of the real owner, have any goods in his possession whereof he was *reputed owner*, the commissioners have power to dispose of the same." It was decided in *Horn* v. *Baker* (East, 48 Geo. 3.) that stills fixed to the freehold do not pass to the assignees under the words "goods and chattels," and that vats, &c. that are not fixed to the freehold, do pass to the assignees, as being left by the true owner in the possession, order, and disposition of the bankrupt, he being considered in the eye of the world as *reputed owner*. But if there is a usage in the trade for the utensils of it to be let out to the trader, then it would admit of a different consideration.

T. E.

* No. XI. page 175.

Although the forms of the affidavit of the execution of articles of clerkship, which are given in the books, mention *two* attesting witnesses, there is nothing in any statute or Rule of Court, that we are aware of, which renders more than one witness necessary. The common practice is, however, the safe course.

---

Q. calls the attention of the profession to the Bill for improving the Building Act, now in progress in the House of Commons.

---

The name of the gentleman to whom Lord Kenyon served his clerkship was Tomkinson not Tomlinson.

---

Z. Y. X. will be obliged to any Chancery practitioner who will inform him what fee is payable to the Secretary of the Lord Chancellor or Master of the Rolls, for answering a petition intituled in an original cause, and two supplemental causes; that is, whether one fee of 11*s.* as for one cause, or three fees of 11*s.* each, as for three causes?

---

QUERIES.

Whether an assignment of a portion of a trader's book debts to a creditor requires an *ad valorem* duty; since it has been determined (*Warren* v. *Howe*, 2 Barn. & Cress. 281.) that the assignment of a judgment debt does not require the *ad valorem* duty according to the meaning of the act.

It is also said that it is not necessary that the assignment of a *chose in action* should be by deed; for, not being strictly transferable from one person to another, the instrument of assignment is to be considered rather as evidence of the parting with the right of the assignor, than the transferring the thing itself to the assignee. —*Howell* v. *M'Ivers*.

Then, if an assignment is not actually necessary, what can be substituted so as effectually to divest the assignor, and transfer to and vest in the assignee the absolute right and property in the thing so transferred?

E. E. E.

---

A. deposits with B. a brown paper parcel, "*to be kept till he called again for it in a few minutes.*" B. is a publican; A. a casual customer, and a perfect stranger to B.; no one calls till the following evening — the applicant asks for the brown paper parcel, and B. hands it to him, supposing him to be the right owner. On the third day, another applies for it, alleging himself to be A., and insists on being recompensed for the loss.

*Query.* Can B. be said *not* to have exercised sufficient care under the circumstances, and therefore liable?

F. G.

---

## NOTES OF THE VACATION.

It was positively stated, prior to the last term, that the Lord CHANCELLOR had withdrawn his bill for establishing *Local Courts*, and the report was confirmed to our satisfaction, by an authority that we deemed unquestionable. With equal positiveness this report was subsequently contradicted, and in strictness the measure could not be said to be withdrawn during the adjournment of parliament. Whilst any degree of doubt remained we deemed it expedient to continue the publication of the letters from a BARRISTER, the third of which appears in the present number. We were the more inclined to insert these valuable contributions, not only on account of the ability they displayed, but in anticipation of a modified bill, which it is probable will be substituted for that which was last introduced.

There is one point, in particular, in the letter of this day, which we think of the greatest importance to the public interests We mean the reference to that part of the bill by which "*the defendant's place of residence determines the venue.*" The trading community are evidently ignorant of the incalculable injury which would result from this provision. In ancient times, when trade was limited to small districts, and scarcely ever proceeded beyond an adjoining county, nothing could be more proper than the trial of causes in the immediate vicinity, where both the parties and their witnesses necessarily resided.

But how will the wholesale dealers in the metropolis and the great manufacturing towns, to whom small debts are owing in all parts of the kingdom—how will their interests suffer, in being obliged to send witnesses to every Local Court in which they will be compelled to enforce their rights? The inconveniences and interruption to business, as well as the expense, will be intolerable. It is owing, we conceive, to the change in the condition and circumstances of society that the Old Local Courts have fallen into disuse, and, until the tide of commerce has rolled back, they or any thing like them cannot be usefully revived.

---

It is said that the excellent CHIEF JUSTICE OF ENGLAND is about to retire from his high station. His Lordship's infirm state of health is of course the only cause of his retirement. Lord LYNDHURST, it is supposed, will succeed to the vacant seat.

The Lord CHANCELLOR has added four new commissioners to the Common Law Enquiry. They are, Messrs. *Pollock*, *Starkie*, *Evans*, and *Wightman*.

His Lordship has also appointed four of the present Commissioners of Bankrupts,

Messrs. *Montagu, Beames, Fonblanque* junior, and *Fane,* to consider the subject of the bankrupt laws, and to report to him thereon.

He has also appointed four other gentlemen to consider the subject of reform in the Court of Chancery, and report thereon. The selection is a very proper one, as it is understood that they are the *Solicitor General,* Mr. *Courtenay* Cler. of Par., Mr. *Merivale,* and Mr. *Spence.*

Mr. Justice James Allan Park, it is said, is about to retire from the Bench.

---

During the last two Terms, 219 Attorneys have been admitted on the Rolls of the Court of King's Bench, and 5 additionally in the Common Pleas. There were 343 who gave notices of application; but it seems that of these 119 abandoned their intention.

It is generally supposed that nearly 800 Attorneys are yearly admitted, or 200 each Term. It has been deemed material, by a careful search of the original Rolls of the several courts, to correct this mistake. Those who are not admitted within four Terms after notice must repeat it. Many of the applicants renew their Notice at an early period; some at a distant one; and others from a change of views, never apply again. In the Supplement to the "Legal Observer," will be found a list of those whose names were added to the Roll since our first publication on the 6th of November.

---

Since the letter of J. N., inserted in No. XII., we learn from the same correspondent that the Judges of the New Court of Error, upon a representation of the circumstances, have appointed *Thomas Abbott,* Esq. of No. 15. Clifford's Inn, (the Deputy Associate of the King's Bench), to be the *Clerk of the Errors in the Exchequer Chamber*

---

## MISCELLANEA.

### ANCIENT LECTURES ON JURISPRUDENCE.

In the fourteenth century, lectures upon the science of jurisprudence were given in the University of Bologna, in Italy, by *Giovanni Andria,* a celebrated professor. His daughter, the accomplished *Novella,* was often prevailed upon by her father to take his chair; but in order that her consummate beauty might not distract the attention of the pupils, a veil was drawn before her, which concealed her from the public gaze.

This interesting incident is thus related by *Christina* of *Pisa:*—"In regard to his amiable and beautiful daughter, whom he so affectionately loves, she is so thoroughly skilled both in letters and law, that when he is himself engaged she pronounces her lectures, with a light curtain drawn before her."—*Citta del Donne.*

---

### A LORD CHANCELLOR WISHING AN INFERIOR OFFICE.

The step which Lord Lyndhurst has taken, in accepting the office of Lord Chief Baron, is not entirely without precedent, as far as the *desire* to take office goes. It is well known that Lord Loughborough, on resigning the Great Seal, actually asked for an inferior office, but was refused.

---

### BURKE'S OPINION OF THE LAW.

Burke says, speaking of Grenville, "He was bred to the law, which is, in my opinion, one of the first and noblest of human sciences,—a science which does more to quicken and invigorate the understanding than all the other kinds of learning put together; but it is not apt, except in persons very happily born, to open and liberalise the mind exactly in the same proportion."—*Speech on American Taxation.*

---

### PATCH, THE MURDERER.

Mr. Amos, in a lecture lately delivered on medical jurisprudence, related the following singular fact:—"I may mention a fact, which of course does not appear in the printed trial, that Patch's counsel, then Serjeant Best, pressed the prisoner, in conference before the trial, to say whether he was not left-handed,—but he protested he was not,—as the evidence proved that the murder was committed by means of a pistol-shot by a left-handed man; but being called upon to plead, and put up his hand, he answered 'Not guilty,' and *raised his left hand.*"

---

### LORD THURLOW'S RESIGNATION.

"When it was resolved to deprive Lord Thurlow of the seals, none of the ministers seemed willing to be the person to demand them (which it was desirable should be done personally), from the ungracious reception which it was supposed he would meet with. At last Lord Melville was prevailed upon to undertake the task. He adopted the following plan for that purpose. The evening before, he sent a note to the Chancellor, informing him that he proposed having the honour of breakfasting with his Lordship next day, and that *he had some very particular business to settle with him.* On his coming next morning, Lord Thurlow said to him, "I know the business on which you have come. You shall have the bag [purse] and seals. *There they are,*" pointing to a table on which he had placed them, "and there is your breakfast," of which they partook very sociably together. Lord Melville said that he never saw Lord Thurlow in better humour, and they parted apparently very good friends.—*The Correspondence of the Right Honourable Sir John Sinclair.*

# The Legal Observer.

VOL. I. SATURDAY, FEBRUARY 19. 1831. No. XVI.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

## JUDICIAL CHARACTERS. — No. III.

### LORD WYNFORD.

HAVING ventured to give our opinion of the judicial characters of the two eminent persons* who preceded the present Chancellor on the woolsack, we shall now turn our attention to the other learned individuals who have lately presided in the Superior Courts. Amongst the most conspicuous of these is Lord Wynford, whose title still sounds freshly upon the ear; so long and so well has he been known by his surname. Mr. Best, Mr. Serjeant Best, Mr. Justice Best, and Chief Justice Best, have been so familiar to our ears, that we confess the patrician appellation which his Lordship has selected, is not as yet wholly satisfactory.

We shall first shortly mention the steps of his professional career. We have not been able to learn the precise time when he was called to the bar, but he was created a Serjeant in Hilary Term 1800, and afterwards King's Serjeant, and Chief Justice of Chester. In Hilary vacation 1819, he was made one of the puisne Judges of the King's Bench; and, as it is understood, at the express request of the late King, George the Fourth, Chief Justice of the Common Pleas in Hilary vacation 1824. Although he was never what is called "a reading man," and always entered willingly into the pursuits and gaieties of the world, he, early distinguished himself in his profession; and his peculiar talents soon declared him to be a first-rate man as a *nisi prius* advocate. He selected the Court of Common Pleas for his field; and his business although he had many eminent rivals, was probably as large and varied as any man ever enjoyed in that Court.

He was some years in parliament; but he never distinguished himself particularly in that *arena*. This is sometimes attributed to the failure in his first speech; the disappointment of which he is said never to have overcome. Perhaps, also, his talents were better suited to the common-place minds of a jury, than to the fastidious compound of talent and prejudice of which our House of Commons is usually formed.

In Westminster Hall, however, Mr. Serjeant Best will long be remembered as one of the most effective advocates of his day. Few persons ever addressed a jury with more complete effect. Having mixed much with the world, and having observed the tastes and prejudices of mankind with great attention and shrewdness, he could speak at once to the feelings of the men whose opinions he was desirous of gaining. Ready and quick-sighted, he could turn any trivial and unlooked-for occurrence into account. He was fluent, but not profuse, in his language; bold and confident of success, but rarely allowing his confidence to master his judgment; zealous and active in the cause of his client, and sometimes even vehement in his defence. He had the great art of seizing on the strong point of his case, or the weak point of his adversary's, and bringing all his efforts to bear either in its support or refutation. He would rarely condescend to fight a battle inch by inch; he looked about for some opportunity where a great blow might be struck which would at once decide the victory. When we were accustomed to see him in Court, eagerly supporting some doubtful cause, his face flushed with anxiety, his whole soul absorbed in the interests of his client, his faculties excited to their highest pitch of exertion, there have been few men whom we should have preferred in our greatest need. This, however, was only taking Mr. Serjeant Best in his most fortunate cases. He would sometimes recall to our minds a part of the description which Dryden has given of Achitophel —

* See ante, pp. 65. and 193.

"For close designs and crooked counsels fit,
Sagacious, bold, and turbulent of wit."

He never attempted any great flight of eloquence; nothing could be less laboured than his happiest displays. He never seemed to be under any difficulty or hesitation; his language was correct and well applied; his style copious and perspicuous; his epithets were sometimes nervous and glowing; but he rarely filled his hearers with astonishment, or dazzled them by any transcendent talent. His great desire, and his very general reward, was a verdict for his client.

We have described Lord Wynford's manner at the bar, because, in so doing, we are also drawing his judicial character. He carried his forensic habits to the Bench. He addressed a jury with nearly the same earnestness and emphasis. The only difference was, that, as a Judge, he had not to argue the worst side of the question. He very quickly saw the truth of the matter to be decided; and although he generally espoused one side with some warmth, yet it was almost always the right side. His feelings were so quick, and his temper so lively, that he was sometimes involved in disputes with the bar; but his manners, at other times, were highly courteous to counsel. Many of his Lordship's judgments show very considerable research and legal ability: almost all of them display a clear insight into the merits of the case, although he was sometimes led into error as to the law. He would occasionally rise above the usual common-places of a Judge, and carry the jury with him completely by some straight-forward appeal to their feelings or sympathies.

We might adduce many of his judgments in the Common Pleas, of which any English Judge might be proud. He has, however, lately shown, in presiding in the Privy Council, that his judicial talents are in no way impaired by time. We shall quote one of these last, which has been reported by Mr. Knapp. — A Hindoo testator had made a will, bequeathing the bulk of his fortune to his executors for religious purposes. This will was to be established by the Court; and Lord Wynford thus addressed himself to the subject. In quoting this judgment, however, we have selected it rather from its general interest, than from any remarkable quality displayed in it.

"The interest of sovereigns, as well as their duty, will ever incline them to secure, as far as it is in their power, the happiness of those who live under their government; and no person can be happy, whose religious feelings are not respected. If this were a case between Europeans and Hindoos, we would not take a step without the assistance of some of the persons from India who are acquainted with the usages of that country with regard to the ceremonies which ought to be observed, and the works that ought to be performed, on the death of an opulent native; for we should fear lest, by the judgment which we might advise His Majesty to pronounce, the feelings of the people of Hindostan might be wounded. But this is a case where some members of a Hindoo family object to the allowance that has been made to other members of the same family for the expenses of the obsequies of the father of all the litigant parties, and of the works which that father, by his will, directed to be done by those to whom he bequeathed his fortune. With respect to the obsequies, as the will gives no directions how they are to be performed, we have only to consider, upon the evidence which these parties have laid before us, whether the sums allowed for their performance are more than have usually been expended at funerals of persons of the same rank and fortune as the deceased. If they are more, as some members of the family object to them, we ought not to sanction the expenditure. The sums which have been allowed for the obsequies and works exceed a sixth of the property of the deceased, although he left behind him eight sons and two daughters. This will not surprise persons who are acquainted with the history of the countries where the Roman Catholic religion has been established. In those countries a much larger proportion of men's substance was frequently directed to what we should now call superstitious uses. By the laws, for instance, now existing in Spain, a person, whatever his family may be, may give to the church one fifth of his fortune. I cannot, however, find, upon the evidence, any case in which, in India, more than three per cent. has been expended in obsequies and works; and the persons on account of whom, in those cases, such allowances were made, were persons of superior caste, and larger fortune than the deceased. The sums, too, which have been here allowed, exceed what had been expended by the deceased and his brother for the funeral of their mother. Indeed, although much evidence has been given as to what was usually expended on these occasions, and although that was the proper enquiry for the Master to make, he has satisfied himself with endeavouring to ascertain what had been actually expended, and not what ought to

have been expended. Such a mode of settling a claim of this sort would leave families entirely at the mercy of those who execute the will of their parents; as they might expend whatever sum they liked, however ruinous such expenditure might be to those who had the property bequeathed to them. It is true, that in the will all the children are to be required by the executors to attend the ceremonies; and if they decline attending them, the executors are to perform these ceremonies themselves; and no one is to be permitted to object to the manner in which they shall have been performed: but we do not think this clause gives the executors power to incur any expense they might think proper, without control, and without account. The meaning of these words is this; — If you do not think proper to attend the obsequies of your father, you shall not be heard afterwards to find fault with the manner in which these ceremonies were performed, or to raise trifling objections to the expense incurred. But these words do not give the executors an unlimited authority to waste the property of the deceased, and to leave the children destitute."

Lord Wynford, since he has been called to the House of Peers, does not seem inclined to close his career of utility. He has become an active senator; and although, to a certain degree, disabled * by infirmity, his mind appears still active and energetic. He has made several motions, and proposed several new measures. Two of his bills we have already laid before our readers. (See pp. 113. 148.) His exposure of the modern system of special pleading, we think peculiarly happy. He has not contented himself, however, with mere professional topics: he has frequently launched into the sea of political discussion, and is by no means backward in giving his opinion on the leading topics of the day. He has not, however, been permitted to send forth his opinions without opposition. On a late occasion, when he brought the state of the nation before the upper House, his speech was severely treated by Lord King. "My Lords," said the last noble Baron, "the noble and learned Lord,—for learned I must call him, and learned no doubt he is in his own profession and his own Court, but learned he is not in the information that is wanted here, or at least he has thrown no ray of light on what a gentleman at the bar called the opaque atmosphere of this House, — the noble and learned Lord has moved for a committee to enquire into the causes of distress which now pervades the country, to devise remedies, and to report their opinion thereupon to the House. Taking the view of this question that the noble and learned Lord has taken, I am sure that the committee for which he moves would, if granted to him, be nothing more than an *ignis fatuus;* that it would lead your Lordships out of the clear path, and lead you deeper in the dark.*" The noble and learned Lord, however, did not think it necessary to reply to this somewhat uncourteous attack, and was probably very little injured by it in the eyes of the House, or of the country.

We anticipate much benefit to the country from the exertions of Lord Wynford in the reform of our laws.

* On a late debate, he was unable to address the House standing, but requested permission to speak sitting. This was of course granted, and he delivered his opinion on the question before the House of Lords in this posture. The other Lords crowded round him to hear his speech, and the whole group presented a very interesting "tableau," as the French would have called it.

## ON THE GENERAL REGISTRY BILL.

SIR,

I THINK the remarks I am about to make may be most readily and effectually communicated to the profession through your pages, and I therefore beg their insertion in your next Number.

In perusing an article in the last Number of the Law Magazine, upon the "*State of the Registry Question*," I have been not a little surprised to meet with an assertion, (p. 197.) that the proposed bill for establishing a general register "has been hurried into the House in a more imperfect condition, than, perhaps, any measure whatever of the least importance or interest, for years;" and a few lines beyond, the following paragraph: — "Whether a missive, superscribed, like the missives of old — haste, haste, post-haste — was delivered to Mr. Duval, who had the chief management of the bill, we cannot pretend to explain; but certain it is, that he was scarcely allowed time to copy his clauses, much less to collate or elaborate them: it is matter of notoriety, that the bill was first seen by the majority of the commissioners in print; and the only excuse we have heard for its manifold sins of omission and commission is, that these will be remedied by the Committee of the House of Commons; an as-

* Mirror of Parl. part 71. 461.

sembly well qualified, no doubt, to decide on questions of abstruse technical lore, and mould anew one of the most complex and anomalous systems in the world,— the English system of conveyancing."

In the absence of explanation or contradiction by authority, I think the profession at large should be apprised of certain facts lying within the knowledge of many of its members.

Among practising conveyancers, at least, it is no secret, that the members of the original commission for enquiring into the laws of real property, had, in effect, abandoned the idea of a general registry. But when Mr. Duval afterwards consented to take part in the commission, and joined it with Messrs. Sanders and Tyrrell, the subject was resumed; and the first-named gentleman planned the simple and ingenious mode of indexing deeds, which it is now proposed to adopt, and which first satisfied the most eminent men in the profession of the practicability of a general register. This was in the autumn of 1829; and from that time till the presentation of the Second Report of the Real Property Commissioners, the minds of the members of the commission in general, and that of the author of the plan in particular, were in a great measure employed upon "*the mechanical parts of the plan.*" When, therefore, instructions for the preparation of the bill were given by the government in August last, and the execution of those instructions was confided to Mr. Duval *exclusively*, he had not for the first time to consider the principle or even the mechanical parts of the plan; and however he might afterwards be pressed for his draft, it is probable that more actual time and consideration was devoted to the *framework* and *language* of the bill, than has been bestowed upon the form of any preceding public bill; and it lies within the knowledge of many, that almost every original clause was retouched or altered before the *heads of the* BILL were printed. The general draft, being considered as a production for which the individual framer of it was alone responsible, was not, I have understood, formally submitted to the other commissioners, until it was printed, in the middle of November last: but here the imperfect information of the Editors of the Law Magazine has strangely misled them; for the draft was printed, not as a bill, but merely as the *heads of a bill*, for the express purpose of being submitted to the commissioners, and many other members of the profession, for their opinions, and it was accordingly circulated to a considerable extent. In deference to other opinions, the general arrangement of the draft was changed, and some of the clauses altered; and the bill was then introduced, and was first printed in obedience to an order of the House of Commons, made on the 21st of December last.

The alleged "*manifold sins of omission and commission,*" in the bill as it stands, are matters of opinion. I believe they are to be accounted for by the fact, that at least some members of the commission (and those esteemed by the profession the most competent to judge) think that the bill should pass into a law nearly as it stands; and, if I am rightly informed, it is for this reason only that additional or substituted clauses will be proposed in the Committee of the House of Commons: but which clauses either already have been, or will be, framed by a commissioner, with the same attention as the other parts of the bill.

I am, Sir,
Your obedient servant,
A CONVEYANCING BARRISTER.

10th Feb. 1831.

---

## MEDICAL EVIDENCE.

TRIALS OF JOHN DAVIS; — OF DONELLAN, FOR POISONING SIR THEODOSIUS BOUGHTON; — OF DONNAL; — OF COWPER.

IT is not a little surprising, that so intelligent and respectable a class of men as the medical profession should make so poor a figure in the witness-box. In our own experience, we have known so many gentlemen of this profession "break down," as it is called, that we have a great distrust of this kind of evidence. We have frequently seen a medical witness called into the box, and positively swear to a certain fact as the result of his experience, and then suffer himself to be completely driven out of his opinion. Take, for instance, the evidence of tests of poison; we have repeatedly heard a doctor declare that he had on analyzation discovered poison — arsenic, for example — in a particular vessel, or in the stomach of a deceased person, and, when asked his reason, he has stated that the existence of a particular fact, or a certain test, was an infallible proof of the presence of the poison; on cross-examination, this statement has been closely sifted, and he has been forced to admit that the appearance on which he relied is by no means infallible, and might have been produced by other substances: and that, in fact, although the life of the

prisoner has been depending on his testimony, he has been guided by mere inference and supposition. We have seen this repeatedly happen: we have alluded to evidence of the presence of poison: we recollect one recent and remarkable instance on another point, which, as it has never been in print, we shall mention.—At the autumn great Sessions, 1829, John Davis was tried at Carmarthen for the murder of a young woman, who had been his sweetheart. The evidence was entirely circumstantial, and was of the faintest kind; a bloody hatchet had been found near the young woman, which was, to a certain extent, brought home to the prisoner. This circumstance was the most important proof against him. A medical witness was called, and was asked, by the counsel for the prosecution, his opinion as to the instrument by which the young woman had been murdered. He answered, "that in his opinion it was either with a hatchet *or* a bill-hook." On cross-examination by the prisoner's counsel, the following questions were asked. Q. "You said that the wounds were inflicted with a hatchet or a bill-hook?"—A. "Yes." Q. "You think they could have been committed with no other instrument whatever?"—A. "*Yes.*" Q. "You are ready to swear that these were the only two instruments that could by possibility have been used?"—A. "*I am ready to swear it.*" Q. "You think, then, that precisely the same effect would be produced by a hatchet and a bill-hook?"—A. "*I do.*" Q. "The one having a concave, the other a convex edge?"—A. "*I am of that opinion.*" Q. "These were the only two instruments that could have been used?"—A. "*I think so.*" Q. "Now, Sir, might not these wounds have been inflicted with a sword?"—A. "*They could not.*" Q. "Why could they not?"—"*Because the prisoner* HAD NO SWORD." Thus this person's evidence was given throughout on the presumption that the prisoner was actually guilty.

These observations have been suggested by reading a lecture lately delivered by Mr. Amos at the London University, reported in the Medical Gazette of the 12th of February, 1831. It will supply-us with some further instances of the truth of our opinion on this subject; and we shall, therefore, quote the most interesting part of it.

"A medical man who has not seen a patient, may, after hearing the evidence of others, be called to prove, on his oath, the general effect of the disease described by them, and its probable consequences in the particular case. Thus, in prosecutions for murder, medical men have been allowed to state their opinions, whether the wounds described by witnesses were likely to be the cause of death; or, in another description of cases, whether such and such appearances are symptoms of insanity? So a medical man may be asked his opinion upon many hypothetical points, not proved in evidence, but suggested by the ingenuity of counsel: as, for example, where the strangulation of a new-born infant is charged, whether the swollen and red appearance of the head might not have been occasioned by its being born some time before the body, or been produced by the accidental ligature of the navel-string.

"It is part of the business of a course of lectures upon Medical Jurisprudence, to inform the medical student, when you are summoned upon a trial of this or that description, besides any *facts* which you may have witnessed, upon what points is the counsel on one or the other side likely to call for your *opinion?*

"You will say, it is easy enough to give an *opinion.* I may answer, that lawyers have the advantage of medical men in this—that the opinions of medical men are submitted to a much more severe ordeal. Having given your *opinion,* you will be asked, what are the *grounds* of your opinion? If you say, *your own experience,* the extent of this will be narrowly investigated. If you say, from analogical experiments, which you have made upon the lower animals (as it is very frequent that horses and dogs, and cats, and other animals, are drowned or poisoned with a view to throw light on the manner of death of a person supposed to have been murdered), you will be required to give a satisfactory answer to the questions: for example, whether any certain analogy is to be drawn from the effects of any given species of poison upon an animal of the brute creation, to that which it may have upon a human subject; and whether particular substances, which would kill animals instantaneously, would have no noxious effect, or at least a much less immediate effect, upon the human subject?

"I will give some extracts of examinations, where analogy has been stated as the ground of medical opinion.

"[Here the Professor read some passages from the direct and cross-examination of Dr. Rattray—and then the following passage from the evidence of John Hunter on the memorable trial of Donellan.]

*Mr.* JOHN HUNTER *examined by* MR. NEWNHAM.

"'Q. Is any certain analogy to be drawn from the effects of any species of poison upon an animal of the brute creation, to that which it may have upon the human subject?—A. As far as my experience goes, which is not a very confined one, because I have poisoned some thousands of animals, they are very nearly the same. Opium, for instance, will poison a dog as well as a man; arsenic will have very nearly the same effect upon a dog as it would have, I take it for granted, upon a man; I know something of the effects of them, and I believe their operations will be nearly similar. Q. Are there not many things that kill animals almost instantaneously, that will have no detrimental or

noxious effect upon a human subject; spirits, for instance, occur to me? — A. I apprehend a great deal depends upon the mode of experiment. No man is fit to make one, but those who have made many, and paid considerable attention to all the circumstances that relate to experiments. It is a common experiment, which I believe seldom fails, and it is in the mouth of every body, that a little brandy will kill a cat. I have made the experiment, and have killed several cats; but it is a false experiment. In all those cases where it kills the cat, it kills her by getting into her lungs, not into her stomach; because, if you convey the same quantity of brandy, or three times as much, into the stomach, in such a way as that the lungs shall not be affected, the cat will not die. Now, in those experiments that are made by forcing an animal to drink, there are two operations going on: one is a refusing the liquor, by the animal kicking and working with its throat to refuse it; the other is a forcing the liquor upon the animal; and there are very few operations of that kind but some of the liquor gets into the lungs. I have known it from experience. Q. If you had been called upon to dissect a body suspected to have died of poison, should you or not have thought it necessary to have pursued your search through the guts? — A. *Certainly.* Q. Do you not apprehend that you would have been more likely to receive information from them than from any other part of the frame? — A. *That is the track of the poison, and I should certainly have followed that track through.*'

" Nay, more: you will not always be let off with stating your *own opinion*, and giving some *ground* for it, but you will be expected to know something about the opinions of others; or at least you will appear very ignorant if you do not. And it may be observed, that perhaps lawyers, whose freedom of intellectual enquiry is fettered in the closest and most servile manner by authority, are apt to lay too great stress upon authority in medical matters. You must constantly, therefore, be expected to be taxed with such questions as these: — What are Hunter's opinions upon such or such a subject? Was Haller, was Dr. Mead, of the opinion you are now giving?

" I remember a medical man, at Lincoln, endeavouring to give the go-by to such questions, by slighting the information which was to be obtained from medical writers; answering, that ' the writers of books would advance any thing.' Chief Justice Dallas severely reprimanded the witness, observing, that he would not sit in a court of justice and hear science reviled, and the recorded researches of the medical world represented by ignorant tongues as leading only to uncertainty.

" It has been a great reproach to the medical profession, that, on the occasion of celebrated trials, the medical witnesses on the one side and the other have contradicted each other in such a point-blank manner in their opinions delivered upon oath.

" Thus in the case of Donnal, tried at Exeter, in 1817, for poisoning his mother-in-law with arsenic, Dr. Edwards, for the prosecution, is asked — What is your opinion, from the appearance of the deceased on dissection, as to the cause of her death? — A. From the appearance of the stomach and intestines, independently of the examination and analysis of their contents, I have no doubt that the death was produced by arsenic. And, in re-examination, you have stated your opinion that the death was not occasioned by cholera morbus, and have been asked several questions upon the nature of cholera: do you change your opinion? — A. I do not. When Dr. Adam Neale is called for the defence, he is asked — Did you hear distinctly the description Dr. Edwards gave of the appearance of the stomach after it was opened? To what should you, independently of other circumstances, have attributed that appearance? — A. To no cause but disease. Q. What disease? — A. Cholera morbus. In this he is followed by two or three more doctors. Dr. Edwards spoke also as to the certainty of two tests he had employed — blue vitriol and lunar caustic; and that the circumstance of Mrs. Donnal having eaten onions shortly before her death, could not have effected the tests. The doctors for the defence denied the sufficiency of the tests, and deposed that the tests would very probably be affected by the onions.

" So, in Donellan's trial, the doctors for the prosecution were particularly asked as to their opinion upon the symptoms described by Lady Boughton, and which I read on the last occasion; and they say that they are of opinion, from the symptoms described, that the cause of the death was laurel water. Q. Is the heaving of the stomach a circumstance which attends epilepsy, or apoplexy? — A. It is not. Now, when John Hunter is called, he is asked — Are the symptoms that appeared after the medicine was given, such as necessarily to conclude that the person had taken poison? — A. Certainly not. Q. If an apoplexy had come on, would not the symptoms have been nearly or somewhat similar? — A. Very much of the same. Q. You have heard of the froth issuing from Sir Theodosius's mouth, a minute or two before he died; is that peculiar to a man dying of poison? — A. No; I should rather suspect an apoplexy. You recollect the circumstance that was mentioned of a violent heaving of the stomach? — A. All that is the effect of the voluntary action being lost, and nothing going on but the involuntary.

" Again, the doctors for the prosecution swore that it was their opinion, from the *appearances of the body on dissection*, that Sir Theodosius had been poisoned; and that those appearances could not arise from putrefaction. John Hunter said, that, in his judgment, the appearances were entirely the result of putrefaction, and that they did not afford the least suspicion that Sir Theodosius died of poison.

" But the most remarkable of a multitude of instances of cross-swearing by doctors, with regard to medical opinion, was in the case of Cowper, afterwards a Judge. He was tried for the murder of Mrs. Stout, a Quaker lady, whose body was found in a river near Hertford, during the time Cowper was attending the Hertford assizes as a counsel, and who had fallen in love with Cowper. She had also written some love-letters to another swain, signed " Your loving duck." The charge against Cowper was,

that he had strangled the woman, and then had thrown her body into the river, in order to give a colour to the charge of suicide. At the time this happened, Cowper's father and brother were sitting members for Hertford, after a recent election, which had been strongly contested; and the irritation occasioned by it was still active. Accordingly, a long list of Tory doctors were summoned for the prosecution, and an equally long list of Whig doctors for the defence. The contest was upon a point of medical opinion with regard to bodies found *floating, without water in them* — how the deceased came by their death. Mrs. Stout was found at the top of the water the day after she was missing; but her body was not opened till six weeks afterwards, when no water was found in it.

[The contradictions of the medical witnesses in this case were very remarkable indeed. We may refer the reader to them in Gordon Smith's Analysis of Med. Ev. pp. 274, 275. 281. 285.]

"I shall have occasion frequently, in the course of my lectures, to advert to the subject of the demeanour of medical witnesses. The hour will just allow of me, this evening, adverting to one piece of advice; which is, in the witness-box to drop as much as possible the language which is known only to scientific men, and to adopt that which is in popular use. If you have occasion to speak of a person fainting, do not say, as I have heard it said, that you found the patient in a state of *syncope;* — and you must not expect a court of justice to understand you if you talk of a person being *comatose*, or of the appearance of his stomach after death being *highly vascular*, or of your having discovered poisonous ingredients in his intestines by means of a *delicate* test. The Judge and counsel are generally very shallow men of science, and it is a great advantage for them to raise a laugh at persons whom they would represent to be using hard names for common things. Veterinary surgeons are a great game for counsel; as I remember, in particular, a veterinary surgeon, who, when cross-examined by Serjeant Vaughan, was so unfortunate as to make use of the term 'suspensary ligament,' which the Serjeant interpreted 'a hangman's noose.' I should guard you also against the use of metaphorical expressions, of which I will give you an example.

In the examination of Mr. Tucker, in Donnall's case, the witness is asked 'Have you seen the prescription which Dr. Edwards wrote that night? — A. No, I have not; but I could wish to see it. (Here the prescription was shown to the witness). Now, supposing a person to have retchings and purgings for several hours, and that you found these attended with frequent and fluttering pulse, in that state of the illness what should you have prescribed? — A. *I should have prescribed diametrically opposite to the prescription of Dr. Edwards; I should consider that prescribed by Dr. Edwards as adding weight to a porter's back.*' Mr. Justice Abbott, (to the witness) 'Don't speak metaphorically: you are speaking just now of a gentleman of experience and respectability; I don't wish you to conceal your opinion, but only to speak it in different language.'

"And considering that, when you are giving testimony in a witness-box, you are discharging a most responsible duty upon your oaths, I should recommend you, even if you should meet with rude and unbecoming treatment from an advocate, that you should not vie with him in a dexterous use of what my Lord Bolingbroke calls 'the flowers of Billingsgate.' A short extract from a scene in the Oldham Inquest will illustrate my meaning.

"Mr. Simmons, a surgeon of Manchester, is undergoing a cross-examination by Mr. Harmer. 'I think,' says Mr. S., 'I am more capable of forming a correct opinion on the subject than Mr. Cox.' 'The jury, Sir,' replies Mr. H., 'will no doubt duly appreciate the value of that self-opinion.' *Mr. Ashworth.* — Really, Mr. Coroner, I must interpose to protect the witness from this sort of attack. *Witness.* — Oh! Mr. Ashworth, let me go on, I will teach him surgery; I am anxious for a little more discussion; he is not the first lawyer I have taught surgery. *Mr. Harmer.* — Perhaps not; but notwithstanding the opinion you entertain of your own skill, I should be very sorry to be under your hands. *Witness.* — Oh! I'll teach you surgery, Sir. As you have challenged me with a castigation from different medical opinions, I hope you will bring down Dr. Cline, Sir Everard Home, and the other leading members of the faculty. I shall be very happy to see them. *Mr. A.* — I will ask you, Mr. Coroner, whether the witness is to be attacked in this kind of way. *Witness.* — I am sorry you should interrupt the gentleman, Mr. Ashworth; I am anxious for a little more discussion with him. (Here much clamour ensued, and different gentlemen addressed the Coroner together.) *Witness.* — I want a little more discussion; don't interrupt the gentleman; I should like a little more discussion with him. *Mr. H.* — I beg you will hear Mr. Simmons; he says he wants a little more discussion. *The Coroner.* — I have exhausted all my patience,' &c."

## REVIEW.

### LAW REPORTING.

*Reports of Cases argued and ruled at* Nisi Prius *in the Court of King's Bench and Common Pleas, and on the Western and Oxford Circuits, from the Sittings after Hilary Term* 11 *Geo.* 4. *to the Sittings after Trinity Term* 1 *Will.* 4. By William Moody and Benjamin Heath Malkin. London. J. and W. T. Clarke; and Saunders and Benning.

Lord Redesdale, four years ago, in a pamphlet upon the Chancery Commission, gave it as his opinion, that one great evil of the present state of the law was the number and length of the present law reports. He referred, he said, with pleasure, to Atkyns and Peere Williams, where he found that the exact point decided was stated shortly and correctly; but when he opened

the reporters of the present day, he was confused and wearied by long and useless statements of deeds and wills, and the real points of the case overlaid by all the *verbiage* which the Judges had uttered. His Lordship ascribed this unfortunate change in the manner of reporting to law-book-selling being a more profitable trade than formerly. Now, we are not inclined to go the whole length of the learned Lord; we think that there are some reports now published which display great ability and judgment; but we regret to say that there are many which richly deserve the censure which his Lordship passed on them. When it is recollected that the reports of common law alone occupy more than 60,000 pages, we think it is full time that some end should be put to it; and we have long intended to turn our full attention to the subject, and expose what appear to us the most prominent evils of the present system. It would be no difficult matter to show that many of the cases reported are mere specimens of book-making; that they might be compressed within a quarter of their present space; that the interests of the profession are greatly affected by the present system, not merely in being made to pay four times as much as they should pay, but, what is more important, in not having the knowledge which these works contain presented to them in an accessible form, and the consequent loss of valuable time. These are the evils of which we complain, they are universally felt and lamented; and we could, if we pleased, bring together so numerous a list of extracts showing the truth of what we state, that the whole overgrown pile of modern reports would totter to its foundation. We are inclined, however, for the present, to spare ourselves this somewhat painful task: we have now stated the grievances of which we complain; we think we owe it to the profession to do our best to remedy them; we, moreover, promise to do so, having both the power and the will to carry our intentions into effect. But we are unwilling to do this without due notice to the parties concerned; we are willing to pass an act of oblivion which shall obliterate from our minds all offences of this nature up to the present day. But, in future, we shall hold any such feelings to be mere signs of weakness: we should abandon the charge that has been committed to our care—the interests of the profession—if we acted otherwise; and we promise, if occasion should require, that we shall not be slow in following up this announcement, be the offender who he may.

We have great pleasure in stating that the reports of Messrs. Moody and Malkin do not come in any degree within the limits of our censure. They are models for the *nisi prius* reporter, and are deserving of considerable praise; they are, with some few others, the Abdiels of the host;

——— "Among the faithless, faithful only they;
Among innumerable false, unmoved,
Unshaken, unseduced; ———
Nor number nor example with them wrought
To swerve from truth, or change their constant mind."

The points decided are given neatly and correctly; the opinions of the Court condensed and clearly stated; and the subjects well selected. The whole of the cases in this Number will be found shortly stated under their proper heads in the QUARTERLY DIGEST. We shall here mention more fully the most important cases.

The first decision which we shall notice, is the case of *Obbard and another* v. *Betham*, p. 483., which establishes an important principle. Where bills are given in payment for goods, if the goods turn out to be worth much less than the estimated price, a doubt arose, whether the whole amount of the bills could be recovered. It is well known that great frauds are frequently committed on distressed persons in this manner. They consent to accept bills, and receive, instead of money, goods which prove to be worth about half the amount of the bills they have accepted. Lord *Tenterden*, however, ruled in this case, that the full amount of such bills may be recovered. "The cases cited for the plaintiff*," said his Lordship, "have completely established the distinction between an action for the price of the goods, and an action given for the security for them. In the former, the value only can be recovered; in the latter, I take it to have been settled by those cases, and acted upon ever since as law, that the party holding bills given for the price of goods supplied can recover upon them, unless there has been a total failure of consideration. If the consideration fails partially, as by the inferiority of the article furnished to that ordered, the buyer must seek his remedy by a cross action." There was a warranty that the goods were "of good quality;" but Lord *Tenterden* thought that did not alter the case.

There are also two cases on a point in bankruptcy of much interest. The first is *Ward and another* v. *Clarke*, 497., which

* *Morgan* v. *Richardson*, 1 Camp. 40. n. *Tye* v. *Gwynne*, 2 Camp. 346.; and see *Heming* v. *Simpson*, 1 Camp. 40. n.

has decided, that where a bankrupt, after a secret act of bankruptcy, bought on credit, and sold for ready money at unduly low prices, the purchasers were not entitled to the protection of the 6 Geo. 4. c. 16. § 82., which enacts, "That all payments really and *bonâ fide* made by and to a bankrupt before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy, provided the person so dealing with the bankrupt had not notice of any act of bankruptcy, unless the purchase was in the usual course of business. This principle is extended still farther by the subsequent case of *Cook and another*, v. *Caldecott*, 522.; in which Lord *Tenterden* held, that a sale of goods under such circumstances is an act of bankruptcy; and that the buyer is liable to the assignees in trover for the value of the goods: the jury however could not agree, and no verdict was found. We think the case so important, however, that we shall give it fully.

The action was brought to recover the value of two parcels of goods, delivered by the bankrupt to the defendant, on the 12th and 19th of February, 1829, respectively, under the following circumstances: — The goods delivered on the 12th of February, were about half of one and the whole of another parcel of goods, which the bankrupt had bought a few weeks before on three months' credit. Evidence was given that the prices at which the bankrupt had purchased were the fair and usual prices at the time of his purchase, and that no depreciation had taken place between that time and the time of the sale to the defendant. The defendant bought them for ready money, at a depreciation of 33⅓ per cent.; the original prices, and that deduction, being stated on the invoice to him. It did not appear, however, that the original prices were stated as those paid by the bankrupt; nor was any evidence given to show that the defendant knew them to be so. The circumstances respecting the goods delivered on the 19th of February were just similar, except that, with respect to part of them, the price paid by the bankrupt and the value were not proved; and that the rest were shown to have been purchased by the bankrupt on the same day, at 48*s.* 6*d.* a piece, and sold by him to the defendant at 38*s.* 6*d.* a piece: but here, as before, there was nothing to fix the defendant with knowledge of the price given by the bankrupt, or the time of his purchase. The other circumstances relied on against the defendant were these: — That the original seller of part of the goods purchased on the 12th of February, bought one piece of these goods from the defendant at 2*s.* 3*d.* a yard, the sale price to the bankrupt being 2*s.* 10*d.*; and that on the next day the defendant's shopman refused to deliver it, and mentioned a higher as fixed upon those goods, but refused to sell them to that party, stating that they were already contracted for; that the goods were packed in bales, containing articles of various kinds, and that the defendant had purchased them after inspecting one bale only; and that the defendant had stated, on his examination before the commissioners of bankruptcy, that the goods were soiled or damaged; which witnesses were produced on this occasion to negative. Down became a bankrupt, and a commission was issued against him within a week of the transaction of February 19th. No act of bankruptcy was proved earlier than the 20th, though he was shown to have contemplated absenting himself from his creditors as early as the 16th. The resolution, however, did not appear to have been acted on till the 20th.

*Campbell*, in opening the case for the plaintiff, admitted that the assignees could not avoid the transactions in question, however fraudulent they might be, if they took place before an act of bankruptcy, because with respect to such transactions they only stood in the place of the bankrupt, who could not have defeated them by relying on his own fraud; but he contended, that if it should turn out that there was no other act of bankruptcy at the time, the transactions themselves were acts of bankruptcy within the 6 Geo. 4. c. 16. s. 3., as "a fraudulent gift, delivery, or transfer of goods or chattels, with intent to delay or defeat his creditors."

Lord *Tenterden* C. J., in summing up to the jury, said,—"All other proof of any act of bankruptcy previous to the sales in question having failed, the only question is, whether the transactions themselves, or either of them, are to be considered as acts of bankruptcy within the 6 Geo. 4. c. 16. s. 3.? The words of the clause are, 'fraudulent gift, delivery, or transfer,' the word 'fraudulent' of course applying to each of those that follow it. Now, a sale is a transfer, and therefore may come within the meaning of the provisions of the statute as a 'fraudulent transfer.' But though it may be so, it is not, from its nature, a transaction exposed to the same suspicion as some of those which would be comprehended under the former words: and I think that a sale cannot in reason be held to be a fraudulent transfer, unless it takes place under such

circumstances that the buyer, as a man of business and understanding, ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditors; and that the sale is made for that purpose. The question, therefore, for the jury is, whether they think that the defendant, as a man of business, ought to have known that Down affected these sales, or either of them, for the purpose of putting the proceeds in his own pocket, and defrauding his creditors? If so, the verdict should be for the plaintiffs for all the goods comprised in that transaction, or delivered subsequently to it." The jury (a full special jury) were equally divided in opinion; and after retiring for two hours, were discharged from giving a verdict.

These appear to us the most important cases in the Number, but there are other useful points decided, the knowledge of which will be serviceable to most professional men; and we have great pleasure in lending an additional circulation to the cases which we have extracted; and we hope to be able, from time to time, as the reports are published, in the same manner to extend the sphere of their utility.

---

*Some Observations on the Necessity of reforming the House of Lords considered as the Court of ultimate Appeal in the Administration of Civil Justice.* London. H. Butterworth. 1831.

THE object of the pamphlet now before us is to point out the total inefficiency of the House of Lords, as at present constituted, to act as a competent Court of ultimate appeal. The author shows the incompetence of the Peers themselves to decide on the various questions brought before them; and that the Chancellor in reality decides. He then proceeds to prove, that in matters of law, the Chancellor, from the course of his previous life, is not generally a proper person to review the judgments of the Courts of law. Next he demonstrates that the appeal from the Court of Chancery to the House of Lords is only an appeal *from* the Chancellor *to* the Chancellor. As this is the scope of the work, our readers will readily perceive that there can be nothing very new in it, and we could have wished that the author had stated his objection to the present system less flippantly than he has done. However, now that reform in the law is the object of constant attention with the legislature, any work which points out the real abuses of our judicial system must be useful. The author seems, however, not to have attended to the provisions of 1 Will. 4. c. 70. s. 8., with regard to Writs of Error. In pp. 11. and 12. he speaks of appeals from writs of error, from the C. P. to the K. B., and from the K. B., in certain cases, direct to the House of Lords. The above-mentioned statute, however, provides, "that writs of error upon any judgment given by any of the said (superior) Courts, shall hereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the other two Courts in the Exchequer Chamber;" and from the "judgment in error" of such Judges, or Judges and Barons, "no writ of error shall lie or be had, except the same be made returnable in the High Court of Parliament." Some other mistakes might be pointed out; and we would advise the author, when next he recommends a reform, to make himself fully acquainted with the existing system.

---

## CUSTOMS OF LONDON.

### ANCIENT LIGHTS.

THE customs of London, so ancient, and so justly prized by the citizens, are not, strictly speaking, parcel of the common law of England; but are recognised in the Superior Courts, as obligatory within the precincts of the city.

These customs are, however, not acknowledged by the Courts, until they have been once certified by the Recorder; and who certifies to their existence by an *ore tenus* communication to the Court, in which the *certiorari* to return the custom is made returnable.

Returns of this kind have been made occasionally, within the last three centuries, into the Court of Chancery; but the records of the Court of King's Bench present no such certificate during the intermediate reigns from Hen. VI. to Geo. II.; and the only instance which exists since the latter period is in the case of *Plummer* v. *Bentham**, where the form of certificate used was in the following form:—

"The answer of Marshe Dickenson, Esq. the Mayor, and of the Aldermen of the City.

"We the said Mayor and Aldermen of the said city, by Sir William Moreton, Knight, Recorder of the said city, by word of mouth of the said Recorder, according to the said custom of the said city, do, in obedience to the said annexed writ, humbly certify that there is now had, and from the time whereof the memory of man runneth not to the contrary there hath been had, and received such ancient and laudable custom in the said city, used and approved, to wit, 'that if any one hath a messuage or house in the said city, near, or contiguous and adjoining to another ancient messuage or house, or to the ancient foundation of another ancient messuage or house in the said city, of another person his neighbour there, and

* 1 Burr. 248. 252.

the windows or lights of such messuage or house are looking, fronting, or situate towards, upon, or over, or against the said other ancient messuage or house, or ancient foundation of such other ancient messuage or house, of such other person his neighbour, so being near, adjacent, contiguous, or adjoining, although such messuage or house, and the lights and windows thereof, be or were ancient, yet such other person his neighbour, being the owner of such other messuage or house of ancient foundations, so being near, adjacent, or adjoining, by and according to the custom of the said city, in the same city for all the time aforesaid used and approved, well and lawfully may, might, and hath used, at his will and pleasure, his said other messuage or house so being near, adjacent, or adjoining, by building to exalt or erect; or of new, upon the ancient foundation of such other messuage or house so being near, adjacent, or adjoining, to build and erect a new messuage or house to such height as the said owner shall please, against and opposite to the said lights and windows near or contiguous to such other messuage or house, and by means thereof to obscure and darken such windows or lights; unless there be or hath been some writing, instrument, or record of an agreement or restriction to the contrary in that behalf.'"

Upon this important occasion, the Recorder of London appeared *down at the bar*, and in his purple cloth robe faced with black velvet.

TEMPLARIUS.

## WOUNDING WITH A BLUNT INSTRUMENT.

*To the Editor of the Legal Observer.*

MR. EDITOR,

You are, no doubt, aware that a man was convicted at the late Special Commission, holden at Salisbury, on an indictment under the 9 G. 4. c. 31. s. 12., for wounding a magistrate with a hammer, intending to do him some grievous bodily harm. The case was referred to the Judges for their opinion, whether the wounding with such an instrument as a hammer was sufficient to sustain an indictment on that statute. The Judges were of opinion that a wounding with any blunt instrument was sufficient.

Sir, — I live in a country where people are not so cool and collected as they are in yours, and, therefore, the effect of this decision will be felt more strongly here than with you. "Any blunt instrument" will include an appalling restriction on the laudable disposition to punish impertinence. If I just beat a man with a cudgel; if I knock down an insolent rascal who has affronted a female; if I even pull his nose, and the skin be in the least removed; since that is a wounding, and my stick, or finger and thumb, are blunt instruments, then there is "a wounding with a blunt instrument," and therefore I am liable to be hanged! Why, Sir, can such things be? They talk of the laws of Draco, and the Black Act, but this construction of the 9 G. 4. c. 31. is infinitely more merciless. If this could have been the intention of Lord Lansdown, when he brought in the bill, he ought to be called Lord Moloch! Sir,—when once such a construction is admitted, there is no knowing how far it will go. "Blunt instrument!"—why, sometimes Mr. O'Connell's speeches are blunt instruments, and inflict wounds: so he is liable to be hanged, according to this construction.

Though I am only a poor Irishman, perhaps, Sir, you will have no objection to put this in your very clever publication, to oblige

Your obedient servant,

Sackville Street, Dublin. O'M.

## SUPERIOR COURTS.

### PRACTICE IN LUNACY.

The *Lord Chancellor*, after noticing that a particular case of great injustice to a lunatic had been brought under his notice by one of the Masters, delivered the following opinion, as to the remedy which might be applied: — "The difficulty in which the Master found himself is this — and at first it appeared to me to press a little also on myself — that, strictly speaking, he can do nothing unless set in motion. This is the general prevailing opinion in the Master's office. I am not of that opinion. I hold, that at all events the Master has a duty to perform, and has a power to discharge that duty, so far forth as to convey immediate and precise information to the Great Seal, if it happen (as is generally the case) to be vested with the powers of the Crown in lunacy. Then the question arises, whether the Great Seal can act without being put in motion? and some have said, and I think most thoughtlessly and contrary to all principle have said, that the Great Seal never can be put in motion judicially without an application — that it cannot put its own power into motion; but this is a wild idea. In the first place, I doubt whether it applies to the judicial functions of the Court at all. But I am clear that it cannot apply to the jurisdiction in lunacy, which is not even *quasi* judicial, though dealt with often judicially, with respect to the rules of evidence and the mode of proceeding, but the powers and duties of the Court are any thing but judicial in lunacy. The individual holding the Great Seal sits *in foro domestico*. He represents the sovereign, as the guardian of the lunatic in his capacity of *parens patriæ*. My course is perfectly clear; for if I wait till I am put in motion, I may wait for ever. The existence of the abuse assumes, that no party will apply to me; the abuse would not exist, if the parties were contesting. But it is because the breach of a high duty—a sin against every humane and Christian feeling, as well as every honest principle — is committed by those who have the care of the unhappy lunatic, and owe to him and the Court a duty, which they violate, that neither will impeach the other, and that, therefore, I am bound for the protection of my jurisdiction, and I am bound for the protection of the lunatic, to interfere, and put the power intrusted to me in motion

That these combinations should exist between the committee of the person and the committee of the estate, is by no means a remote possibility; for, if you consider, you will find that the committee of the estate is either the heir at law, or some person selected by him; and the committee of the person is either one of the nearest of kin, or some person connected with him, not being the heir of the estate; so that, in the majority of the instances, the two committees are probably near relations, at all events persons connected with each other. They may very easily have a joint interest, and, if they are unconscientious men, they may sacrifice to that joint interest both their duty to the unhappy patient and to this Court. That being the case, therefore, it would be absurd in the grossest degree, and carrying the thing to a most dangerous extent, to give countenance to the idea, that there is any doubt as to my power and my duty of actually interfering, although, or rather emphatically, because no application is made to me. I think that the Masters ought to understand, that whenever they see any thing suspicious generally—not confining themselves to such cases—but, at all events, whenever they see any thing suspicious, and there appears to be a lack of disposition in any quarter to bring that matter before them so that they may deal with it, their duty is, if they cannot put the parties in motion before themselves,—if they can, I shall be better pleased, because it will save the time occupied in the Court hearing it, and it may save a heavy expense,—but if the parties appear sluggish and indisposed to move, it is their duty to do what they can; and if they find they can do nothing consistently with the practice of their office, in order that justice may be done, that they should immediately come to me and put me in motion: then I shall take in all those occasions the step I have taken in this, which is to appoint a solicitor, a respectable person in whom I have confidence, to act in the case, and to move me after having made due enquiry. I have no officer to make the necessary enquiries, and I have no means of meeting the expense but by making the estate of the lunatic defray the charge, which shall be as small as possible; but I do not see how a few pounds of the estate can be better bestowed for the benefit of the lunatic himself, than, when I see there is a want of conscience and common feeling on the part of the committee, by putting the affair into the hands of a person I can rely upon, and who will see that justice is done also to the estate.

## ROLLS COURT.

MORTGAGE AND BOND.

A mortgage had been made, and a bond was given as a collateral security. The mortgagor had been arrested, and the question was, whether the mortgage was discharged by the arrest. The *Master of the Rolls* was of opinion that it had not any such effect. It was true that taking the body in a personal action destroyed and extinguished all right of future personal actions, but it did not affect a collateral security on land. The mortgage, therefore, remained unaffected by the action.—*Davison* v. *Batine.* Feb. 7.

FRAUD—GUARDIAN AND WARD.

Anne Faulkner, the plaintiff, was entitled, as the grand-daughter and next of kin of Elizabeth Ducket, to a bond debt of 2100*l.* due to the latter by the plaintiff's aunt, Mrs. Salmon. Elizabeth Ducket died, and appointed Salmon and Goldby trustees and guardians of the plaintiff. Goldby acted as trustee, and remained possessed of the bond until the plaintiff came of age, when he delivered it to her; and she, having been brought up by her uncle the defendant, and his wife Mrs. Salmon, sent it to the latter, by whom it was destroyed. The plaintiff afterwards married; and a bill was now filed against the representatives of Salmon, to impeach the transaction, and for an account.

Mr. *Bickersteth*, for the plaintiff, contended, that this case came within the well known rule of the Court, that a guardian cannot benefit by his ward's property; and relied mainly upon the case of *Hatch* v. *Hatch*, 9 Ves. 292.*

Mr. *Pemberton*, for the defendant, contended, that at the time the bond was given up, the relation of guardian and ward did not, in fact, subsist.

The *Master of the Rolls* thought it clear that the relation of guardian and ward had not terminated when this gift was made; but even if it had, he thought the transaction, under all the circumstances of the case, could not be sustained. He therefore decreed, that the estate of Salmon should be charged with the amount of the bond, and also the arrears of interest on it.—*Faulkner* v. *Salmon.* Feb. 8.

## COURT OF KING'S BENCH.

CONCURRENT WRITS OF EXECUTION.

*Barstow* showed cause against a rule calling on the plaintiff to show cause why the *ca. sa.* issued in this case should not be set aside for irregularity, and the sum paid to be discharged from custody under it restored. The facts were, that the defendant had given a cognovit; on this a judgment was entered up, and a *fi. fa.* issued in the last long vacation, returnable on the first day of Michaelmas term. A levy was made on the defendant's goods, but it realised only a part of the amount. The Sheriff, at the request of the plaintiff, made a return to this writ; and the plaintiff then issued a *ca. sa.* for the residue of the debt against the defendant. She was taken upon it, and she paid the amount. The *ca. sa.* and the *fi. fa.* were both returnable on the first day of Michaelmas term. It would be contended, in support of the rule, that the *ca. sa.* could not be issued until the return of the *fi. fa.*, and therefore that issuing it was an irregularity. But he should submit that the *fi. fa.* was returned, for all practical purposes, before the *ca. sa.* was issued. The proceeds of the seizure had been paid over by the Sheriff to the plaintiff; the writ was returned; and the return was recited in the *ca. sa.* It was true, this was before the

* The following cases on the point may also be cited:—*Cray* v. *Mansfield*, 1 Ves. 379.; *Pierse* v. *Waring*, cit. 1 Ves. 380., 2 Ves. 548.; *Hylton* v. *Hylton*, 2 Ves. 547.; *Mellish* v. *Mellish*, 1 Sim. and Ster. 138.; *Revett* v. *Harvey*, 1 Sim. and Ster., 502.; 1 Ball and B. 169.

Sheriff was bound to pay over, or to make a return according to the exigency of the writ, but there was nothing to prevent or forbid his so doing. If he were not allowed to do so, this consequence would result;—a defendant might not have more property than would amount to a shilling which the Sheriff could seize, and then the plaintiff would be prevented from proceeding against the person of the defendant until after the return of the *fi. fa.*, which might, as in this case, include the long vacation. The best way of trying this question was, by considering how these proceedings would be entered on the roll. No inconsistency or incongruity would appear there, because the *teste* of the writ of *ca. sa.* would not appear.

In *Miller* v. *Parnell*,* the Court observed, that if a plaintiff, after suing out a *fi. fa.*, could abandon it, and sue out a *ca. sa.*, "it would confer a power which might be much abused." Here the plaintiff had not abandoned his *fi. fa.*, and if in such a case he were not allowed to sue out a *ca. sa.* before the return of the *fi. fa.*, the converse of the mischief would apply. In *Miller* v. *Parnell*, it was also remarked, "If the *fi. fa.* be returned, there is something to bind the plaintiff, and to limit for how much he shall have the body, by showing how much he has already gotten." But here the *fi. fa.* was returned, and therefore here was the means of limiting for how much the plaintiff should have the body. So far, that case was in support of his proposition. He should therefore submit, that the rule must be discharged.

*Follett*, in support of the rule, contended, that although a plaintiff might have two different writs if he chose, he could not have a *ca. sa.* until the return of the *fi. fa.* Now the return of the *fi. fa.* meant by the law, must be the return to the Court. The endorsement on it by the Sheriff of what he had done, and sending it to the plaintiff, were not returning it. The *fi. fa.*, therefore, not being returned, the issuing of the *ca. sa.* was an irregularity.

*Parke* J. If you execute the *fi. fa.*, you cannot take another step till the following term, for that writ cannot be returned into Court until the Court, in contemplation of law, is sitting. You have been too rapid: you should have waited till the return of the *fi. fa.* before you issued the *ca. sa.* The rule must be made absolute, but without costs, and no action must be brought.—Rule absolute, without costs.—*Lawes* v. *Codrington*. *H. T.* 1831, *K. B.*

---

ENTERING THE ISSUE.

*Dowling* opposed a rule calling on the plaintiff to shew cause why an *exoneretur* should not be entered on the bail-piece, on the ground that the plaintiff had not entered the issue, and judgment of *non pros.* had been signed. The affidavit, on which the rule had been obtained, stated, that issue having been joined, the plaintiff was ruled to enter it, but that, on searching at the Treasury, the roll could not be found; that if it had been brought in as it ought, to complete the entering of the issue, it would have been there; and that judgment of *non pros.* had been accordingly signed. In answer to this, the plaintiff's attorney made an affidavit, in which he stated that he had taken in the roll to the Treasury, and paid the usual fees. Mr. Edge, the clerk of the Treasury, also made an affidavit that the roll had been brought in, and the fees paid; that he had made an entry of it in his diary; that he had given it to the bagbearer; and he presumed that the roll must, by some accident, have been placed amongst those of some antecedent term, which were not filed; that such an accident as this had not occurred for fifty years in the office of the Treasury. These affidavits, it was submitted, were a sufficient answer, since the attorney had done all in his power to complete the entering of the issue. Besides, if the attorney for the defendant, when he was making the search, which it was his duty to make, had thought proper to enquire of Mr. Edge, who sat in the next room to that in which the rolls were kept, he would have found that no blame could be attached to the plaintiff's attorney, as he had evidently brought in the roll.

*Arnold*, in support of the rule, contended, that this being an application on the part of the bail, they ought not to be prejudiced by the negligence of the affairs of the Treasury, or of the defendant's attorney.

*Parke* J. I think you are answered. It was not the fault of the plaintiff that you could not find the roll. He clearly brought it in. The rule must be discharged, but without costs.—Rule discharged without costs. ——— v. *Menzies*. *H. T.* 1831, *K. B.*

---

NOTICE OF DISHONOUR OF BILL.

In an action against the drawer of a bill of exchange, the handwriting being proved, the case turned upon the notice of dishonour.

It was proved, that the defendant had resided at Kennington, and that when the bill was dishonoured it was taken there with the intention of giving the defendant verbal notice of the dishonour; but the messenger was informed by a female servant at the house, that the defendant had gone away, that she believed he had "broken," and she did not know where he was to be found. No written notice was left, but the messenger mentioned to the servant that he had come with a bill. On the part of the defendant it was proved, that his new residence was in Adam Street, Adelphi; but it did not appear that the fact was known to the plaintiff.

Lord *Tenterden* C. J. was of opinion, that the plaintiff's evidence did not sustain the allegation of notice, and that therefore the plaintiff must be nonsuited; but as the point was a new one, he would give the plaintiff leave to move to set it aside, and enter a verdict for the amount of principal and interest. His Lordship distinguished the present case from one where the bill was sent to the country-house of the party in his absence; and observed, that as the house at Kennington was not the actual residence of the defendant, the intimation to the servant could not be considered as notice to the defendant. The plaintiff was then called, with leave to move.—*Harris* v. *Richardson*. *Sit. after H. T.* 1831, *K. B.*

* 6 Taun. 370.

## REFORMS

INTENDED TO BE PROPOSED BY THE LORD CHANCELLOR IN THE COURT OF CHANCERY.

We have just received intelligence from a source on which we rely, which will enable us, this week, to lay before our readers, the most important changes which the Lord Chancellor intends to propose on Tuesday next.

Our readers will have seen, that the noble and learned Lord, on Monday last, applied for, and of course obtained, permission from the House of Lords to attend the Finance Committee on the subject of his salary. On his attendance there, to use his own expression, he "unburdened" himself on the subject of his fees; and the important result of this evidence was, that a proposition was made by the Committee to his Lordship to be paid by a salary and not by fees; TO WHICH HE IMMEDIATELY ACCEDED. We know of no terms adequate to express our joy and satisfaction at this intelligence. We further understand, that he is to receive two salaries—one as Speaker of the House of Lords, the other as the Chief Judge in Equity. It is understood that he will state this fact in his speech.

It is also intended to abolish the present lists of Commissioners and to give them moderate compensation, to appoint three high Judges in Bankruptcy, and an inferior court of six to dispose of the minor business; but to admit of an appeal from the superior Court to the Vice Chancellor.* Another great change which is intended to be effected in bankruptcy is, that no commission need in future pass the great seal, and that this expense shall therefore be saved to the suitor.

A great alteration is also to be effected in the administration of the law relating to Lunacy. The Lord Chancellor has declined, for some time, to direct any Commission to the present Commissioners, in consequence of the intended change; and, on Tuesday, he will propose that they shall be abolished with moderate compensation, and a more efficient and less expensive system be established.

We also understand, that no very important change will be at present proposed in any other particular, but that farther measures are in contemplation.

We hail these alterations most fervently; rojoicing that we have lived to see the day when a moderate, but effectual, reform has commenced.

These proposals are likely to provoke considerable discussion. Lords Eldon and Lyndhurst will both be in their places; the one, as the firm opposer of innovation; the other, as the graceful and dignified arbitrator between the contending parties. We anticipate a most interesting debate.

---

## THE ECCLESIASTICAL COMMISSION.

We understand, that soon after Lord BROUGHAM was appointed Chancellor, he requested the commissioners appointed to consider the state of the ecclesiastical courts to turn their immediate attention to the Court of Delegates. Our readers are probably aware that this is a court of appeal from the ecclesiastical courts, composed of some of the common law judges and doctors of civil law. These last were appointed to sit in rotation; so that the youngest doctor of civil laws might sit to reverse the decision of Sir John Nicholl or Dr. Lushington. The Court was, indeed, a very heterogeneous assembly, and wholly inadequate to decide the important matters intrusted to their care. The mode of reversing the decision of the Court of Delegates by Commission of Review was almost equally anomalous and ill advised. This state of things, therefore, in the opinion of the whole profession, called loudly for some reform, and the report of the Commissioners upon it was expected with very considerable anxiety, not merely by those who were immediately interested, but by all friends of judicious and moderate reform.

We are now informed that the Commissioners have made a report which is already laid on the table of the House of Commons. This report we have not yet seen, as no member has moved for a copy of it, but we believe that the Commissioners have recommended the *entire abolition of the Court of Delegates;* and have further recom-

* See the proposal as to Bankruptcy in our last number.

mended that the appeal from the Ecclesiastical Courts shall be made to the Privy Council. Of the benefit of the latter recommendation, more doubt may perhaps be entertained than of the former. It will, however, relieve the Court of Chancery from one small part of its labours, and so far it will, at least, be beneficial.

It is further rumoured, which in fact was incidental to the change, that the practice in the Privy Council will not be confined, as in the Court of Delegates, to *proctors*, but will be open to all *attorneys* and *solicitors*.

This we believe is the substance of the Report, which we shall take an early opportunity of laying before our readers, either in one of our Numbers, or in our next MONTHLY RECORD.

## STAMP LAWS
### AND OTHER MEASURES AFFECTING THE PROFESSION.

MR. EDITOR,

I AM desirous, through your influence, to induce the practising members of the legal professsion, in all parts of the country, to form a society for the protection of their common interests. I am perfectly aware that associations exist, which are excellent in their nature, and sufficiently extensive in their objects; and it is their union and cordial co-operation that I wish to see effected.

I would particularly allude to the law relating to the revenue of stamps, the study of which is much more difficult than the common law, because there are no fixed principles, and because the statutes relating thereto are unconnected, unintelligible, and indefinite.

I observe a communication has been made by the Chancellor of the Exchequer to the House of Commons, that he found several bills in his office relating to the stamps, which he intended to bring forward. What these bills are, their nature and objects, I presume the public are not to know until they shall have been presented to the House; and, from the mode in which Treasury measures are carried through, the time allowed for consideration by persons who have other pressing calls for their attention is insufficient for any effectual purpose.

It will be recollected, that the penalties and restrictions affecting attorneys are, by the stamp laws, extremely harsh and oppressive, although it is through them that nine tenths of the revenue is received, and from which they can derive no pecuniary emolument; but a misconstruction of an expression in the act may be productive of ruin and disgrace.

Presuming, however, that the measure to be brought under consideration in the House of Commons is remedial and explanatory, it behoves the profession to watch its progress and examine its details, with a view to render the law, if possible, intelligible to the meanest comprehension.

I trust, I have said enough to show the members of the existing associations the necessity of their uniting their exertions upon this subject; and I feel convinced that all legal measures introduced into parliament ought to receive their attention, and that they should institute a mode of communication between themselves for that purpose.

W. J.

*** We shall be most happy to assist in promoting the object of our correspondent; and in our next we shall insert another Letter on the subject of the Stamp Laws. — ED.

## LIABILITY OF A GRANDFATHER TO MAINTAIN HIS GRANDCHILDREN.

We have been favoured with a note of the case of *The King* v. *James Cornish*, which, although not decided, we think material to report, as objections to the *form of the order* have been made, which in future may be avoided.

In the early part of the last term, Mr. *Rogers* obtained a *certiorari* for the removal of three orders made by the Justices of the petty sessions at Wellington, in Somersetshire, by which the defendant was ordered to pay the churchwardens and overseers of Hockworthy certain sums, for the maintenance of the grandsons and granddaughter of the defendant.

In moving for the *certiorari* it was stated, that, for any thing that appeared, the father might be a person able to pay; or, supposing the father poor and impotent, and these children living with him, then the order ought to have been for the maintenance of the father. Counsel contended, also, that it should be stated, that the defendant was the *natural* grandfather, as a grandfather *at law* would not be liable.

The orders having been accordingly returned, Mr. *Rogers* now moved (Jan. 31.) for a rule to quash them, which was granted, unless cause shown to the contrary next term.

The authorities in support of the liability of a grandfather are as follow: — Though the father be living, yet if he be unable, the grandfather, being of ability, may be compelled to keep the grandchild. — *Burn. Poor.* 4. 121. An order for the maintenance of a grandchild was made, the father being then living and unable to do it. — *Viner's Abrid.* 16. 423. *Poor.* c. 3. *R.* v. *Joyce.* So of a son's wife, he being beyond sea. *Ib.* c. 5. *Anon.*

## MINOR CORRESPONDENCE.

If Z. X. Y., who enquires "what fee is payable to the Secretary of the Lord Chancellor, or Master of the Rolls, for answering a petition intituled in an original cause and two supplemental causes; that is, whether one fee of 11*s.* as for one cause, or three fees of 11*s.* each as for three causes;" will refer to the first Report of "the Commissioners for examining into the Duties and Emoluments of the Officers, Clerks, and Ministers of the several Courts of Justice in England, Wales, and Berwick upon Tweed," as to the Court of Chancery, dated the 9th April, 1816, he will find that only one fee of 11*s.* is payable; and a Master will not allow more on taxation.

QUERY.

If A. rents a house as a workshop, in the parish of B., but always resides with his family in the parish of C., is A. liable to the payment of parochial rates to the parish of B.?

## MISCELLANEA.

THE TEMPLE.

"Fuimus Troës; fuit Ilium, et ingens"
"Gloria Teucrorum."
*Virg. Æn.* lib. ii. 325, 326.

THE first profession of Knights Templars was as a safeguard of the pilgrims going to visit the Holy Sepulchre. They commenced in the year 1185, being in the reign of Henry II. Their number in the year 1228, when Honorius was Pope, amounted to only nine; but they very soon increased their numbers. In the time of Pope Eugenius they had red crosses upon their upper garments, that they might be distinguished from others after their retirement from the Holy Land.

In pursuance of a decree made by the Great Council at Vienna, anno 1234, respecting the profession of the Knights Templars, Edward III. granted the Temple to the Knights Hospitallers of St. John of Jerusalem. It was afterwards granted by them, at a rent of £10. per annum, to divers professors of the law, under the name of the "*Students of the Common Law of England.*" These latter seem to have migrated from *Thavies Inn*, in Holborn. The New Temple was so called, because the Knights Templars had previously a building in Oldbourne, termed the Temple. The New Temple was founded in the time of Henry II.; and in the year 1185 it was dedicated to the Virgin Mary by Heraclius, patriarch of the church called the Holy Resurrection, in Jerusalem.

Henry VIII. granted to the professors of the law a lease, under which they held, as tenants to the Crown, until the sixth year of James I., when that King granted *Hospitia et capitalia messuagia cognita per nomen de le Inner et le Middle Temple, sive Novi Templi*, to Sir Julius Cæsar and others, to them and their heirs, for "the use and occupation of the professors and students of the law."

*Hospitia Curiæ*, or Inns of Court, were also established in Scotland; and their existence is recognised expressly in the ninth act of the second parliament of James IV., where "the sheriffs and bailies, collectors of the King's tax, are ordered to be before the Chancellor and Lords of the Council, on Friday that next comes, in George Robieson's Innes, to make full compt of the said tax."

Every grant of chambers to private individuals, who are neither students nor practitioners, but who often carry on the trade of stationery, or the art of the perruquier, is an unjustifiable deviation from the original constitution of these "seminaries of legal learning."

*Spero meliora.* TEMPLARIUS.

LORD THURLOW AND LAVATER.

Lavater, on being shown a picture of Lord Thurlow, examined it for a moment, and said, "Whether this may be on earth or on hell, I know not; but wherever he is, he is a tyrant, and will rule if he can." — *Lardner's Cabinet Cyclopedia.*

LAWYERS IN NAPLES.

"In the kingdom of Naples there are 20,000 lawyers, most of them younger branches of the nobility; and there is no nation, however large, in which so many lawsuits are carried on." — *Michael Kelly's Memoirs.*

PATCH THE MURDERER.

We are indebted to Mr. Hobler, Jun. for the following anecdote:—"The incident mentioned by Professor *Amos* (inserted in the last number) reminds me of a conversation I had a few years since on Patch's case, with the late Mr. Charles Humphreys, well known for his great skill in Crown practice, and who conducted the prosecution against Patch. He related the circumstance nearly in these terms: — He (Mr. H.) had examined the premises of Mr. Blight who was murdered; and he had the chair in which he was sitting, and the other things in the room, placed exactly in the positions they were in at the time of the murder; and from the manner, it occurred to him that the pistol must have been fired with the left hand. With this idea, he obtained an interview with Patch at a time when he was at dinner: Mr. Humphreys then observed that Patch used the knife with his left hand, which at once confirmed the opinion he had formed, that Patch was the murderer, notwithstanding his protestations of innocence."

# The Legal Observer.

VOL. I. SATURDAY, FEBRUARY 26. 1831. No. XVII.

"——— Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## THE LORD CHANCELLOR'S REFORMS.

WE were able to anticipate the speech of the Lord Chancellor, and to mention the principal alterations intended to be effected by him. If our readers will consult our last number, page 254., they will find that they were in possession of the great features of the measure *three days* before they were announced elsewhere.

We do not intend to dwell on these reforms at any great length at present: we think them so important, however, that we shall glance at each of them, reserving their more ample discussion for future Numbers. Indeed, we cannot properly enter into their details until we see the bills themselves, which will probably be in our hands before our next publication.

We are happy to say that we approve of most of the alterations which Lord Brougham proposes. Having ourselves recently pointed out the necessity for the alteration in the administration of the bankruptcy, we rejoice to find that the plan which we considered as the most eligible * has been adopted by the noble and learned Lord, with only one important variation — the nature of the appeal. According to the Lord Chancellor's plan, there are to be two Courts; there is to be an appeal from the lower to the higher Court, and from the higher court *to the Court of Chancery*. We earnestly entreat a reconsideration of this latter part of the measure. According to his Lordship's speech, the appeal is to be merely on points of *law*; but this, we think, does not obviate the objection which we make, which is simply this: the Court of Chancery is at present unable to despatch the business before it: the great cause of this is its jurisdiction in bankruptcy. The remedy proposed is to disincumber it of this jurisdiction, in order that it may devote itself exclusively to its other business. Its jurisdiction in bankruptcy can be safely and entirely removed: it has no necessary connection with equity; it is entirely distinct. All this seems to be admitted by Lord Brougham: he is willing to abolish the present defective system; to deprive himself of fees, and strip himself of patronage; he forms a separate and complete Court for the despatch of bankruptcy business: he does all this; but he opens a sluice through which all the former evils may pour in again; he allows an appeal to the very Court, the burdens of which it is a main object of the measure to relieve. It is said, an appeal simply on points of law; that is, on all the most difficult points which occur. Then again the question immediately arises, What are points of law? If the parties, or their counsel or solicitor, are desirous of appealing, what bankruptcy petition may not be capable of affording some point of law? who is to determine it? the judge, or the parties, or their professional advisers? As it appears to us, this appeal will defeat the whole benefit of the measure; it will carry in its bosom a germ of destruction. It may be a better arrangement than the present, but it will be in a great degree *the same system*. The suitor will still be delayed, his expenses will still be ruinous, and the Court of Chancery will still be overburdened with business. With the highest admiration for the generous self-devotion of the present Lord Chancellor, with the deepest reverence for his talents and integrity, we entreat a reconsideration of this part of the plan. If an appeal be necessary, let it be made, as we before suggested, not to the Court of Chancery, where it cannot be made with advantage to the matter in dispute, and where

* See ante, p. 227.

it would embarrass the Judges in equity, in the despatch of their legitimate business—but to the Court of Exchequer, or some other Court which can devote itself to it without injustice to the prior claims on its attention. These are the considerations which, with the most friendly feeling, we offer to the noble Lord who has proposed the plan.

We have now exhausted our objections to the new measure for Chancery reform. We are glad that a reasonable compensation is to be given to the commissioners of bankrupt; and here again we find that the plan of compensation proposed by the Lord Chancellor, agrees with that suggested by us in a former article.*

The Court of the Commission of Lunatics was certainly not the proper tribunal for deciding the matters which came before them. Those who are most familiar with the subject will know that questions of evidence the most novel and embarrassing, constantly arise in enquiries of this nature; and were to be decided by men who had either no experience at all, or men whose experience was in matters of an entirely different kind. We are acquainted with no better plan than that determined on by the Chancellor,—to direct an issue to a Court of common law to try the fact.

We entirely approve, also, of the change which is to be wrought in the Masters' office. We only add, which is also admitted by Lord Brougham, that here reform will only be *commenced.*

At the proposed alterations in the Register's Office, in the Six Clerks' Office, and in all the other train of useless or sinecure offices, we ardently rejoice. There are to be found the buyers and sellers of justice; there are the persons who weigh it out in drachms and ounces, and mete it out by measure. We have little sympathy, we confess, for this class of persons—these toll-keepers on the road to justice; and we rejoice most heartily at their approaching destruction.

There is only one other principal point to be adverted to,—the introduction of *viva voce* evidence into Courts of Equity. Of these we have only to say, that we marvel not at the change, but that the present system has been endured so long. Cumbrous, ineffective, and insecure, we know no blot so foul on the face of our laws, as the system of written interrogatories. How often have we seen the course of justice diverted by this absurd impediment! A difficulty has occurred in the evidence; a link in the chain has been wanting; a notice has not been given; an interrogatory has been omitted: we have seen the witness *in Court*, who could immediately remedy the omission; but he could not be examined on account of the present rules of evidence in equity: and justice has been defeated by a mere slip of this kind. Then the evidence which has been actually taken; the mass of ridiculous inconsistencies and imperfect conclusions: the questions prepared before the answers are received, the examiner not knowing one word about the matter, or of the evidence to be obtained; the exclusion of all persons who are acquainted with them;—all this is so useless and absurd, that it must long since have excited universal indignation, and been effectually remedied, were it not that there was one other part of the present system even more monstrous,—the cross-examination of a witness without knowing the examination in chief, without even seeing the person examined; and the putting a second cross-examining question without knowing his answer to the first. To use the emphatic language of the Lord Chancellor's predecessor, "You cannot transfer the blush of perjury to paper;" and the very witness who will make the most triumphant deposition in writing, will sink under a *vivâ voce* cross-examination, and leave the witness-box, pallid and disordered with shame at the discovery of his perjury.

We further think that the notion of appointing a conveyancing Master is extremely happy. The Chancellor evidently alluded to the decision of *Flower* v. *Walker*†, in which Lord *Eldon* held that every Master might appoint his own conveyancer; and we think his remedy complete. Besides, it was fully due to that "long-suffering" race, the conveyancers.

---

It is rumoured that Mr. Coltman is to be the Chief Justice in Bankruptcy; that the other new Judges are to be chiefly of the common law bar; and that the compensation to be given to the commissioners is in some cases to be 400*l.*, and in others 300*l.*

We have also heard that Masters Cox and Stratford have resigned their offices; and that Mr. Roupell and Mr. H. Martin are to supply their places.

---

* See ante, p. 226.

† 1 Russ. 412.

## ST. JOHN LONG'S CASE,

### AND THE RESPONSIBILITY OF THE MEDICAL PROFESSORS.

We have hitherto advisedly abstained from alluding to Mr. St. John Long's case, because the discussion of a matter which was still to be decided appeared to us hardly justifiable. This difficulty is now removed, Mr. St. John Long has been acquitted, and we shall now attempt to lay down the principles on which the case should be decided. Having done this, we shall shortly state the existing law on the subject, and enquire how it is affected by the case which has just been decided.

It appears to us that it is greatly for the benefit of the public that the investigation of medical science should be perfectly free and unfettered. We know from experience that many most important discoveries have been made in medicine by persons who have not been regularly educated. Admitting most willingly that a licensed practitioner, who has gone through a prescribed examination, will in all probability be better qualified to attend to the treatment of disease than one who is unlicensed, we are still desirious that this license should not exempt him from control, or should act as a bar to his responsibility. On the other hand, if a man possesses a fair quantity of prudence, caution, and ability, we are desirous that they should be duly appreciated, although he may owe them to his own researches, and not to the examination prescribed by a college. We would have all men tried by their merits and not by any fictitious distinction. Despising quackery most heartily, we would carefully distinguish it from experiment. In short, although we might consider the circumstance of a man having no licence as requiring a more rigorous investigation, we would not make it a sign of guilt.

These are the simple principles on which we think this question should be decided. They appear to us the true ones. They have not however been generally favoured either by the profession or by the public: we shall therefore consider them a little further. We are then for free toleration in these matters, and without entering into the question of licence or *diploma*, would leave every case of gross ignorance and neglect to be tried by its own merits. The system should be liberal and open while the individuals adventuring to act under it should be amenable to public good sense and good feeling, assisted by the opinion of persons competent to testify to the practice and experience of those who followed the healing craft. We would call upon medical practitioners, as upon merchants or artists, to estimate the merits or demerits of any transaction.

We are opposed to a certain extent to the exclusive privileges of medical colleges and corporations, because, even supposing these institutions to be entirely free from all the objections which are commonly brought against them by professional men, (and these are many,) we consider that if left to masses of men and societies, the art of healing, in common with all arts and sciences, would of necessity remain stationary. However respectable and learned they may be, these bodies cannot in the nature of things advance rapidly in the pursuit of knowledge. All innovation, all improvement, is a conquest over the *vis inertiæ* and venerable rust of corporate bodies. The history of medicine sufficiently exemplifies this.

Harvey's theory of the circulation was laughed at by the anatomists, who demonstrated on the dead body, that the arteries were empty, and, as their name still implies conveying only air. His whole system was deemed an improbable innovation by those individuals of the profession who were over 40 years old, probably the most respectable and most dignified portion. Vaccination, though received much better by medical men, was preached against in the pulpit and invested with fancied terrors by most respectable people. Scurvy, which at one time decimated our navy, was considered an incurable incident to seafaring people. The simple remedy of lemon-juice, the present great specific, had been recommended one hundred years before it was advised by the College of Physicians, and issued accordingly by the Victualling Office during the administration of Lord Spencer.

There is one thing, about which the more scrupulous professors of the healing art are not only backward, but which they do not even attempt; namely, to answer the continual demand which exists in the mind of the public, for experiments out of the routine of every-day practice. There are certain familiar terms which express what we cannot so well make known by the most studied periphrasis. The populace (whether nobility or mobility) crave after *humbug*, for which they resort to *quacks*: and this craving is, at present, satiated by the lowest and most ignorant *charlatanism*. Now we do not call upon humane and intelligent physicians to sink from their sphere, and degrade their profession by a servile imitation of those who are themselves, indeed the apes of legiti-

mate practitioners; but we suggest in the name of a tried experience of human nature this plain reflection, that while there remains a chance of benefit from new and untried modes of relief, these had better be under the scrutiny of a man of education and integrity, than of an ignorant aspirant. We assert that in most departments of knowledge; but in an especial manner in medicine, which is, in its prevailing nature, an experimental and indeterminate affair, the established principles of one period are soon converted into prejudices by the continual revolution of opinion; and that, of all attempts, the proposal to make stationary what is fleeting, and certain what is doubtful, is the most pernicious in effect, and most preposterous in character. We, on the contrary, reasoning from the known as to the unknown, look back to the improvements of the past history of experimental medicine, and anticipate for future generations greater discoveries, wider improvements, more scientific combinations. And, whilst we call upon the profession to put forth their strength, and not to leave it to the charlatan to subtract from them the merit of discovery and the profits of honourable exertion, yet we would still leave the field open to every kind of competition.

We have not been sparing, hitherto, in our remarks upon legitimate institutions, and licensed professors; we have frankly told them their deficiencies; we have endeavoured to arouse them from a treacherous slumber. It is only justice which now impels us to point out the true foundation of their superiority. The value of medical science, as it exists among the enlightened and honourable men who principally profess it, consists mainly of two points. First, its frank and liberal character. We are pleased to bear testimony to the total exclusion of all mystery and pretension from the books and conversation of the better class of medical men. If there be difficulties in the profession, it is in the application of their information and principles. There is no technical or artificial exclusion whatever: their discoveries, their experiments, their successes and their failures, are all open to investigation and comment.

The second great feature in enlightened practice is, the variation of research, and the adaptation of expedients to each case as it presents itself to the physician. His mind, as a mirror, copies the individual features of the most various conditions, and aims to discover and apply the peculiar remedy indicated. There is seldom any entire repetition either in the phenomena of disease or the right prescription. We object to Long, therefore, not because he has tried what is new, but because he has departed from fair and manly practice. One who should profess to cure by routine, to measure all diseases by one bed of Procrustes, and treat them by an invariable *panacea*, would at once fall under the suspicion of ignorance and quackery. If, in addition, he should conceal his remedy, and publish extravagant accounts of successful cases, at the same time slurring over his difficulties and his failures, he would proclaim himself, by so doing, unworthy of the consideration of honest and reflecting men. We are nothing swayed by the droves of dupes who are ever ready to eulogise their idol. For,

> "Of whatsoe'er descent their godhead be,
> Stock, stone, or other homely pedigree,
> In his defence his servants are as bold
> As if he had been born of beaten gold."

We would merely ask, whether Mr. St. John Long, when he practised as an artist, and we believe he did so, whether he made one secret colour serve him on all occasions, and one stock set of features answer for the portraits of all his sitters. Simplicity is, however, one characteristic of greatness: and we have, perhaps, to congratulate Mr. Long on the attainment of the same admirably constant and easy method as a painter and a physician.

These, we think, are the true principles on which this important question is to be argued and decided. We shall now shortly state the previous law on the point, and the alteration, if any, effected in it by the case which has been just decided, and which has given rise to these remarks.

By certain well-known acts of parliament*, and charters†, the practice of physic or surgery is forbidden in London, without a licence being first obtained from the Royal College of Physicians and Surgeons; and the due observance of these acts and charters is enforced by pecuniary penalties of different amounts, which may be recovered against such persons as shall disobey them. The peculiar remedy provided by the legislature for practising without a licence is, then, a pecuniary penalty. There is a general power given to the College of Physicians to restrain all malpractice of medicine; but this extends as well to licensed as to the unlicensed practitioners. The criminal punishment of such offences

* 3 Hen. 8. c. 11.; 32 Hen. 8. c. 42.

† 10 Hen. 8. c. 5.; 15 Jac. 1. and 15 Car. 2.; 5 Car. 1., confirmed by 40 Geo. 3.

committed by an unlicensed person remains unaffected by these acts and charters.

These being then disposed of, we must look to the books for information; and here there is a considerable conflict of authority. Lord Coke* says, "If one that is of the mysterie of a physician take a man in cure, and giveth him such physic as within three days he die thereof, without any felonious intent, and against his will, it is no homicide. But Britton saith, that if one that is not of the mysterie of a physician or chirurgeon, take upon him the cure of a man, and he dieth of the potion or medicine, this is, *saith he*, covert felony." He then cites a passage from the Mirror†, laying down the rule, that gross folly or negligence in a physician or surgeon, whether licensed or not, "*que ils mittent froide pour chaude ou le revers, ou trope peu de cure, ou nemi mitter un due diligence, et nosement en arsons et abscissons que sont defend, afaire*," they may be punished criminally, according to the degree of injury sustained. It will be seen, therefore, that Lord Coke gives no opinion of his own, and that he quotes Britton, expressly stating it to be merely the conclusion of the latter writer's opinions, and then cites the passage from the Mirror, which relates generally to all practitioners, whether licensed or unlicensed. It is incorrect, therefore, to say that Lord Coke is a clear authority for the opinion that the want of licence is a material circumstance in cases of death or mayhem by the means of a medical practitioner.

We next come to Lord Hale's opinion‡, who declares, that if a medical man give a potion with intent to cure, it is no homicide, and adds, that no mischance of this kind should make a person not licensed guilty of murder or manslaughter. Mr. Justice Blackstone§ follows Lord Hale literally in the first part of the rule; but adds, "it hath been holden that if it be not a regular physician or surgeon who administers the medicine, or performs the operation, it is manslaughter at the least;" and cites Lord Coke, who, we have seen, is not an authority for this rule.

Thus stands the law of the text books. There are two or three modern cases on the point which must be noticed; the first is *Williamson's case*‖, where Lord *Ellenborough* ably exposed the principles which we have endeavoured to demonstrate, and although Williamson was not a regular surgeon, this circumstance was not adverted to in this case. In the recent case of *Van Butchell*¶, which is in the recollection of most persons, evidence was proposed to be offered, that the prisoner had received a regular education. Baron *Hullock*, however, declined to receive it, and held expressly, that it made no difference whether the party was a regular or an irregular surgeon.

Thus we have seen, that with the exception of Mr. J. *Blackstone*, there is no direct authority for the rule, that the licence of a practitioner alters his case; and that there is a series of *dicta* and decisions in favour of the principle that the circumstance of the licence is beside the question. There is, however, a recent case**, of which there is no regular report, in which Mr. J. *Bayley* seems to have supported *Blackstone's* opinion, but for the reasons hereafter stated we think they need not be further adverted to.

This being the state of the law, the profession has looked with some anxiety to the case of Mr. St. John Long, as likely to settle this important point; and we think this case will be allowed to have done this, and to have established the correct rule, viz. that the circumstance of a person being unlicensed is immaterial, except as demanding a stricter attention; that if gross ignorance, carelessness, or inattention be shown in the medical practitioner, his licence shall be no defence; and that if a reasonable degree of ability and experience be proved, the want of licence will not render him guilty. These are the principles which we consider Mr. Baron *Bayley* to have laid down; because having all the cases fresh in his recollection, he did not allude either directly or indirectly to the circumstance of Long being unlicensed. "If *any man*," said his Lordship, "presuming to meddle with what he did not understand, and unacquainted with principles, ventured to prescribe for the sick, he incurred a heavy responsibility, and indisputably, in some cases, was guilty of manslaughter," and in his direction to the jury, "God forbid that felony should be imputed in all cases where ill success took place. The chief consideration for the jury was whether or not the prisoner had in the present case acted with due caution; and been previously aware of the nature and effects of the substance he was applying; and also, whether he had shown sufficient skill and

* 4 Inst. 251.
† Cap. 4.
‡ 1 Hale P. C. 430. See also Hawk. P. C. c. 31. § 62.
§ 4 Bla. Com. 197.
‖ 3 C. & P. 635.
¶ 3 C. & P. 629.
** Wilcock's Law of the Med. Prof. App.

knowledge to estimate the effects of the remedy which he had applied upon the peculiar constitution of Mrs. Lloyd. To state the question briefly, if they thought that he had betrayed gross ignorance, gross rashness, or want of thought, they must find him guilty." We fully agree with the learned judge in the way in which he put it to the jury; and we consider that the doctrine of Blackstone may now be fairly considered as exploded, and these sentiments are the more valuable as coming from a judge who appears at one time to have been of a very different opinion.

We have now therefore the united opinion of Hale, Ellenborough, and Bayley, in favour of the principles for which we contend. Some desire has been expressed in the public prints for legislative interference in this matter. We strongly deprecate any such interference. The law as it present stands is amply sufficient to provide against all evils which can arise. We offer no opinion of the correctness of the verdict which has just been given, we are only anxious that its effects should be stated; and we think that in this case principle and authority go hand in hand.

## LIABILITY OF REAL ESTATE

### TO THE PAYMENT OF DEBTS.

[*From a Correspondent.*]

THE statute 1 Will. 4. c. 47., though entitled "An act for consolidating and *amending* the laws for facilitating the payment of debts out of real estate," appears open to such doubts and objections as render explanation and further amendment necessary.

The most weighty objection to the act is, that, according to the probable construction of its very vague language, it will render insecure the titles to all freehold estates that are or shall be held under any *devise* to be hereafter made, or which has been already made by any person who was living when the act was passed, or under a conveyance from any person who took by such a devise. This will appear on reference to sect. 2. 6. and 8. Sect. 2. makes *void* all wills as against the *specialty creditors* of the deceased; sect. 6. makes heirs at law answerable for the value of the lands descended, *though sold before any action brought*, with a saving, that the *lands themselves*, *bonâ fide* aliened *before the action brought*, shall not be liable *to the creditor's execution*; and sect. 8. makes devisees liable in the same manner as heirs at law, but *the saving as to the lands* is not added to *this section*.

It should here be observed, that the act does not say *affirmatively*, that the lands themselves, in the hands of a purchaser, *shall* ever be liable to a creditor's execution; but as the saving introduced for the protection of purchasers, says that lands *bonâ fide* aliened before action brought, *shall not* be liable to such execution, the inference is, that if not *so* aliened, (that is, either not *bonâ fide*, or, though *bonâ fide*, not till after action,) they will be liable; otherwise, the saving means nothing. The act must, therefore, be taken to import, that lands, not aliened within the terms of the act, are liable, even in the hands of a purchaser, to execution at the suit of a creditor; meaning thereby, not merely one to whom a *debt* is owing, but also any one who has a claim for damages under a broken covenant.

Now, while such provisions remain in force it seems impossible for any legal practitioner to approve a title, or for any owner of freehold property to be secure in his possession of it, where the will of a person who was alive at the passing of the act forms a link in the title. For, in the first place, the saving at the end of sect. 6. is not inserted in sect. 8., unless it is to be considered as *implied*, which (though probably intended) is by no means clear; and if wills are void as against specialty creditors, and the lands devised are subject to execution at their suit, whether sold or not before action brought, it follows, that neither the devisees, nor any claiming under them, can, till the lapse of a very long period (undefinable as the law now stands), have any security against the claims of specialty creditors.

But even if the saving should be implied in sect. 8., the evil complained of would not be much diminished, as that saving only declares, "that the lands, &c. *bonâ fide aliened before* the action brought, shall not be liable to execution." But how is a purchaser to know whether an action has been brought, even if the existence of a specialty debt should come to his knowledge? Perhaps it may be said, Let him enquire of the creditor. Without dwelling upon the possibility of the creditor's being abroad, or otherwise inaccessible, I will suppose that he is seen, and says that he *has* brought no action,—Is the purchaser then safe? May not the creditor bring an action afterwards, *before the conveyance* of the estate? Suppose the creditor's writ should be sued out on the day the conveyance is executed,—which would be considered as having the priority? In the case of a tender, it is held, that a writ issued on the same day is presumed to be first, and the tender is bad, as being after action. But there may be other specialty creditors, of whom the purchaser knows nothing, and by whom writs may have been issued; and how is any purchaser to know that this is not the case? And without knowing that, how can he ever be safe, when the vendor holds under a will to which the act extends? Will it ever be possible to obtain reasonable satisfaction, that there are not hidden charges on the estate, in the shape of bonds or covenants, by means of which the *bonâ fide* purchaser may be stripped of the estate in which he has invested his money.

The foregoing observations apply equally to the case of heirs as to that of devisees, except that the act is not confined to the heirs of persons who were living when the act was passed;

and it therefore extends, as well to persons now holding lands which they took by descent, as to persons who shall hereafter take by descent, and to purchasers from them respectively.

It is hardly possible to form an adequate idea of the risk now incurred by purchasers from heirs or devisees, when it is considered that not merely bonds and covenants for *payment of money* (as formerly), but covenants and specialties of all kinds, in which the heirs are named, are by the new act made actual charges on the freehold property belonging to obligors and covenantors at the time of their deaths, even in the hands of *bonâ fide* purchasers, buying after a writ sued out against the heir or devisee, though neither the vendor nor purchaser should be aware of the action, or even of the debt. And when it is further considered, how frequently the owners of freehold property enter into covenants as trustees, lessors, lessees, mortgagors, grantors of annuities, vendors, settlers, or in some other character, and that their heirs and devisees, and even purchasers from them, are by the recent statute made sureties for the performance of such covenants, *the greater part of the freehold property of the kingdom will, in no very long period of time, be liable to the incumbrance of covenants*, of the nature, or indeed the existence, of which the owners of the property charged therewith can know nothing, except by accident, and over the performance of which, in most cases, they can have no control.

The hardship to which heirs and devisees are themselves subject is also very great. By sect. 3, 4. and 6, they are made responsible, to the value of the lands devised or descended, for all the specialty debts, and the performance of all the covenants of their testators and ancestors, though the lands may have been sold before the creditors or covenantees commenced any action to recover their claims, or even gave notice of their existence. The consequence of this is, that heirs and devisees are unjustly placed in a situation of great jeopardy. Such a person may reasonably consider, that if a year elapse without any claim being made, the estate is free from incumbrance, and he will naturally deal with it as his own. Suppose him then to sell it, and employ the money in some way that shall put it out of his power to produce it when required. Suppose further, that after he had so done, a claim should be made upon him, to the full value of the property, for damages on account of the breach of a covenant entered into by his ancestor, or otherwise claimable under a specialty of some kind of which he had no notice when he sold the estate. This is by no means an unlikely case; and it is one of great hardship and unfairness.

The heir or devisee has no means of ascertaining the existence of specialty debts (judgment debts excepted), and yet he remains liable, I may say almost for ever, to claims of incalculable amount in respect of such debts. A descended or devised estate thus becomes a *trap* to the person taking it; for while it induces him to incur responsibilities, which he would otherwise have avoided, it renders him liable to be deprived of the means of meeting them. The consequence is, *that no person taking freehold property under the will, or as the heir of another, can be sure that it is really his own*, or that his children after him may not find, to their sorrow, that what he has left for their support, is, in the strictest sense, *damnosa hæreditas*.

The hardship under which heirs and devisees labour in respect of real estate falls in like manner on legatees and next of kin in respect of personal property, as they are bound to refund what they have received, if debts subsequently appear; and in case they should be insolvent, the executor or administrator is liable. The representatives of deceased persons ought not to be placed in such a situation, though it is proper that due protection should be given to creditors who do not forfeit it by gross negligence.

The evils above depicted might be in part remedied by a public registry of specialty debts; and, but for the length to which these remarks have already extended, some suggestions would be offered for securing the interests, as well of debtors as of creditors, in a manner consistent with justice to both. These, however, must be postponed till a future time, especially as some of the doubts already alluded to yet remain to be stated.

It is enacted by sect. 4., that devisees may be sued without the heir, *when there is no heir*. Now, though such a negative can be proved in some cases, there are a much greater number in which it cannot; and is the creditor in such latter cases to be barred of his remedy against the devisee? Why, indeed, make the joining of the heir necessary at all, instead of allowing the creditor to sue heirs and devisees either together or separately, as he may think fit? As the act stands, what is to be done, when there is known to be an heir, who is out of the jurisdiction of the Courts at Westminster?

Another doubt arises on sect. 6. and 8, which make heirs and devisees liable for the value of the lands aliened *before* action brought, but which say nothing of lands aliened *after* action brought; as to which, devisees at any rate are in a better situation than if they had aliened before action, whatever may be the case with heirs and purchasers. It is only by statute, that devisees are liable to the claims of creditors at all except when the will makes them so; and as the statute limits their liability to such lands as they shall sell *before* action brought, they will be safer by waiting *till an action is brought* against them, and then selling, than by selling at a time when they had no notice even of a debt. Can this be so? And yet, is it not so?

Sect. 7. also is open to this inconsistency,—that in the case of a verdict for the plaintiff on a plea of *riens per descent*, it directs the jury to enquire into the value of the lands; but, in the case of a judgment on *cognovit*, without confession of assets,—or upon demurrer,—or *nil dicit*,—it shall be without any writ to enquire of the lands: yet it should seem to be as necessary in the three last cases as in the first.

These are some of the doubts and objections to which this act for the *amendment* of the law is liable. Titles, it should be remembered, are

rendered insecure and unmarketable as well by doubtful provisions, as by those which impose burdens upon property; and at all events such an act might have been made less ambiguous, whatever may be thought of the justice or policy of the parts that are free from doubt.

## CHANCERY MOTIONS.

THE *Lord Chancellor* stated in his Court, on the 19th February, that the representations respecting the existing regulations as to the precedence of counsel in making motions on seal days, had been fully considered by himself and the Judges of the other branches of the Court; and with the concurrence of the leading counsel, who had most handsomely waived their privilege, orders had been framed upon the subject:—

"First, That each counsel shall, according to his precedence, and in his turn, on seal days, be allowed to make two motions, and no more, till all the counsel shall have made their motions.

"Second, That in each notice of motion to be made upon or after the third seal after last Hilary term, before the Lord Chancellor or Vice Chancellor, the name of the counsel to make the motion, or the name of one of the counsel who are to support it, shall be specified, otherwise the notice of motion shall be void."

Sir *Edward Sugden*, at a subsequent period of the day, adverted to the first order, and stated that he had not the least objection to make against the arrangement, as he was always happy to concur with the Bar in what promoted the general convenience; but he expressed his doubts whether an order of the Court could alter the patent right of the King's counsel as to precedence. When Lord *Mansfield* had effected the alteration in his Court upon this point, it had not been by order, but he had intimated his desire.

The *Lord Chancellor* felt the weight of the observation, and, therefore, he would wish the regulation to stand, not as an order, but as an annunciation of the intention of the Court upon the subject.

---

No orders have yet been drawn up, and, a correspondent observes that it may be doubtful whether they are likely to produce the advantage expected from them. The old practice, which in its origin when all motions during a seal were heard in one day, and which many of the old practitioners of the present day may remember was the case, became very inconvenient from the great increase of business at the seals, arising chiefly from the practice which was introduced during Lord *Eldon*'s time of endeavouring to obtain his Lordship's opinion on the principal question in a cause by an interlocutory motion, which, from the nature of it, generally occupied as much or more time than even the hearing of a cause, so that the seal frequently continued for several days. The object of the alteration is said to be to benefit the suitor; but let us see if that is likely to be the case, by trying how it will work in practice.

"A solicitor," says our correspondent, "being desirous of having his motion soon heard serves his notice early: in fact, it happens to be the first served for the seal, gives his brief to the Solicitor-General, or other counsel having the right to move first in Lincoln's Inn Hall at the sitting of the Court on the Seal Day; and with breathless anxiety hears the Solicitor General make his first, and then his second motion also, but his is not one of them. Then follow the other king's counsel, and the other barristers in seniority, with their two motions apiece, and after a brisk firing from the centre to the right and left, the first round ceases. The Solicitor General then commences the second round with his two motions, but still neither of them is the desired one, and the solicitor leaves the Court in despair, seeing that it is impossible his motion can be made on that day.

"The next morning he is in Court betimes, and finds that the second round of motions was not finished the preceding day, but is still going on, and he waits to see the end of it, and perceives that it does not consist of so many as the first round, some of the counsel having now only one motion, and some of them not making any motion at all. Then commences the third round, but the Solicitor General not being present, his client loses all hope of his motion being ever heard; at length, however, after several counsel have fired off their two shots apiece, the Solicitor General appears, and the solicitor now makes sure of his motion being made, but he is again disappointed. After two or three more rounds, the numbers continuing to decrease, the combat, like a Welsh main, is reduced to the Solicitor General and Sir E. *Sugden*, who are opposed to each other in several successive motions, and that of our solicitor, which he expected would have been the first, or at all events the second, comes the very last of all, so that what avails his having

given his notice early, and his brief to the leading counsel in the court?

"It would have been better had he given his brief to the youngest counsel at the bar, for then, as he in all probability would have had only one brief, the motion would to a certainty have been heard, the last of the first round.

"Another difficulty will be, that, as solicitors do not know the standing of counsel they will be obliged to be constantly on the watch in court for their motion coming on, much to the annoyance of the Judge, and the obstruction of business; for they are of a chattering species: and the Lord Chancellor will be obliged to send some of them to the Fleet, or to order the Court to be cleared, as on a late occasion, in order to preserve silence.

"The second order is objectionable in requiring the name of the counsel who is to make or support the motion, to be inscribed in it; for in many cases the solicitor does not determine what counsel is to make the motion until the brief is delivered (usually the day before the motion is to be made), and then takes the chance of counsel; and if he find the counsel to whom he intends to give his brief is retained, or has got a brief to *oppose* the motion, he gives his brief to another: whereas, under this order he will be obliged to retain the counsel whose name is to be inserted in the notice; otherwise the adverse party may retain him, and thus defeat the motion by rendering the notice void.

"Now all these and many other difficulties and inconveniences with which the orders are fraught, may be obviated by the simple method of a list of motions, as mentioned in our last number to have been once ordered by Lord *Eldon*, and by which strict justice would be done to the suitors.* He whose solicitor was most active and diligent in serving his notice and delivering his brief would have his motion heard first; and this would also accomplish the very object which these orders have in view, namely, to save the expense of a brief to a king's counsel to obtain an early hearing, and enable suitors to employ whatever counsel they pleased; for every motion would come on in its turn according to the order in which the notice was marked by the Registrar previously to service. No good reason can be assigned against this plan; for the petitions in causes, lunacy, and bankruptcy prove its utility; and as well might it be contended that counsel should be called on according to their rank and seniority to open these petitions as to make motions. The practice of courts of law is referred to in support of counsel making only two consecutive motions, but it bears no analogy to motions in equity, for in courts of law motions are made without notice, and rules to show cause granted which are equivalent to notices; whereas in courts of equity (except in motions of course or for injunctions, &c.), they are made upon notice; and with all due deference it is submitted, that even in courts of law it would be very convenient and just to the suitors, if a list of rules *nisi* was made out after service of them, and if they were called on in their turn to be made absolute."

*** We give these observations of our able correspondent with pleasure; and we recommend them to attention; we do not, however, give any opinion of our own on the point.

* See ante, pp. 221. 237.

## METROPOLITAN REGISTRY FOR DEEDS.

*To the Editor of the Legal Observer.*

SIR,

I HAVE read in the "Legal Observer" of last week some remarks on District Registry, which must have excited great surprise in the minds of its readers. I will, as briefly as possible, endeavour to suggest a few observations, which, though in no respect novel, may yet prevent the younger members of my branch of the profession from being misled by those remarks, and from thereby acquiring those prejudices against the establishment of a Metropolitan Register, which might be mischievous in their effects, and excite an unjust opposition to the well-conceived plans of the real property Commissioners. The writer commences with a statement of the host of authority arrayed in favour of District Registry, and for his purpose cites Messrs. Butler and Humphries, and refers us to the last report of the real property Commissioners for other distinguished names: now, sir, I find the authorities on both sides very nearly equal in number and ability; for if the friends of a District Registry boast of Messrs. Butler and Humphries, surely it will be allowed their opponents to oppose to them the names of Messrs. Bell, Tyrrell, &c.; I therefore conceive I have, at least, neutralised the writer's observations in favour of a District Register as far as regards individual authorities.

The writer proceeds to state that District Registers only, and not Metropolitan Registers, prevail in foreign countries. I admit there are District Registers in some of the states of *Germany*, in *Holland*, and a few other places; but it must not be forgotten that the laws and customs of those countries differ materially from ours, which is a sufficient reason for the preference of District Registers in foreign states. The facility of communication also is incomparably greater in England than in those countries; and on investigation it will be found, that a deed sent from a village at a distance of forty miles from a given place, selected for District Registry, would, in numerous instances, reach the metropolis sooner that it would the country or other town chosen as the spot for the establishment of a District Register.

The same writer's observations, that District Registers will occasion less expense to small purchasers are not correct, if the suggestions of the real property Commissioners be adopted: for it is proposed by them, that a provision should be made for equalising the charges to be incurred for registration, which is very practicable; and inasmuch as the Government, as a matter of course, will be responsible for the conduct of the officers of the establishment, the expense of an agent for making searches will scarcely ever be necessary.

From the writer's remarks, as to the probability of the delay which will arise in the entering of deeds, it would naturally be inferred, that he was little acquainted with that part of the report which proposed, in my opinion, as effectual a remedy against delay as can be conceived, viz. the entering a *caveat*. I think the writer would do well, if he have leisure, to reconsider the propositions of the real property Commissioners, emanating as they do from the united labours of some of the ablest men in the profession. I will mention one or two other objections to District Registers, and I have done.

First, The varieties of practice which must arise under almost any circumstances in branch establishments, and any attempt to remedy this evil, must entail on the country a vast increase of expense in the payment of salaries to competent individuals appointed for the purpose of accomplishing the object. Secondly, The monstrous expense to be incurred in erecting buildings and offices *not quite equal*, certainly, to the expenditure that would be necessary in erecting that "leviathan of a building" suggested by the writer, on a base as extensive as that of the largest of the pyramids, but undoubtedly an expense in amount, at least, four times as great as would be required for the erection of buildings, if a Metropolitan Register were adopted. And, thirdly, the necessity of registering wills or deeds, comprising property in different districts, in each district. I would finally beg leave to suggest to "*Leguleius*," that the skill required in the officers of a public register is much greater than many persons suppose. The management of the indices, in the instance of settlements, by transferring one field from an estate included under one index to a separate index, &c. demands greater attention and practical knowledge than theorists usually imagine.

T. C. H.

New Boswell Court,
17th February, 1831.

I have forgotten to state, that commissions of bankrupt could not be conveniently entered in District Registers.

## PAROCHIAL REGISTRATION.

*To the Editor of the Legal Observer.*

SIR,

THE subject of Registration is likely to occupy much of the attention of Parliament in this or the next session. With respect to the registration of deeds, there is a variety of conflicting opinions; but on the absolute necessity of some improvement of the law for regulating *Parish Registers*, there is perfect unanimity.

The subject has been recently taken up by Mr. Burn, in his History of Parish Registers; and a letter has been just published, addressed to Lord Brougham, by Mr. Matthews; in addition to this, Mr. Wilks has given notice of his intention to move for a Select Committee of the House of Commons, for taking the subject into consideration.

One great evil of the present system is, that while the body of Dissenters are increasing in wealth and respectability, and in point of numbers comprise a very large proportion of the population of England, they are without the benefits of registration for the baptism of their children, for neither are their registers of baptism or of burial admitted as evidence in our Courts of law.*

The next objection is, that although the late act of the 52 G. 3. c. 146. (commonly called Mr. Rose's Act,) directs that

* See, in conformity with our correspondent's remarks, Ex parte Taylor, 1 J. & W. 483.

a copy of every parish register shall be annually sent to the bishop of the diocese (a direction also of the canon of 1597), yet there is no penalty for the neglect, and therefore in many cases it is omitted altogether; and even where these copies are sent, they are frequently thrown by in bundles, without any arrangement or index, because there is no remuneration to the registrar for arranging, &c. Every lawyer who has had a pedigree to trace, or an ejectment cause to manage, may have experienced the immense utility of these transcripts; indeed, without them, the public have no security against the loss of, or forgery in, parish registers, which in some cases are their *only* evidence of title. A very recent instance of their utility occurred in a case tried at Chelmsford, in which the plaintiff produced a copy of a register to prove a certain baptism, and obtained a verdict, by which the defendant would have lost a property of 2000*l. per annum.* After the trial, however, the Bishop's Registry was searched, when no such entry appeared in the copy sent there. The fact was, that the entry of baptism had been interpolated in the register; the defendant obtained a rule absolute for a new trial, and a true bill was found against the guilty party, who fled the kingdom.*

The system requires also many minor improvements, among which are the following: —

The clergyman should make the entries immediately after the rite is performed.

The entries should be more comprehensive in their particulars.

The witnesses to the marriage entry should be two or three, in addition to the parish clerk or sexton, who, in large parishes, cannot sometimes identify the parties again.

Indices should be made to all parish registers, and the fees for searches and extracts specified: at present these fees are wholly dependent on the liberality or cupidity of the clergyman.

I trust these points will not be overlooked, and that we may hope for a more useful act than the one before alluded to, the only penalty in which is fourteen years' transportation, which is most sagely divided *between the informer and the poor of the parish.*† Yours very obediently,

B.

* See also Lloyd and Passingham — the Attorney General and Oldham — the Stafford Peerage case, &c.

† See ante, p. 43.

## NEW STAMP DUTIES.

*To the Editor of the Legal Observer.*

SIR,

As the Chancellor of the Exchequer has mentioned that a Bill is about to be laid before the House for the purpose of altering the laws relating to stamps, I beg, through the medium of the Legal Observer, to suggest a new clause, which I flatter myself may be of material service to the public at large. All the stamp acts that have hitherto been framed, as well as many other acts, have been, and probably in some respects will always be, unintelligible. In consequence of the difficulty of applying the Stamp Act to certain special cases, it has frequently been, and, unless the law be altered, will hereafter be, necessary to lay cases before counsel for their opinion as to what stamps should be affixed to certain instruments. Counsel have frequently great difficulty in answering such cases. My object, therefore, is to save the expense incident to such cases, and to render the public more secure than they can be at present; and it is to be observed, that the expense above alluded to is incurred without any adequate benefit to the practitioner, as the remuneration is not in proportion to the responsibility incurred.

It may, perhaps, be said, that the opinion of counsel relieves the attorney from responsibility; but it does not enable him to avoid the displeasure of his client in the event of his practice being wrong. The object, I submit, may be obtained, by inserting a clause in the New Act to the effect that the Solicitor of Stamps be bound, on the tender of any engrossment or writing, to make a memorandum in the margin of the amount of the stamp proper to be affixed; that such memorandum be an indemnity to all parties interested in such instrument for the accuracy of the stamp; and that for the writing of every such memorandum, the Solicitor of Stamps be entitled to the remuneration of six shillings and eight-pence. The public will thereby avoid a considerable portion of the expense they are now subject to; they will be more secure, and the members of the profession will be relieved from a great portion of the responsibility they now incur without any remuneration.

I am, Sir,
Your obedient Servant,
AN ATTORNEY.

Lincoln's Inn, Feb. 11. 1831.

## INCENDIARIES.

REMEDY AGAINST THE HUNDRED.

*To the Editor of the Legal Observer.*

SIR,

I take the opportunity to call the attention of your correspondent on the subject of Incendiaries in your ninth Number. Your correspondent states that the summary remedy given by the 3 G. 4. c. 33. which is repealed by the 7 & 8 G. 4. c. 27. is not re-enacted by the concurrent statute passed in the same session, c. 31. I however beg to call his attention to the eighth section of the latter act. He also states that there is a decision in 9 B. & C. 134. as to the

construction of the 9 G. 1. c. 22. § 1. 7. (reported after such statute was repealed), which might lead to a supposition that the remedy given by it against the hundred still exists. The case to which your correspondent alludes is that of *Pellew* against *The hundred of Wanford:* the damage there happened on the 9th of July, 1825. The cause was tried at the Devon Spring assizes of 1827; and the royal assent was not given to the act to which your correspondent alludes until the 21st June, 1827. It is true that the decision was pronounced after the passing of the act; but it was on motion, and was of course to be decided according to what the law was at the time the cause of action arose.

I am, Sir,
Your obedient Servant,
AN ATTORNEY.

Lincoln's Inn, Feb. 11. 1831.

## WHAT IS USURY?

*To the Editor of the Legal Observer.*

SIR,

IN a case recently before the Court of King's Bench it was stated an agreement had been made between the plaintiff and the defendant, that the former should lend 200*l.* to the latter, to be repaid 100*l.* every six months, and 100*l.* over, if both parties survived; but should either die in the interim, the unpaid portion to be cancelled. This, it was contended, was usury; but the Court held to the contrary, inasmuch as there was a risk in the case of losing all the money, and the agreement might have been enrolled as an annuity.

I am, Sir, yours very obediently,
February, 1831. H. B. ANDREWS.

## SUPERIOR COURTS.

### THE LORD CHANCELLOR'S COURT.

#### RECEIVER.

THIS case was an appeal from a decision of the Master of the Rolls. The facts were these: — A Mr. White had been appointed receiver of the estate in this cause, and had entered into the usual recognizances for the due discharge of his office, in which he was joined by Mr. Adams and Mr. Barton as his sureties. It was arranged between these parties, that Mr. White should pay the monies which came into his hands as receiver, from time to time, into the banking house of Messrs. Rodgers, and that a Mr. Anderson should fill up all the draughts that should be drawn by White upon the monies so deposited at Messrs. Rodgers; and that such draughts, so filled up, should be signed by White. The bank of Messrs. Rodgers failed, and a loss was in consequence sustained. The account was then transferred to another bank, where the deposits were made in like manner, and into which the dividends received on the balance which had been in the former bank at the period of its failure were also paid. The second bank also failed; a further loss was sustained in consequence; and the question to be decided in this appeal was, whether the receiver, or in his default his sureties, were liable to make good to the estate the sums which had been lost by the failure of these two banks. The *Lord Chancellor* said, that although it appeared the receiver had accounted yearly for all the sums which he had received, it appeared also he had had larger balances in his hands than he need have kept to pay the current expenses of the estates. The necessity of accounting yearly had been laid down by the Courts, but he took that period to mean the maximum of the time in which a receiver could be permitted to retain possession of the monies belonging to the estate, and the minimum of the times at which he ought to render his accounts. It was, however, unnecessary to advert to this more particularly, because it did not form the ground upon which he was about, very reluctantly, to reverse the decision of the Master of the Rolls. That ground was, that the receiver, by an arrangement unknown to, and not sanctioned by, the Court, had put the fund out of his own control, and that he thereby became a guarantee for the solvency of the persons into whose custody he committed it. By agreeing to the arrangement that another person should fill up the draughts, the concurrence of that other person became necessary before the money could be drawn from the place in which it was deposited. The receiver was on no longer able to watch over it, to exercise his own discretion as to the period at which the safety of the money ceased, and its peril began; and in case of a run having taken place on the bank, he could not draw out the money which he had been permitted to receive, and for the receipt and custody of which he was paid a salary, without the consent of Mr. Anderson. The Court had, at the least, a right to expect that a receiver, or any other trustee, would exercise as much care over the property intrusted to him, as a prudent man would exercise over his own property. It had been said at the bar, that there was no difference, as to their responsibility, between a trustee and a paid agent. It was not necessary to decide that point, but he adverted to it for the purpose of expressing his dissent from that doctrine. This case must be decided upon its own particular circumstances, and taking them altogether — considering the receiver had dealt with the fund in a manner not sanctioned by the Court, nor with such care as he ought to have exercised—he had rendered himself, and, by consequence, sureties, liable for the losses which had been sustained. The appeal was therefore allowed, with costs.—*Salway* v. *Salway.* 9 Feb.

#### NE EXEAT REGNO.

In this case, a motion had been made to have a writ of *ne exeat regno* reversed.

The bill charged that a sale had been made, with the authority of the defendant, to a Mr. Wilson, of an estate of which the defendant was trustee, for a sum of 10,000*l.*; and that estate, after 3000*l.* had been laid out upon it in the erection of a house, which, for any thing that appeared, might not have improved the estate (as building houses at a distance from London often did not increase the value of the estates),

had been sold for upwards of 23,000*l.* The *Lord Chancellor* said, that without wishing to prejudge the case, he must say it was one pregnant with suspicion, and that nothing was before the Court tending to remove that suspicion. It was stated that the defendants, against whom the writ had been issued, had left the country before it was so in fact issued; but there was no statement that the defendant did not know it was about to issue, or to be applied for: it was impossible, therefore, to comply with the application. The defendant was a person engaged in a public office, having duties there to perform, and it might be possible that he had paid little attention to the matters in question in this suit. The Court could not enter into this fact, if it were so; and his Lordship had endeavoured to find some excuse for his conduct, until it was duly proved. It, however, only furnished another instance of the impropriety of public men taking upon themselves the discharge of private duties. One or other were likely to be sacrificed; and the latter more than the former. For this reason his Lordship had made it a rule, ever since he had entered public life, never to undertake any such offices. He was willing to believe that the defendant's conduct was capable of explanation; but until it should be explained, it was impossible to call the writ which had been issued. The motion was, therefore, dismissed with costs.—*Wilson* v. *Broughton.* Feb. 9. 1831.

LETTER TO THE LORD CHANCELLOR.

The Lord Chancellor stated to the bar that he had received a letter signed by several members of parliament, physicians, and one barrister practising in his court, requesting his Lordship to reconsider a judgment which he had given in lunacy. His Lordship reprobated the course which these persons had pursued, and stated that the proper mode of correcting an erroneous judgment was by appeal. He further alluded to two similar cases which had happened to Lord Holt and Chief Justice Willes, and intimated that he would, in future, commit any persons writing similar letters for contempt, or otherwise severely punish such conduct.—Feb. 18. 1831.

## COURT OF EXCHEQUER.

EVIDENCE—NEXT OF KIN.

This was a suit instituted by the plaintiff as next of kin of General Koeler, deceased. He had died in 1800, and his property, about 8000*l.*, was taken possession of by the defendants on behalf of the crown. The principal question was, whether General Koeler was the legitimate son of George Koeler and Elizabeth his wife. No direct evidence was produced of the marriage; but declarations that such was the fact had been made by Elizabeth Koeler, who died thirty years ago. There was also a pedigree which supported the claims of the plaintiff as to this point.

Mr. *Wray*, on behalf of the Crown, did not oppose the application, being only desirous that a clear title should be made out on behalf of the plaintiff.

The *Lord Chief Baron* thought that a *prima facie* case had been made out by the plaintiff, and referred it to the Master to enquire who were the next of kin of the intestate.—*Boar* v. *Mitford.*—*Excheq.* Feb. 12. 1831.

EVIDENCE OF DEATH.

A sum of 1000*l.* was assigned to trustees upon trust to pay it to a person of the name of Greenwood on his attaining the age of twenty-one, and if he should die under that age, upon trust to pay the same to the plaintiff. In June 1820, Greenwood sailed from London to Jamaica, and in August 1820 sailed from Montego Bay in that island for England; but had never been heard of since. The present bill was filed against the trustees, to compel the payment of the sum of 1000*l.* to plaintiff.

Mr. *Lovat*, for the trustee, was willing to consent to the payment, if the Court thought that this was sufficient evidence of the death of Greenwood.

The *Lord Chief Baron* was of this opinion, and granted the prayer of the bill.—*Greenwood* v. *M'Carty.* *Excheq.* Feb. 12. 1831.

## COMMON PLEAS.

PRINCIPAL AND AGENT.

In an action to recover the amount of certain Neapolitan coupons and bordereaux put into the hands of the defendant as securities for advances made by him to a broker named Watts, to whom they had been intrusted by the plaintiff as his broker, the question was, Whether these instruments were transferable by delivery, so as to entitle the defendant to retain them? The cause was tried before *Tindal* C. J., who admitted evidence of the usage on the subject. The witnesses, for the most part, stated that in their opinion coupons were never transferred without the certificate, which is a document granted by the Neapolitan government to those persons whose names were entered in the Great Book at Naples as subscribers to the loan raised in England for the use of that state. The bordereau may be described as an instrument empowering the holder to receive a set of fourteen coupons, which coupons were the receipts given on the payment of the dividends; and whenever the set of coupons was exhausted, the party producing the bordereau was entitled to a fresh set. It was further stated by the witnesses, that they had never known one of these instruments transferred without the other. The Chief Justice, in leaving the case to the jury, told them, that if they were of opinion that the custom of merchants here did not make these coupons negotiable like bills of exchange, they were bound to find for the plaintiff, as he did not think the defendant, in that case, had made sufficient enquiry into Watts's title to them, and had, consequently, taken them subject to all the equities to which they were liable in the hands of Watts himself. The jury having returned a verdict for the plaintiff, a rule was obtained in the last term, calling on the plaintiff to show cause why a new trial should not be had, on the ground of misdirection by the learned Judge.

*Taddy* Serjt. and *Jones* Serjt. showed cause

against the rule; *Wilde* Serjt., *Bompas* Serjt., and *Heath* Serjt., supported it.

The *Court* observed, that the case depended upon the question, Whether or not these coupons had acquired the character either of money, of bank notes, or bills of exchange with open or blank indorsements, or of exchequer bills, which were in the nature of the currency of the realm? It was a principle of law, that if a man intrusted his property to an agent who misapplied it, he was entitled to claim that property wherever he found it. To which rule, however, there was an exception in favour of property, which was in such a degree of currency as to be allowed to stand on the same footing as money. It was therefore proper, in the present case, to see whether these coupons assumed the one character or the other. Now the Court saw nothing, on the face of them, to show that they were of a negotiable character, but rather the reverse, since some of them appeared to be payable at a remote period, subject to a discount. It was therefore impossible to put them on the same footing as bills of exchange. The bordereaux were nothing more than undertakings, on the part of the government of Naples, to give fresh lists of coupons when the others should have been used. However, the real answer to the objection was, that these were not instruments recognised by the English law, but brought under the notice of the Court as foreign securities rendered available by the law of Naples. In the absence of evidence, therefore, to show that they were negotiable like bills of exchange, it was not competent to the Judge to come to the conclusion that they were bills of exchange, and recognised by the law and custom of merchants, which was a part of the law of the land. The like was the case with respect to Exchequer bills. The defendant, therefore, having failed to show that these coupons were in a course of currency, and therefore within the exception before stated, the direction of the Judge and the finding of the jury were right in giving to the plaintiff the property in these securities which had been misapplied by his agent. — Rule discharged. — *Lang* v. *Smith*, *Com. Pl. H. T.* 1831.

JUSTIFICATION. — ASSAULT AND BATTERY.

In an action of assault which was tried before *Tindal* C. J., at the last York assizes, it appeared that the plaintiff having attended a select vestry of his parish for the purpose of making some representation on the subject of the poor rates, the defendants, who are members of the select vestry, put him out of the meeting by force. The plaintiff brought his action for the assault, and the defendants justified their conduct, on the ground that the meeting having been duly convened, the plaintiff had no right to intrude himself upon them, and they were therefore justified in putting him out. It appearing, however, that the act of parliament required that the members should be duly summoned, and it not being proved that more than four out of the five who attended had been so summoned, the learned Judge was of opinion that the defendants had failed to establish their plea, and the jury therefore returned a verdict for the plaintiff, — Damages 1*s.*

*Jones* Serjt. having obtained a rule calling on the plaintiff to show cause why the verdict should not be set aside, and a new trial had on the ground of misdirection, was heard in support of it, and contended that it was unnecessary to prove that the whole of the select vestrymen had been summoned. It was quite sufficient to show that the majority who alone could pass any bye-law had been duly summoned.

The Court were of opinion that although the majority alone could pass a law, yet they might be influenced in their judgments by the arguments of those who had not been duly summoned. The defendants therefore having failed to show that they had all been duly summoned, the plea of justification had not been made out, and the verdict for the plaintiff was right. — Rule discharged. — *Dobson* v. *Fussy and another. Com. Pl.*

## ANSWERS TO QUERIES IN NO. XV.

1st. — It would appear by the decision of *Abbott* C. J. in *Warren* v. *Howe* (Barnewall & Cresswell, 4 G. 4.) that the assignment of a book debt as well as a judgment debt would not require the *ad valorem* duty, as it cannot be considered property within the meaning of the act. The words of the act are, "conveyance of any *right, title, interest, or claim, or* OTHER PROPERTY, for or in respect of the deed whereby the lands or other things sold shall be conveyed to the purchaser." The statute enumerates things which are the subject of sale, and which are usually converted into money: now, the words judgment and book debts cannot come under the meaning of this part of the act, as requiring an *ad valorem* stamp, unless under the words OTHER PROPERTY; but which *Abbott* C. J. says applies to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money.

A chose in action on a bill or note can be legally transferred without an assignment, merely by an indorsement; and I think a letter of attorney might be so framed as to authorise any person to recover and receive the debt of another by suing in the creditor's name, with a declaration of trust, that the money when recovered shall be retained by the person to whom the power is given for *his own use*; but in this case a covenant should be introduced that the creditor should not afterwards receive or release the debt, or discontinue any action.

2d. — B. cannot be considered liable, as not having used sufficient care, as a general bailment will not charge the bailee (he not having received any profit from such bailment) with any loss, unless it happens by *gross neglect*, which is an evidence of fraud. Now this is a bare and naked bailment to keep for the use of the bailor, and such bailee is not chargeable for a *common neglect*; and this omission in the bailee cannot be considered more than as such, under the circumstances of the case.

T. E.

## COSTS OF EXECUTIONS.

Esteeming the "Legal Observer" as a mirror wherein the opinions of practitioners in English law are to be reflected, probably a portion of attention cannot be more usefully directed than in bringing into notice such hardships and inconsistencies as have occurred to their experience, leaving it to those who have seats in the legislature to apply a suitable remedy.

It is an old but just complaint that few statutory enactments are free from obscurities and imperfections. It appears as if the 43 G. 3. c. 46. s. 5., had been framed to entrap *young* practitioners into the commission of error. The section referred to enacts, that "in every action in which the *plaintiff* shall be entitled to levy under an execution against the *goods* of the defendant, such plaintiff may also levy the *poundage fees* and *expenses* of the execution, over and above the sum recovered by the judgment." Now the act does not give the plaintiff poundage, fees, and expenses of execution, when issued against the defendant's *person;* nor does it apply to those very numerous cases where *defendants* obtain judgment by verdict, non-suit, or non-pros against plaintiffs. No poundage, fees, or expences of the execution, either against the plaintiff's goods or person can be levied by a defendant either under this or any other law, however wrongfully or vexatiously the defendant may have been harassed. He must pay these expenses out of his own pocket. Is this equal law, and the "perfection of reason?" Indorsements have been and are frequently made on writs of execution against the goods and persons of plaintiffs, and against the persons of defendants, to take poundage, fees, and expenses; and numerous motions have been in consequence made before the courts, calling on those who have committed such mistakes to refund what was over-levied, and to pay the costs of the application; nevertheless the law has not been altered. The statute of 28 Eliz. c. 4., which enables sheriffs to make certain charges for levying executions, is most obscurely expressed; but after the discussion and decision of many cases, it at length appeared to the learned expounders that the sense and intention of it is, that the sheriff is entitled to 1*s.* in the pound for the first 100*l.* levied, and to 6*d.* in the pound for every pound above 100*l.*

The injustice of the law as it now stands, in reference to the subject in question, will be still more glaring when it is considered that the sheriff is entitled to poundage on the sum marked to be levied, upon executing a writ of *capias ad satisfaciendum*, although the prisoner go to gaol without making any satisfaction whatever to the creditor (Lake v. Turner, 4 *Burr.* 1981.); and the charge is also made even when the party is already in custody, when the writ is delivered to the sheriff to execute. Taylor v. Wood, 2 Tidd. Prac. 1684. 8th ed.

The great body of attorneys cannot fail to be practically acquainted with almost innumerable instances in which the laws are defective as regard the details of business; and now that a periodical work has been established as their "mouth-piece," it is hoped they will not be backward in laying open those aberrations from justice which they have individually observed. The effect will be the slow but sure and gradual improvement of our system of jurisprudence.

R.

## MISCELLANEA.

### LEGAL REMINISCENCES.

"Celâ sedet Œolus arce,
Sceptra tenens, mollitque animos, et temperat iras." *Æn.* i. 56.

The ancients appear to have almost invariably dedicated some particular spot to the administration of justice; and from the fact of the *Hebrew* Judges sitting at the gates of cities, they obtained the name of "Elders of the Gate."* In Zechariah† the Jewish people are commanded, upon their restoration, to execute the judgment of truth and peace "in their gates."

The *Athenians* selected a small eminence near Athens for the seat of the "Areopagitæ." It was termed Ἄρειος Πάγος, "the hill of Mars," because Mars was supposed to have been tried there for the murder of Hallirothius.

At *Granada*, in Spain, the street "Calle de los Gomelles‡" leads to a massive gate at the entrance of the magnificent palace of Alhamra, or Alhambra.§ Over the gate is a large tower, called the "Gate of Judgment," the "Gate of Justice," the "Gate of the Law;" and upon which there is the following inscription in Arabic:—"Turn pale, O wickedness! Wheresoever you go, I will follow! Punishment always speedily follows crime. Draw near, come without fear, ye deserted orphans; here shall ye find the father ye have lost."

In *China*, there is an old willow, celebrated from the fact of the Emperor Kang Vang having sat under this tree when he gave judgment upon the differences of the labourers in agriculture. Out of respect to the Emperor, its branches were never cut. St. Louis often used to sit under the shade of an oak in the wood of Vincennes, when all who had any complaint freely approached: at other times he seated himself upon a carpet spread in a garden, and heard the causes which were brought before him.‖

---

* Deut. xxii. 15. xxv. 7.; Ruth, iv.; Prov. xxi. 23.; Lament. v. 13.

† Chap. viii. 16.

‡ So called from an ancient Moorish family.

§ The red city.

‖ Joinville, Hist. de St. Louis, p. 13. ed. 1761.

In the vicinity of *Scone* there is a tumulus, where the stone chair removed by Kenneth II. from Argyle was placed; and in which the kings of Scotland were crowned in the more ancient times. Upon this hill the King held his court of justice, and promulgated laws. From the "pleas of the barons" being determined here, it was called "Mons placiti de Scona omnis terra," or the "Mote hill of Scone;" but among the common people it bore the name of "Boothill," from a tradition that, "at the coronation of a king, every man who assisted brought so much earth in his boots, that every man might see the King crowned, standing upon his own land." The "Hill of Strife *," at Uliuish †, and the hills called "Laws," as "Kelly Law," "North Berwick Law," were places probably devoted to the seat of justice.

What a source of gratification must the scientific always discover in the contemplation of sites which have been thus dedicated to, or have formed the scene of, some great and important historical event. Take, for instance, the White House ‡ on the river Tav, in Dyved.§ Here Howel, the good son of Cadell, and King of all *Cambria*, in the tenth century, upon his return from Rome, which he had visited with a view of improving the laws of Cambria, and obtaining a knowledge of the laws of other countries, and of those the emperors of Rome put in force in the isle of Britain during their sovereignty, summoned all the chiefs of the tribes, the family representatives, and all the wise and learned men, both of the clergy and laity, to a collective convention. The laws of Dyonwall Moehund being found superior to the whole, were systematised by Blegwryd, and, after the approval of the convention, constitutionally established over all Cambria.

The ruins of *Iona*. Her monastery and cathedral recall to mind the learning and superstition of even classic ages; while her cemeteries of the Kings of Scotland, Ireland, and Norway, painfully remind the traveller of the short but momentous passage between life and death.

The island of *Runeymeed*, or Runeymead, where the brave English barons forced from the reluctant Plantagenet the great charter of English liberties, and the charta de foresta.

The ancient and stately hall of *Eltham*, first built by Edward I. ‖, and the chief residence of Edward II., and where probably the famous statutes, "De Officio Coronatoris," "Of Mortmain," and "Prerogativa Regis," were enacted. The hall is approached through a long vista of widespreading trees; and the picturesque scenery of the spot, the gorgeous roof of the building, and the castellated remains, all remind the beholder of historic times, and hours of regal grandeur.

The parliament chambers in the old palaces of Scotland, and particularly *Linlithgow* and *Stirling* ¶; the latter of which presents a fine view of the river Forth, to Alloa, the once famed residence of the chieftains of Mar; the age of Wallace and Bruce are remembered, and the eye of sympathy sorrows for their fate, and finds a melancholy reflection, that these patriots, born in the land of chivalry, became worthy sons of Caledonia.

The site of *Fotheringay*, which holds a prominent place in our annals as the birthplace of Richard III., and the place where the beautiful and accomplished Mary Queen of Scots suffered! Filial piety removed every vestige of its castle, but the name and site still exist. Westminster Hall, where the fatal judgment was given against *John Hampden!* and, lastly, the rocks in Switzerland, where *William Tell*, clinging to the crags, braved the abyss, and escaped from his tyrants.

I shall conclude my present observations with the words of our great moralist; "That man is little to be envied, whose patriotism would not gain force upon the plain of Marathon, or whose piety would not grow warmer among the ruins of Iona."

Feb. 9. TEMPLARIUS.

---

LORD ERSKINE AT HOLKHAM.

"I had frequently had an opportunity of meeting with Lord Erskine at Holkham, and other agricultural fêtes, where, though he knew nothing of husbandry, his wit and eloquence insured him a cordial reception. At one of those meetings, he pleasantly said, 'that he had formerly studied Coke at Westminster, and that he was now studying Coke at Holkham; that Coke, the agriculturist was as great in his line as Coke the lawyer in judicial questions." — *Sir John Sinclair.*

---

* The signification of the Erse word.

† In the island of Sky, or Skye.

‡ "Ty Gwyn," so called because it was made by a watling of white rods, for the convenience of hunting.

§ This spot is still recognised in the ruins of Whitland Abbey, above Tenby, on the small river Tav, in Carmarthenshire.

‖ The present hall was probably built in the time of Edward IV.

¶ Barr. Obs. Stat. 41.

# The Legal Observer.

VOL. I. SATURDAY, MARCH 5. 1831. No. XVIII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## CHANCERY REFORMS.—LUNACY.

### THE LORD CHANCELLOR'S BILL.

WE have now obtained a copy of the Lord Chancellor's first bill, and are so confident that he is zealously endeavouring to remedy the real abuses of his Court, and so anxious to aid him in his noble efforts, that we have some hesitation in saying we have read it with disappointment. This, however, was our feeling, and we shall shortly mention the reason; the provisions of the bill as they now stand are unimportant, if not objectionable, and the omissions are very considerable. The first section simply provides, that the Lord Chancellor may cause commissions in the nature of writs *de lunatico inquirendo* to be addressed to any judge of the Courts of Record at Westminster. Now when Mr. Michael Angelo Taylor proposed to bring in a similar bill in the last session of parliament, he was informed by Lord Lyndhurst, that having made the proper enquiries, he had ascertained that the Lord Chancellor already had the power of directing the fact to be tried by a Common Law Judge; and Mr. Taylor accordingly *withdrew his bill.* This first provision, therefore, was unnecessary. The rest of the bill is devoted to clauses for enabling the Chancellor to appoint "visitors" to enquire into the state of persons who shall be found lunatic by inquisition. These visitors we understand are to consist of two or more medical men, and one barrister. The salary is to be considerable, it is said from 800*l.* to 1000*l.* a year. We do not consider this plan decidedly faulty, but we think it capable of much improvement, and having first mentioned the most important omissions in the bill, we shall take the liberty of making a suggestion as to these visitors, and of proposing another plan.

The most obvious omission is, that no provision is made by the present bill, for the security of the property of the lunatic, before he shall be found such. The consequences of this are plain. A person possessed of property may, on becoming insane, be able materially to impair it; he may proceed to cut down and dispose of timber; he may sell out money invested in the funds or other securities, and improperly squander it away; he may, in short, commit irreparable damage before he can under the present bill be stopped. Now the present system is better than this; a commission may issue on the first act of insanity; the commissioners may immediately enter upon the enquiry, whether the lunatic be resident in town or country, and the fact, if clear, may be speedily ascertained. But if a commission be issued to a Judge, it would seem highly inconvenient, consistently with his other duties, to despatch him into the country to try a fact of this nature, and almost impossible to obtain his immediate attention to it in town. We submit then, that clauses must be inserted, which shall provide against the injury or destruction of the property of the lunatic, before he shall be ascertained to be such by inquisition.

The Chancellor has further declared, that it is his intention to send all contested commissions to a Judge; but that he is willing to leave the uncontested commissions to be disposed of by the present commissioners. This we think deserves reconsideration. We fully agree to the sending the contested commission to a Judge; but we cannot see the advantage, if the present system is considered defective, of preserving any part of it. An uncontested commission frequently requires more care and experience than a contested one. In the one case all parties are represented by counsel, whose

duty and object it is to see that the evidence is clear and satisfactory. In the other, there are either no counsel at all, or counsel only *on one side*. It is obvious, therefore, that in many instances it is more important that there should be a Judge of the highest class to try uncontested commissions. We are inclined, therefore, certainly to dispense with the present commissioners as Judges, but to benefit by their services, information, and experience, in another way, and this brings us to the additions to the Lord Chancellor's plan which we respectfully propose.

It will be seen that the "visitors" to be appointed under the bill, are merely to enquire into the state of lunatics, and persons of unsound mind, who shall be found such by inquisition. We would extend their power considerably. They should in our opinion be vested with authority to proceed in the preliminary steps of all commissions, which might still be directed to them: they might, on receiving the opinions of three medical men to that effect, and on a personal examination of the alleged lunatic, have power to certify the fact to the Chancellor, who might direct an issue to a Judge, and all the evidence might then be regularly brought forward. The advantages of the present system might thus be preserved, and the evils be removed. We would further propose that three or more of the present commissioners might be appointed visitors, with these powers; and that compensation for their offices might thus be saved: we can conceive that it would be advantageous to associate two medical men with them. We should then have the present number of commissioners or visitors; and we might thus, as it appears to us, obtain the benefits of both systems, and be subject to the disadvantages of neither. We should have the facility, despatch, and advantages of detail of the present system, and the ability, experience, and cheapness, of a trial at *nisi prius*, which would then be beneficially employed in all cases of lunacy.

This is the plan which, after much consideration of the subject, we venture to propose. We now lay before our readers an analysis of the bill.

The Bill is entituled "*An Act to diminish the inconvenience and expense of Commissions in the nature of Writs de lunatico inquirendo; and to provide for the better care and treatment of Idiots, Lunatics, and Persons of unsound mind, found such by inquisition,*" and recites that great inconvenience and expense have been experienced from the practice of directing or addressing commissions in the nature of writs *de lunatico inquirendo* to three or more persons therein named, as Commissioners; it is therefore proposed to be enacted,

That the Lord Chancellor, in case he shall deem it advisable, shall cause any commission in the nature of a writ *de lunatico inquirendo* to be directed to any Judge of the Courts at Westminster, who shall make inquisition, and return the same into the Court of Chancery, and for that purpose issue precepts to the Sheriff to summon a jury, subpœnas to compel the attendance of witnesses, and warrants to produce the alleged lunatic, and shall have all other the powers now possessed by the Commissioners; and such inquisition shall be valid as if the Commission in the nature of a writ *de lunatico inquirendo* had been directed, and the said inquisition returned by three or more Commissioners as heretofore.

2dly, That the Lord Chancellor may appoint persons to be *visitors* for superintending, and reporting upon, the care and treatment of persons of unsound mind, so found by inquisition, and to make regulations as to the duties of such visitors, and allow such salaries and travelling expenses as shall be reasonable. That if the visitors shall die, or refuse to act, or become unable, it shall be lawful for the Lord Chancellor to appoint others. And, that no person shall be appointed visitor who shall be, or shall have been within the two years then next preceding, directly or indirectly interested in the keeping any house licensed for the reception of insane persons.

3dly, That the Lord Chancellor may appoint fit persons to be *secretary and clerk* to such visitors, and allow such salaries as shall be reasonable.

4thly, That the Lord Chancellor may raise a *fund for the expenses* by a per-centage on the clear annual incomes of the persons found of unsound mind, not to exceed a limited amount, and to order the same to be paid by the committees or receivers of the estates of lunatics, &c. into the Bank of *England*. Committees, &c. to pay such per-centage into the Bank within a month after notice. The Masters of the Court of Chancery to certify the amount of income of idiots, &c. within two months after the act shall pass. The payments out of the fund to be by checks signed by the Lord Chancellor *without fee*. The accounts to be audited yearly, and filed *without fee*.

---

## SYNOPSIS OF

## THE LORD CHANCELLOR'S PLAN.

### I. *Lunacy.*

1. In *undisputed* cases, commissions *de lunatico inquirendo* to be directed, as at present, to the commissioners in lunacy.

2. In *disputed* cases, the commission is to be directed to, and tried before, one of the Judges in Westminster.

3. The institution of a medical board to report from time to time to the Lord Chancellor upon the case of the lunatic, and also to superintend the committee.

II. *Bankruptcy.*

1. The abolition of the fourteen lists of commissioners of bankrupts.

2. The institution of a Court, consisting of one presiding Judge, and nine commissioners, to be sitting from day to day throughout the year.

3. The division of these ten commissioners into three tribunals:—1. The presiding Judge. 2. Three senioro cmmissioners. 3. Six junior commissioners.

4. Undisputed cases to be heard before one of the class of commissioners.

5. Disputed cases before the Judge and one commissioner or three commissioners, in public; examination of witnesses to be *vivâ voce*, and court to have power of imprisonment.

6. The commissioners to sit in chambers, separately, transacting the general business of bankruptcy.

7. If disputed questions arise, such cases to be decided before the Judge, assisted, if required, by a jury, and occasionally by a commissioner.

8. A court of appeal, consisting of the presiding Judge and three senior commissioners, and judgment in cases of fact to be final.

9. High Court of Appeal to the Lord Chancellor.

III. *Officers in Bankruptcy.*

1. Accountant-general, in whose name *all* the assets in bankruptcy will be placed in the Bank of England.

2. Official assignee, a limited number of mercantile men, to be approved of by the Court. These officers are to see that all funds are duly collected and paid into the Bank of England, to report upon the estate, to act as accountants, and to superintend the proceedings of the elected assignees.

3. Abolition of the office of patentees of bankrupts.

IV. *Masters in Chancery.*

1. To be paid by fixed salaries.

2. Attendance daily from ten till four.

3. Courts of appeal to sit every evening, in public, to be composed of two Masters, and the Master whose decision is appealed from.

4. High Court of Appeal to the Vice-Chancellor.

5. No attendance at the public office.

6. Evidence to be taken *viva voce*, before a Master, and the parties.

V. *Register Office.*

1. Report office to be reduced.

2. Office of Master abolished.

3. All patent offices done by deputy, and in the gift of the Chancellor, abolished.

VI. *Six Clerks, and Sixty Clerks.*

1. These offices to be remodelled.

## LOCAL COURTS IN IRELAND.

ASSISTANT BARRISTERS.—EDINBURGH REVIEW, NO. 104.

SOME time since, one of our correspondents directed our attention to an article on the Civil Bill Courts of Ireland, which appeared in the Edinburgh Review, February, 1826. The number of that work just published (January, 1831,) contains an article on the same subject; and as Time changes all things, it has changed the opinion of the reviewer. Those very Courts which formerly afforded a field for so much pathetic and indignant declamation are now discovered to be excellent instruments for procuring justice, and though not absolutely faultless, capable of being very readily made so. The matter is managed with great adroitness. The reviewer bestows little *direct* praise upon the Courts. He enters into no controversy on their behalf. He takes their excellence for granted, and assumes the tone of a man who is not aware that any thing ever *has* been said or even *can* be said against them. The former article is completely sunk with all the abuses and horrors which it laid open,—why, the reviewer knows, *and so do his readers.*

We shall not occupy our pages with a very minute examination of the article in question; but content ourselves with calling the attention of our readers to one or two points in it. The reviewer says, that "the Civil Bill (or Assistant Barrister's) Court is emphatically the poor man's court." Yes, truly it *is* the poor man's court, it is the court where the poor may make themselves still poorer. It is the court where a poor man may spend his own last sixpence in dragging the last sixpence from the pocket of his neighbour as poor as himself. It is the court where the poor may enjoy the gratification of harassing and torturing one another under the forms of law, and where, if a poor man cannot get justice, he may at least get revenge. The wretched consequences of this facility of litigation were sufficiently pointed out in the Edinburgh Review, in 1826, and to that article those who wish for information may be referred; but even in the recent number, the reviewer, with a want of his usual tact, has exposed some of them.

Six hundred and fourteen thousand actions in one year in the petty courts alone! Can there be a more striking commentary upon the *former* opinion of the reviewer, that the lower orders would be great gainers by depriving them of the power of litigating small debts?

The assistant barrister sits four times a year. The average number of processes issued and served for each sitting is about 4800, making 19,200 annually in each county. There are thirty-two counties, consequently in the whole kingdom the number of processes annually issued is no less than 614,400! Is not this a frightful

state of society? A process is regularly sold for three-pence, and the labourer it seems may buy one at the chandler's shop along with his soap and sugar. The pleadings are oral, and of course very exact. The parties sometimes conduct their cases in person, sometimes have the assistance of attorneys. For the services of these officers the court awards a liberal remuneration. We give it on the authority of the reviewer.

Fee to the plaintiff's attorney, for entering the cause, 1*s.*

Fee to the plaintiff's attorney, for drawing up the decree, 1*s.*

This appears to be all that the plaintiff's attorney can possibly get (by fair means), two shillings from first to last. For his attendance in Court it does not appear that he is paid at all; and for each step in the proceedings for which he is allowed any thing, he is rewarded with the same sum which he would bestow upon the mendicant who stands at the door of the Court to hold his horse. What sort of attorneys must these be? How they are educated, how they are admitted, we are not told. In "the lights and shadows" of Irish "life" they must certainly form a very curious study; and it is much to be desired that some Edgeworth or Croker would make us better acquainted with them. Devoutly is it to be hoped, however, that we may never know them except by report. An able and respectable attorney is one of the most useful and one of the most honourable members of society; an ignorant, needy, and unprincipled attorney, is one of the most despicable and most mischievous: no greater curse can be inflicted upon a people than to surrender them to the mercy of a set of low and rapacious practitioners, urged on by necessity, and unrestrained by either honour, honesty, or charity.*

It is unnecessary to say that there are no counsel in these courts, but a Judge there must be; and in these as in the late Welsh courts, and in the *local courts proposed in this country*, the Judge never changes his circuit. This has been objected to on the usual grounds; and the reviewer admits the force of the objection, by proposing a remedy, which is, that the assistant barristers shall visit every separate county in regular succesion. As it is quite evident that the Irish local courts are brought forward *at this time solely with a view to recommend the establishment of similar courts in this country, and for no other purpose*, we shall beg to ask how this remedy could be applied on this side the Channel? In Ireland the county Judge is a practising barrister. His home is in Dublin; and when he makes his quarterly excursion, he may as well travel to one part of the country as to another. But in England the local Judge is to quit the bar, and devote his time exclusively to his judicial functions. If he, therefore, is to travel through all the counties of England and Wales, he will have no home at all, since the courts are to sit all the year round except in the month of August. He will be a living exemplification of perpetual motion. He will lead the life of a pedler or a vagrant on the earth; such a life as is only befitting the chief justice of the king of the gipseys.

The objection so forcibly made by the present Lord Chancellor to Judges continuing to practise at the bar has been urged against the assistant barristers in Ireland; and it has been proposed to raise the emoluments of the office, and compel the holders to withdraw from the metropolitan bar. The reviewer says no, and states his reasons. These reasons are so excellent and convincing; they are so applicable, not only to the objections against which they are directed, *but against the creation of the local Judges wherewith we are threatened*, that we are induced to extract them.

"Our apprehension is, that from the hour of their retirement they would daily become less and less efficient Judges, and that the public would not fail to make the discovery."—

"Take a barrister from the Superior Courts, and place him on a provincial bench,—detach him from a scene in which every motive of gain, of ambition, of personal responsibility, are incessantly exciting him to keep himself in a state of intellectual fitness for the details of legal business; and transplant him to one upon which the two first of these motives cease to operate, and where his character as a lawyer has little to apprehend from the criticisms of a rural auditory; do this, and the probable result will be, that the process of professional deterioration will immediately begin; that, relying upon his stores of present knowledge, he will take little pains to continue or increase it; that much of that knowledge will rapidly and imperceptibly fade away; that new tastes will spring up, or former tastes revive, and be indulged in the intervals of his official duties; that those duties, instead of being promptly and pleasurably despatched, will gradually be considered as irksome and inglorious, and be performed with corresponding languor: in a word, that his powers as a lawyer, and his weight with the public, will decline together."

This is conclusive as to the character of the Judges in the new local courts.

* See also the second letter of "a Barrister," *ante*, 179.

We shall pass over many of the abuses of the present Courts; the slovenly method of conducting the proceedings, the absurdities attending appeals, and other improprieties not undeserving of notice. We wish at present only to invite attention to the reviewer's most uncandid *forgetfulness* of the article of 1826, and to a few of the discrepancies between his opinion *then* and his opinion *now*. In 1826 he complained of the incompetence of the persons who, down to a certain period, were appointed to the office of Assistant Barristers. In 1831 he is "fully disposed to concur in the testimony of the Report, to the satisfactory manner in which the duties of the office of Assistant Barrister *have hitherto* been discharged," though on the same page he admits that the Marquis Wellesley was the first viceroy who, in disposing of the appointment, attended to any thing but the interest of the candidates. In 1826, on the subject of juries, he "quite concurred with Mr. O'Connell," who maintained that no cause should be tried without a jury. In 1831, he argues, that suitors have and ought to have "greater confidence in the judgment and integrity of the Assistant Barrister" than in "a *nominally more popular* tribunal." In 1826 these Courts "held out a bounty for the encouragement of vicious and frivolous litigation;" and the reviewer "could not but agree with Mr. O'Connell, that the lower orders would be great gainers by depriving them of the power of litigating small debts." In 1831, the greatest of all blessings is a Court which "is emphatically the poor man's Court"—where a process is sold for three-pence—where the plaintiff's attorney gets two shillings—and where, as a delicate morsel for the vindictive, a plaintiff "may proceed to final execution for his demand within the period of a few days from the commencement of his action." But it would be tiresome to pursue all the contradictions of the two articles. These may serve as a specimen; and if paper could blush, they are enough to turn the cover of the Review from blue to crimson. We will not say, in the memorable language of the Lord Chancellor, that they are "unparalleled in the annals of political tergiversation." If that noble person indeed had to deal with them, he would annihilate the reviewer with the thunder of his indignation. Our humble duty will be to endeavour to account for the contradictions. In 1826 the reviewer was the advocate of truth and justice only—therefore the Irish County Courts were attacked. In 1831 *he is the advocate of the Bill for establishing Local Courts in England*—therefore the Irish County Courts are defended.

Before concluding we wish to advert to some remarks made in the Brighton Gazette of Feb. 3. They are as follow:—

"In the Legal Observer for Jan. 15. there is an article on the Local Courts, and their abuse, in Ireland. The writer quotes a speech of Mr. O'Connell in proof of such abuse. The facts may be as Mr. O'Connell states them; but we should certainly have preferred almost any opinion to that of a man who turns every subject into a party question."

Now the quotation was not from a *speech* of Mr. O'Connell, but from his *evidence* before a parliamentary committee:—that evidence was given several years ago, and before Mr. O'Connell became so conspicuous as he has lately been; it relates not to a party question, but to one on which Mr. O'Connell might fairly be supposed to be both well informed and impartial. Under such circumstances, none but as strong a partisan as Mr. O'Connell himself would reject his testimony. But the Brighton critic appears to be one of those of whom Iago speaks, who will not serve God, if the devil bid them. The abuses, however, do not rest on Mr. O'Connell's testimony alone.

One word as to the course of the Lord Chancellor: his Lordship, has proposed the abolition of the fourteen lists of commissioners of bankrupt. This will be a great sacrifice of patronage, for which he will no doubt receive, as he will deserve, high praise; but can it be possible that he intends to neutralise this great act of disinterestedness by simultaneously creating a new and far more copious source of patronage. Seventy commissionerships, worth 300*l.* a year each, are to be abolished. But where is the boon, if this is to be counteracted by the establishment of fifty judgeships at 2000*l.* a year each, and fifty registrarships at 700*l.* a year each. *Seventy* places to be abandoned, and *one hundred* to be created. The emoluments of the old seventy amounting to 21,000*l.* a year; the emoluments of the new hundred, to 135,000*l.* a year. A special diminution of patronage this would be. It may be said, indeed, that it is not proposed to call into existence these new offices all at once. It is proposed to try the experiment only in two counties; and the general establishment of the system is to depend on the success of the experiment. But do its advocates mean to say that it will not succeed; if so, what is their object? But they have no doubt settled that it is to succeed. And

when it shall please them to determine that it has succeeded, *we* are to have the expense, and the Lord Chancellor the patronage: we are persuaded, however, that the high minded and gifted person, who now holds the great seal, will feel that for HIM to attempt to carry such a measure, would be to forfeit that reputation which it has been the labour of a life to raise. Could he succeed it would most enormously increase the power derived from a crowd of obsequious dependents, and hungry candidates for office: but of that power, which his Lordship possesses in so eminent a degree — the power derived from character — the power arising from the reputed possession of the higher moral qualities of our nature — he would deprive himself for ever. The fountains of justice should be transparently pure. The first legal functionary in the realm should be as free from suspicion as Cæsar's wife. The appointment of assistant barristers in Ireland was a project of Lord *Clare*, notoriously for the purpose of patronage, and nothing else. Would it not be said, that the establishment of Local Courts in this country had the same object? No Lord Chancellor could propose the creation of a hundred new legal appointments, dividing among their holders nearly a hundred and fifty thousand a year, without subjecting himself to imputations, which to the present Chancellor would be worse than death. We feel confident, therefore, that he will not ask for that, which to gain would be ruin, and which even to seek would be little less — and if he should ask, we feel equally confident that parliament will refuse. In spite of reports to the contrary we conclude, therefore, that the Local Court project is abandoned.

---

## REVIEW.

*The Life of a Lawyer; written by himself.* London: Saunders and Benning. 1830.

THE *moral* of this work is the inculcation of the truth, that in England the road to honour and distinction is open to all; and it establishes also another position, of equal importance, that industry and perseverance will overcome almost every obstacle. It is a most encouraging production for a young man entering on the arduous career of the law. It contains the history of a lawyer on whom the appropriate name of John Eagle is bestowed; who commenced his career as the junior clerk in the office of a country attorney, and ultimately became Lord Chancellor. We read the volume, immediately on its publication, with great pleasure. It has been recently sent us for review; and we have again perused it with undiminished gratification.

Many of our readers are doubtless acquainted with its contents; and we shall not, therefore, enter upon an analysis of the numerous incidents which mark the career of the hero of the tale, but confine ourselves strictly to the professional part of the work. We shall pass by the love story which the author has skilfully introduced, and also leave untouched the political part of the lawyer's life. The portions which appear to us the most interesting and suitable to our present purpose, and which, we trust, will be so considered by our readers, are the *Sketches of Character*, with which the early part of the volume abounds. Some of these are imaginary; but others are evidently intended to depict, not indeed entire characters, but some striking features of the eminent men of recent times.

Besides these portraits, the volume contains a description of three very interesting trials, in which the hero is engaged as counsel. The first was a trial for murder, the second a question of legitimacy in a civil action, and the third a prosecution for high treason. These are related in a very interesting manner; and, in general, the nature of legal proceedings are described with great correctness. There is however one exception to this merit: the young barrister seeks an interview in the gaol where his client, who was accused of murder, is confined, and endeavours to obtain a knowledge of his actual guilt or innocence; and for this purpose he requests the attorney to withdraw. This is contrary to the usage of the profession, and altogether a useless innovation; for it is highly improbable that the client would communicate to a stranger any information which he had withheld from his confidential adviser: and the result, as might be expected, was, that the prisoner, after great hesitation, merely stated: — "I am not guilty to the extent they allege against me."

In the next case, in which it is necessary to collect evidence in Italy, the learned gentleman sets out to effect this object himself, instead of advising that course to be pursued by the attorney. At this time he had made considerable progress at the bar; and even supposing the journey to have been taken in the long vacation, he must in many respects have neglected his immediate interests. We are perhaps too

technical in these objections; and at most, they are but blemishes of a minor kind.

Ill nature might object to some of the incidents connected with these trials, and particularly to those of the second. The circumstances are certainly extraordinary; but they are not more so than such as sometimes happen in real life. Nothing, indeed, is more easy than to invent scenes which are impossible — monsters in nature, the creation of an unhealthy imagination; but keeping within the range of possibility, we hold that the most fertile imagination is distanced by the marvellousness of truth. And we believe, for the encouragement of the young candidate for legal honours (who may be apprehensive of nothing but disgust and dulness in his laborious career), that a court of justice will often exhibit a scene of far more stirring interest than is ever represented within the walls of a theatre— scenes in which the most singular events and apparent mysteries are brought to light; where the intricacies and contradictions of the human character are curiously unfolded, and where undoubtedly the noblest talents are displayed, and both vice and virtue exhibited in the most striking particulars.

We think the volume before us presents a vivid picture of this kind, and that every lawyer who possesses a gleam of imagination, or any portion of taste and enthusiasm,—from the youngest student, who has for the first time crossed the ancient threshold of Westminster Hall, to the last venerable judge who retired from it, — must feel indebted to the author for this result of his agreeable labours: the one for the bright prospect he holds out to persevering diligence; and the other, for the pleasing retrospect of his past and honourable career.

The author describes the talents which are requisite to attain eminence at the bar as of no ordinary kind.

"To obtain distinguished success at the bar, a man must possess great and varied qualifications. He must not only be able, in his closet, to grapple with and conquer the most abstruse, fatiguing, and inexhaustible of studies, but he must also be thoroughly acquainted with the subtle mysteries of human nature; he must be able to penetrate with equal facility into the researches of the dead, and the motives and actions of the living; he must be able to wield at his pleasure all the splendours of rhetoric and eloquence, and to descend in a moment into minute and trifling technicalities; he must be able to adapt his feelings, language, and ideas, to the highest or the lowest level; he must be endowed by nature with a frame and constitution capable of enduring fatigue and anxiety, the most constant and enthralling; he must not only have commanding talents, but both energy to rouse and keep them constantly alive, and judgment and discretion to direct them. Having all these qualities, he must be full of honourable feeling, and be blessed by good fortune, or he will never succeed at the bar."

No one can question the high education, learning, and talent which eminently distinguish the members of the bar.

But these characteristics are not alone sufficient: it is absolutely necessary to add to their possession the most constant and unflinching industry. Day after day must be passed in court, and night after night devoted to chambers, or success to any eminent extent will be in vain expected.

Like most men who have risen to eminence in the profession, Mr. Eagle at first met with little encouragement. The second day, indeed, after he was called to the bar he gained a half-guinea fee, but he received no more for three years, and the hope and disappointment of each succeeding day are well described.

The circumstance which has generally brought the latent talent of a junior advocate into notice, has been the illness of the leader; on such occasions, of course the intended chancellor distinguishes himself, for great acuteness, learning, and ability, and ever afterwards receives an abundant supply of briefs. In the present instance, the dawning of success commences with a large fee for the skilful preparation of the Deed of Trust of a Joint Stock Company, which our hero prepares for one of the leading conveyancers, to whom the instructions had been sent, and who honourably assigns all the merit, as well as the remuneration, to the junior, to whom it is due.

After these remarks we proceed to transfer to our columns the sketches of legal character to which we have referred. The first may be adduced as a proof, that a gay and fashionable life are incompatible with success in the law. After our hero had emerged from the office of the country solicitor, he was engaged as the clerk of a Mr. St. Leger, who is thus described.

"He was a well-dispositioned young man, and of rather superior talents; but he had none of the patient assiduity which the profession of the law demands, and most of all that branch of the profession to which he had attached himself. His thoughts were wholly occupied by the gaieties and pleasures of high life; his great wish was to make a figure at the west end; to be the best-dressed man, and to drive the best gig and the best horse about town. He had rather an exaggerated notion of his own abilities, from having taken a high degree at Oxford, where perhaps he really had worked: he was well connected both with the rich and the great, and

also with the solicitors, so that he had a good deal of business. If he had only paid reasonable attention, he must have got on; but he was rarely at chambers till twelve or one o'clock in the day, and then two or three parties in the evening; and all the numerous engagements that the variety of the town and his numerous friends put at his command completely unfitted him for the demands which his profession made on him. Now and then he would come down early, and work hard all day and night; but this was of very little service: there was no steady or regular attention, and he was sure to relapse again into his former carelessness in three or four days."

An attorney in Staple Inn, of the old school of practitioners, through whose medium Mr. Eagle receives a legacy of 1500*l.*, and by which he is enabled to prepare himself for the bar, is thus depicted.

"He was nearly sixty years of age, and was one of those dry formal sort of men who cannot possibly be moved out of their usual course. I remember his appearance perfectly well. He wore powder, and a stunted *queue;* his black coat and waistcoat, his tight grey trousers and gaiters, were evidently his constant dress. His language and features were technical and precise, and his manners distant and reserved."

The special pleader, in whose office he next enters, is briefly presented to us, but not described with sufficient minuteness to render an extract desirable. The counsel who were the leaders of the circuit at the time to which the tale relates are thus successively delineated: —

"Mr. Dudley was by far the first. He always completed my idea of what an advocate ought to be. He was, I believe, well connected; and had that noble person, and those dignified manners, which an English gentleman knows so well how to blend with the greatest kindness and urbanity. He was an acute, if not a profound lawyer; he had a commanding style of eloquence; his arguments were always deeply grounded, and vigorously supported. It was a grand sight to see him undertake a cause. It seemed against reason to suppose that he could exert his talents on the wrong side. He was always perfectly calm when stating the wrongs of his client, or enforcing his rights; he attempted no violence, he used no force; the reasoning which he employed seemed to be the conviction of a temperate and well-advised judgment; he seemed merely to be declaring the truth and justice of the case. It was only in describing the wrong-doing, or misdeeds of the party against whom he was engaged, that he rose above his mild and temperate tone. He would then gradually arouse all his energies, his whole face seemed to glow with a virtuous indignation; his voice filled the court, his eyes flashed fire, and one could not help pitying the unfortunate object of his anger, as the most miserable person upon earth. It was remarkable, however, that Mr. Dudley did not always succeed, where an inferior man might have succeeded. He could not always bring his reasoning to the level of the comprehension of the jury; and, although he was never known to fail on any great occasion, yet in every-day causes he was not unfrequently overcome.

"His most successful rival was Mr. Serjeant Duck, who was the advocate in the greatest employ of the day. He always confined his exertions to the particular cause in which he was engaged. He ventured upon no abstract reasoning, he attempted to establish no great principles; he made himself complete master of all the facts of the case; he studied the character of the witnesses, and the taste of the jury; he flattered the prejudices and feelings of the judges; — and the almost constant reward of his exertions was a verdict in favour of his client. It was not in his nature to be either eloquent or humorous, but he could speak fluently and clearly upon every thing, and at all times. He was, moreover, a sound, able lawyer, and could state the law admirably on any subject. He was also very deeply versed in the practice of the courts; and, indeed, such general reputation had he obtained, that it was said that no cause had a fair chance of succeeding on that circuit, if Serjeant Duck was not engaged in it.

"A long way from both Mr. Dudley and Serjeant Duck, in business and capacity, came Mr. Morris; although, from his peculiar talents, he was often preferred to either: his strength lay in a copious and ever-flowing wit, great shrewdness, and immense skill and power in examining witnesses. He was generally unhappy in stating his own case; he was often carried away by his own feelings, and had not sufficient temper and discretion to conduct his cause successfully. His great power was in confusing and entangling the case of the other side. Few witnesses could stand against his peculiar powers of examining them, and his remarks upon the evidence were always most shrewd and effective: unfortunately, he generally quarrelled with the judge; and on this circuit there was open war between him and Judge Draper, which greatly hurt his practice; it being of course imprudent to intrust business to a man, against whom a judge may have a prejudice or a dislike."

The leaders in the Court of Chancery are then described as follows.

"The first, both in business and merit, was Sir Edward Winter, who was then solicitor-general. His distinguishing characteristic, perhaps, was a remarkable shrewdness. He was a perfect lawyer, and, considering his immense practice, his knowledge of every thing relating to his case was perfectly wonderful. If any date were to be supplied, if any minute question relating to it were asked, Mr. Winter was sure to know, and answer it first. I never knew a man who had such complete command of his own faculties, or who could summon them so readily to his command. He rarely rose into any thing like eloquence. It might have been the nature of the subjects on which he treated, and the character of the court and the judge whom he addressed; but he never departed from his own temperate and unadorned style of speaking. He always argued a question with animation, and

sometimes with liveliness; he always spoke with point and effect, and was at present most in request as an advocate in that court. His power of seizing, at a glance, on all the strong points of his case, was perhaps never equalled; and the zeal and intrepidity with which he would fight the battle of his client, was never surpassed. He was the man of all others who had risen purely by his own exertions.

"There were two others, who followed next to him in business and importance, and about equal to each other, having their separate set of supporters and admirers. They were both king's counsel.

"The first of these was Mr. Paine. His talents were all natural; he had improved them but little by reading and reflection. His chief merit was the spirit which he threw over the gravest subject. He would go through a tedious account of legal proceedings, and impart to the recital the greatest interest. He would argue a question, in itself the most dry and dull, in a manner at once effective and vivacious. His great fault was, that he rarely knew the facts of his case, and was consequently liable to be confused and corrected by any one that had taken that trouble, and was on that account rather a hazardous counsel to employ; but even here his great talents were displayed in the manner in which he defended himself.

"The second was Sir Thomas Popping, who had once been in office. He was a good lawyer, a very fluent speaker, and a ready advocate, and generally got through business very creditably to himself and his client."

Next come Mr. Justice Draper, and Mr. Justice Buckle. They were of very different habits and character.

"Justice Draper had been a special pleader, and his thoughts were wholly bound up in his profession, and in that part of his profession in which he had distinguished himself most. He had a most ardent veneration for all the forms and practices of law; he was very ceremonious, and stood much upon the nicest *punctilio:* all the early part of his life he had lived entirely out of society, so that his views of mankind were narrow and confined. He was nevertheless a sound lawyer; an upright, and, at bottom, a kind man. His temper was naturally sour; but his unkindness, which was noted, lay more in manner than in intent. His chief fault was in taking inveterate dislikes to particular barristers, and never endeavouring to conceal his prejudices. He was too often led away by passion in his decisions, and, in stickling for the letter, sometimes overlooked the spirit of the law.

"Mr. Justice Buckle was a very different sort of a man. He knew very little of special pleading, or indeed of any portion of law, and was continually railing at it. He had attained his present elevation by a ready fluent habit of speaking, great and boisterous good humour, and a jovial and pungent wit and jocoseness. He was a very general favourite with the profession, and his business had always been very great, when at the bar. He had entered freely into society and its pleasures, was well acquainted with men and manners, and therefore well adapted to speak to the feelings and prejudices of a jury. He had the greatest horror of legal technicalities, and was indeed culpably ignorant of all that related to the law of real property. He lessened the censure that this would otherwise have raised, by openly avowing and defending his ignorance on every occasion."

And finally the then late, and then present Lord Chancellor, are brought before the reader. The description of the latter, under the name of Lord *Harderly*, has been inserted in one of our judicial sketches.* The former, to whom the name of Lord *Haverford* has been given, is thus drawn at full length.

"The Lord Chancellor, at this time, was the celebrated Lord Haverford—a name which can never be forgotten whilst our present judicial system shall last; a man amazing, even to lawyers, for the extent and profundity of his learning in every branch of our laws; possessing a mind capable of taking a wide and extensive view of a legal question, but also fully competent to enter into its closest details, and wind itself into its subtlest niceties. He brought to the consideration of a question almost every thing requisite for its complete decision: thorough knowledge of all the law and equity relating to it, and the most particular and minute attention to all its facts; yet such was the peculiar nature of his mind, that he very rarely decided a question on broad or general principles, but generally rested the weight of the judgment on some minor circumstances. Perfectly conversant with both the law and the facts of the case, he often decided like a man ignorant of both; for so cautious was he of his opinion, that he generally contrived to make himself some loop-hole, through which he might creep when he was, at any future time, hard pressed with his own decision.

"I do not now allude to the few judgments which he gave — a subject which has been sufficiently dilated upon. I am now considering what he did decide.

"In all his great judgments, he unsettled as much law as he settled; he would go through a long string of cases, pointing out their fallacies, and quarrelling with those who had decided them, but never directly over-ruling them. His hasty opinions, or what are called the *obiter dicta* of a judge, were most important and valuable, for they were always right, and from their very nature unqualified; but his detailed judgments, wonderful as they were as mere efforts of mind, and remarkable for the learning and acuteness they displayed, were so indecisive, so diffuse on points which did not require settling, so vague and qualified on those that should have been set at rest, that they were often useless, if not mischievous. There was scarcely an equitable principle or subject which he had not touched upon in the course of his career, settling or unsettling it, or attempting to settle or un-

* Page 87.

settle it; so that his opinions were necessarily studied, as he had made, or in some way affected all the law of his court."

We think that this little work, which is full of interesting matter, should form a part of every well selected library.

## LIABILITY OF BAIL.

SIR,

THE extract from the judgment delivered by *Gibbs* C. J., with which I concluded my last communication * respecting *Roche* v. *Stevenson*, established the following positions; namely, that the contract of bail is regulated by the same general principles of law as that of common sureties; that it is one of those principles, that the surety is discharged if the creditor does any act which is inconsistent with the rights of the surety; and therefore it is a rule, that the surety is discharged if the creditor agrees to give time to the debtor, such an agreement being inconsistent with the right which the surety has, through the medium of a court of equity, of suing his principal in the name of the creditor at any moment, on his paying the creditor.

With reference to this principle, the case of *Roche* v. *Stevenson* involves the following issue; namely, whether, during the progress of the action, and before final judgment, the bail have any rights which can be affected by the creditors agreeing to give time to their principal?

What the rights of bail are, is shown by the following:—

"Bail signifies guardian or keeper.

"A man bailed is, where any one arrested, or in prison, is delivered to others, who ought to keep him to be ready to appear at a time assigned, or otherwise to answer for him.

"And therefore the bail may keep the person committed to them in their custody, for their indemnity.

"Or, if he be at large, they may reseize him, and bring him before a Judge to find new bail, or to be committed to prison."—See *Comyn's Digest*, tit. Bail (A).

I could multiply authorities to the same effect, but these are sufficient, the doctrines therein contained never having been disputed. They clearly recognize two distinct rights as inherent in bail; that of keeping the defendant; and that of at any time seizing him, if he is at large, to render him. Now, is an agreement to give the defendant time consistent with these rights? or, in other words, whilst such an agreement exists in favour of the defendant, can the bail either keep, take, or render him? The remarks of the learned Judges in *Bousfield* v. *Tower*† seem to afford an answer to this question; I will therefore quote them.

In that case the plaintiff had accepted of the defendant a cognovit for the payment of the debt by instalments; and on the question whether the bail were discharged by that transaction, *Gibbs* C. J., after alluding to a similar case in which it had lately been ruled "that the bail were discharged by analogy to the case where the creditor, by giving time to the principal, discharges the surety," said—"The bail cannot render the principal, if the plaintiff gives the defendant time for payment by instalments, until the time when failure is made in payment of an instalment;" and his Lordship added—"the bail, therefore, are put in a different situation from that in which they placed themselves when they entered into their recognizances;" they being originally entitled to render the defendant at any time. Mr. Justice *Heath* also said—"It would be extraordinary that, if the plaintiff parted with the power of taking the defendant until default made in payment of the instalments, the power of taking him should still subsist in the bail. That power is entirely derived from and dependent on the power of the plaintiff to take him." Now, by what means had the plaintiff parted with the power of taking the defendant? Not by express renunciation, as the phrase used to designate the plaintiff's act would seem to imply, but merely by agreeing to give the defendant time; which agreement, by operation of law, or in the opinion of the Court, gave the defendant a temporary immunity from arrest and imprisonment. Mr. Justice *Chambre* completed the argument contained in the above remarks, by observing, "that if the bail were to surrender the defendant, they would be discharged in a circuitous way, for no doubt the Court would hold the principal entitled to his discharge;"—and therefore, to avoid circuity, the modern practice is, in such cases, to discharge the bail directly. But why, in the mind of this last learned Judge, was it, in the absence of any express adjudication, so entirely free from doubt that the Court would hold the principal entitled to his discharge, were the bail to surrender him? Evidently because it would be inconsistent with the dictates of common sense, to allow the defendant to be imprisoned during the period of forbearance. And, Sir, if such is the ground of the defendant's discharge, and of the consequent discharge of the bail, when the plaintiff agrees to give the defendant time after judgment, is not the same ground applicable, with all its consequences, when, before judgment, and during mesne process, the plaintiff makes the same kind of agreement? The case of *Roche* v. *Stevenson* admits that the defendant cannot be imprisoned after judgment, during the period of forbearance; and I contend, neither can he before judgment, during the period of forbearance. The cognovit in the case last referred to was an agreement for forbearance; therefore it discharged the defendant from the custody of his bail, and they were entitled to an exoneration.

Having, I fear, already exceeded the limits commonly allowed in your excellent periodical to discussions of this nature, although I have given but a brief sketch of my intended arguments, I refrain from bringing forward all the reinforcements which might be drawn from other principles of the law of principal and surety; and I will trouble you with only one or two more considerations. Suppose the defendant in *Roche*

* See Legal Observer, No. XII. p. 191.

† Taunt. R.

v. *Stevenson* had become a bankrupt before the time when, according to the regular course of proceeding, the plaintiff could have obtained judgment, and before the debt, according to the terms of the cognovit, was payable — Could the plaintiff, under the old bankrupt law, or independently of an express provision making debts payable at a future period proveable, prove his debt under the commission? Surely he could not; yet he might have proved, had the debt remained as it was when he commenced his action. As, therefore, the cognovit so far altered the debt, as to deprive the creditor, in the case supposed, of the right which he would otherwise have had of proceeding instanter against the *property* of the defendant, *à fortiori* it deprived him of his present lien on the *person* of the defendant; and the bail therefore could not render the defendant.

It must not, however, be supposed, that it is necessary for sureties, or for bail, to show that their rights are prejudiced, in order to entitle themselves to an exoneration. If the creditor alters the character of his debt, he extinguishes it as to the surety; and the alteration is a novation. The surety may say—"This is not the debt which I agreed to secure, *non hæc in fœdera veni;*" nor would it be a valid answer, that the new debt, or new compact, was more beneficial to him.

Now, Sir, I think your readers will entertain a strong doubt of the propriety of the judgment in *Roche* v. *Stevenson*, though some there are whom nothing but a decision will convince, and who are convinced by every decision.

*Inner Temple Lane,* W. T.
*Feb.* 7. 1831.

## CHANGING A NAME.

*To the Editor of the Legal Observer.*

Sir,

I am happy to find that my letter on the subject of changing a name has been of interest to your correspondent H. L., and very willingly comply with his request that I should mention the instances to which I alluded, in which an absurd or ridiculous name had been "a decided hindrance to a man's advancement in the world." I cannot mention names, nor would it serve any good purpose so to do; but I am sure your correspondent will receive my assurance of the truth of what I relate, when I say that the persons to whom I allude were among my own acquaintance. I chiefly allude, then, to a connection in marriage. There a name becomes a matter of some importance; and the more so, as one party to be consulted is frequently a little fastidious on the point. Now, Sir, I happen to know of two instances in which matches decidedly advantageous to both parties were broken off, principally on the ground of the gentleman's having a name which certainly could not be heard without provoking a smile. Further, two very respectable persons, with whom I am slightly acquainted, lately entered into a partnership in a large trading town as booksellers. Their names were each of them singular; but, when joined together, their juxtaposition was so exceedingly whimsical, that few persons heard it without a smile; and in the end these poor booksellers *were fairly laughed out of their partnership.* I do not dwell on the annoyance which many persons feel on this account; I am now stating actual facts of positive injury done to persons by reason of their names, although I agree with your correspondent that nothing can be more absurd.

I am, Sir,
Your obedient servant,
A Chancery Barrister.

## PRIVATE LETTERS TO THE LORD CHANCELLOR.

In our last Number * we inserted a short notice of the Letter addressed to the Lord Chancellor, in the case of a lunatic. We have now to advert to Mr. Rosser's letter to his Lordship, for the transmission of which, he has been subjected to animadversion, and he is desirous to vindicate his conduct before his professional brethren, through the medium of the Legal Observer. We yield to his request, and publish the letter. Our readers will judge for themselves on the propriety of the proceeding. Mr. Rosser was no doubt actuated by zeal for his client. We are persuaded he entertains the greatest respect for the Court, but, that he considered it to be his duty to make the remonstrance contained in his letter. As a general rule, however, we think it quite clear that a Judge should be addressed in open Court, and that the transmission of private letters is irregular. We have been induced to give insertion to the letter, to relieve Mr. Rosser from the imputation, that he had written it in a violent, disrespectful, and improper manner.

*To the Right Honourable the Lord High Chancellor.*

19 Gt. Ormond Street,
My Lord, 8th Jan. 1831.

No apology will, I trust, be deemed necessary for thus interfering with your Lordship's time: the subject of this letter is of some importance, and I hope you will not think I am acting improperly in pressing it on your attention.

I am the solicitor of the appellant in one of the appeals which have been argued before your Lordship in the cause *Page* against *Broom.* The appeals, you will recollect, were argued at considerable length. "The argument was," to use your own words, "very ample, elaborate, and most ingenious." The cause was complicated and perplexing: you yourself spoke of "the very many facts of this very entangled question." Your Lordship had avowed that your first impression differed from that which you felt when you gave judgment; and the conse-

* Page 269.

quences of an adverse decision would unquestionably be calamitously heavy. You took time to consider the arguments advanced, and the documents on which they were founded; and the bar were looking with some interest for the manner in which the various points raised before you would be disposed of. In this state of things, my Lord, you pronounced a comprehensive judgment of affirmance with costs, after the usual hour of the Court's rising, without any previous intimation of your intention — without your notes, in the absence of all the counsel on the appellant's side but one who was accidentally present, and not in his professional costume; and in the absence of all the solicitors engaged in the cause, without a single exception.

It has, I believe, been the practice of your predecessors when not giving judgment immediately on the closing of the argument, to give notice of the time when the judgment would be pronounced. If I were not apprehensive that my client might be seriously injured in consequence of your departure from the usual course, I would leave it to experience, or to some individual more competent than myself, to point out to your Lordship the inconvenience of such a departure.

After giving his undivided attention to the cause throughout the hearing, I venture to submit to you, the Judge ought to declare his decision only in the presence of the parties, their counsel and solicitors, if they choose to be present, in order that they may set him right as to any matter which he may have mistaken (and the most experienced and attentive judge may mistake); that they may take notes of what falls from him, to be used elsewhere should his tribunal not be one of last resort;* and that they may discuss the question of costs, which seems to be frequently reserved till the conclusion of the judgment. I presume to say, that the parties have a positive right to the opportunity of being present with their professional advisers; and unless notice is given, they can hardly be said to have such an opportunity; for, of course, it is not to be expected that they should be in constant attendance for months perhaps during the sitting of the Court, taking the chance from day to day of hearing the decision.

I venture to submit further, that while giving judgment the Lord Chancellor is himself being judged. He has to show to the parties that he has made himself master of the case in every one of its circumstances; for if he has taken but a partial view, or a false view, of it, his judgment will be right only by chance. He has next to show to the party against whom the judgment goes that he, the party losing, is really in the wrong, and ought not to have, and has no chance of having, a different measure of justice meted out to him. Lastly, he has to show to the public, and to the profession in particular, that he is competent to grapple with the arguments in opposition to which he decides, that he knows the law applicable to the points raised, and that he can, and does, decide those points, article by article, and by the law. If this is not done, I apprehend a simple affirmance or reversal of the decree, where the case would admit of it, would be the best judgment that could be pronounced.

For I am sure your Lordship will see that the great object of every judge, in doing justice, ought to be to do it so as that there may be an end of the strife. In mercy to the parties it should so be done. To carry conviction to the mind of the losing party by clear exposition of fact and of law, would be right and good: to decide without any exposition, or giving any reason, might not satisfy him, yet might leave him not disposed to pursue the contest; but to decide with an evidently imperfect or mistaken notion of the facts, would, almost to a certainty, drive him to further expense and harassment.

As the cause *Page* against *Broom* is still before your Lordship, there would be an impropriety in my going into the various questions arising out of it; but I am afraid that, after all the expense that has been incurred in taking the Lord Chancellor's opinion on the case, my client will carry it elsewhere.

I have the honour to be,
My Lord,
Your Lordship's obedient servant,
ARCHIBALD R. F. ROSSER.

Your Lordship appears to suppose that, according to practice, the Lord Chancellor is to receive notice when to give his judgment: "I shall point out, without entering into the particulars, not having had notice that I was to deliver this judgment, and not having my notebook here," &c. This is what, according to the short-hand writer's notes, was said by you on the subject.

---

## THE LORD CHANCELLOR'S REFORMS.

### BANKRUPTCY.

We have just obtained a copy of the new bill for the administration of bankruptcy, but have only room to glance at its provisions. The Chief Justice and the Puisne Judges, are to be of ten years standing, and the six junior commissioners of seven years; they are to have power to make rules for their own Court. Provision is made for the appointment of country commissioners. A compensation clause is inserted, as we expected. It provides that no commissioner holding "any other public place or situation" shall be entitled to it; but that all other commissioners who have held office for ten years shall have 200*l. per annum;* and those who have held office for a less period 150*l. per annum.*

We may here mention that it is not true that Master Stephen has resigned, or that Mr. Garratt has been made a Master.

There are of course many rumours afloat as to the proposed change. Some of

* It appears, by a subsequent part of the letter, that a short-hand writer was present, and took notes of the judgment. — ED. L. O.

these we shall mention. It is said, very confidently, that the Chief Justice in Bankruptcy is to have 5000*l.* a year — that the three Puisne Judges are to have 4000*l.*, and the inferior commissioners 2000*l.* We have heard the names of all the gentlemen who are likely to be appointed; and have good reason to believe that Mr. Serjeant Pell, Mr. T. Erskine, Mr. C. F. Williams, Mr. Swanston, and Mr. Fonblanque, will be included in the number. It is further said, that the Lord Chancellor will propose that compensation shall be given to the commissioners, on a scale proportioned to the time that they have held office, as mentioned above, and that on promotion, or obtaining other situations, they will cease to draw it: but that this is not a necessary part of the proposed change; and if it be strongly opposed, it will not be pressed.

## SUPERIOR COURTS.

### MASTER OF THE ROLLS.

SPECIFIC PERFORMANCE. — SETTLEMENT BY INFANT.

This was a bill for the specific performance of an agreement, into which the plaintiffs as trustees had entered for the sale to the defendants, of certain *leasehold property*, under the following circumstances: — Kelly bequeathed to trustees certain leasehold property, for the sole and separate use of his granddaughter, until she should attain the age of twenty-one, or marry under that age. She married during her minority, and a settlement, upon reference to the master, and with the approbation of the court, had been executed, whereby the said leaseholds were assigned to trustees upon trust, to sell and to convert the same into money, and to stand possessed of the proceeds upon trusts, for the benefit of the wife and the children of the marriage. The property was accordingly put up to auction, and the defendants became the purchasers. When the abstract of title was delivered, objections were taken to it on the ground that the granddaughter being an infant, could not enter into any contract, as to her property. This objection was now relied upon by *Preston* and *Stuart* for the defendants.

The *Master of the Rolls* in giving judgment, said the question was, whether the disposition of her leasehold estate, made by settlement on the female infant's marriage, should prevail? And he was of opinion that it was to be resolved by the general principle, that an infant was incapable of contract or alienation. Where a female infant possessing personal property married, and the settlement made on that occasion contained provisions with respect to that personal property, it was not a contract by the wife, but a limitation by the husband of his marital rights, and did not affect the principle that a female infant could not make a disposition of her personal property. This case, however, involved a contract on the part of the infant. It was argued that the settlement had been made upon a reference to the Master; and that, being under the approbation of the court, it was made with a view to the infant's benefit. In certain circumstances the Court had, no doubt, a power to exercise its discretion for the benefit of an infant, but it has no power to give benefits not warranted by the rules of law. The marriage settlement, in this case, should therefore be considered invalid, as it affected the leasehold estate; consequently the purchaser was not bound to complete the purchase, and the bill should be dismissed, with costs. *Simpson* v. *Jones*, M. R. Feb. 14. 1831.

### SITTINGS AT THE ROLLS COURT.

The Master of the Rolls will sit every Friday until the last seal, to hear causes, further directions, and petitions by consent.

His Honour will on those days, also, hear such further directions and exceptions as may be set down in the general paper, provided the orders for setting the same down shall be served in due time, or such service shall be dispensed with.

His Honour will also hear such causes as may be set down in the general paper, in which the defendants shall dispense with service of subpœnas to hear judgment.

### COURT OF KING'S BENCH.

CERTIORARI. — PERJURY.

*Turnor* moved for a *certiorari* to remove an indictment for perjury from the Old Bailey into this court on an affidavit by the defendant, which stated that the prosecution had arisen out of a cause in the Common Pleas, and that he was desirous of having the case tried by a special jury.

*Parke* J. observed, that it was very unusual to grant a *certiorari* to remove an indictment for perjury from the Old Bailey as the judges attended there; and if such an indictment were not tried before them, it was tried before the Recorder, who, from his great practice in trying such cases must be well fitted to preside on such occasions. He would, however, take time to consider, and refer to the other judges.

On the last day of term his lordship intimated that the writ might issue. *R.* v. *London*, H. T. 1831. K. B.

ARREST. — BOUNDARIES OF A COUNTY.

*Hulme* opposed a rule calling on the plaintiff to show cause why the service of process should not be set aside. The affidavit, on which the rule had been obtained stated that the defendant had been arrested on a *latitat* directed to the sheriff of Surrey, and that the arrest took place in Holborn in the City of London. This he contended was not sufficient, as it did not go on to state that the place was not on the borders of the county of Surrey,* and that there was no dispute as to boundaries.

* Tid. Forms. p. 179. § 5. a. ed. 9.

*Comyn*, in support of the rule, contended, that where the place in which the arrest took place was clearly not on the borders of the county, that was sufficient. It must be quite evident that Holborn was not on the borders of the county.

*Parke* J., I don't know, without such an affidavit, that Holborn is not on the borders of the county of Surrey, or that there is no dispute as to boundaries.* Rule discharged. *Webber* v. *Manning*, H. T. 1831. K. B.

---

MANDAMUS. — COSTS OF APPEAL.

A rule nisi was granted for a mandamus to the justices of the county of Southampton to issue their warrant of distress for levying upon the chattels of Samuel Gloyne the sum of 10*l.* adjudged by the said justices to be paid by him to Thomas Saywell for his costs in prosecuting an appeal against a conviction of him (Saywell) for having taken of Gloyne a greater toll than by law authorized for the passing of a two-wheeled carriage. The facts were as follows:

An information was laid, by Gloyne against Saywell, for taking a toll for going a third time through the gate on the same day "contrary to the general turnpike acts of 3 & 4 Geo. 4." The magistrate convicted the defendant. An appeal was made to the sessions, Gloyne did not appear, and the conviction was quashed with 10*l.* costs. Payment of the costs being refused, and the magistrates declining to issue a warrant of distress, the matter came before the court for its decision.

Mr. *Follett*, in showing cause against the rule, said, that Gloyne being advised by counsel that no appeal would lie, he had not attended at the sessions. He relied on the 3 Geo. 4. c. 126. §. 14., in which it is stated that no writ of *certiorari* shall be allowed in convictions under 5*l.*; and the words "subject to appeal," which occur before as to sums between 20*l.* and 5*l.*, are omitted in regard to sums below 5*l.*

2d. That the Justices who convict are the "parties appealed against:" there are no other parties by whose act "the party appealing" is aggrieved.

3d. That a *mandamus* will not be issued in a doubtful case, which this is; for no case has been decided, and the Court is very careful how it issues *mandamus* to magistrates; and where the person commanded may be subject to an action for doing what he is commanded, the Court will decidedly refuse. *Rex* v. *Justices of Bucks*, 1 B. & C. 485.

Mr. *Dampier*. The penalty is imposed by 4 Geo. 4. c. 95. § 30., and is under 5*l.* and *above* 40*s.*, purposely to give the appeal, which is taken away only in convictions where the penalty is 40*s.* No argument that the appeal does not lie arises from the words of 3 Geo. 4. c. 126. § 143. There are three branches as to sums under 20*l.* included in these words: — 1st. Between 20*l.* and 5*l.* *appeal and certiorari*, in order that this Court may, by *certiorari*, review the judgment below — 2d. Between 5*l.* and 40*s.* an *appeal* and no *certiorari* — 3d. 40*s.* *et infra*, no appeal or *certiorari*. Hence the words "subject to appeal" are omitted in referring to penalties under 5*l.*, because part (viz. under 40*s.*) are not subject to appeal: so those words are inapplicable to all sums under 5*l.*; and for a like reason all sums between 20*s.* and 40*s.* could not be classed together, because part (viz. under 5*l.*) are not subject to *certiorari*, though all are subject to appeal.

Lord *Tenterden*. Where is the provision taking away the appeal from convictions under 40*s.*?

Mr. *Follett*. That provision existed in 3 Geo. 4. c. 126.; but it is now repealed by 4 Geo. 4. c. 95. § 86.

Mr. *Dampier*. That provision was re-enacted at the end of 4 Geo. 4. c. *c.* 95. s. 87.

Mr. *Dampier*. Against whom is the warrant to issue? "Party appealing" is the person prejudiced; "appealed against" is he who is benefited, or he who would be prejudiced if the order were the other way, *i. e.* the person who, under a reversed state, would be the "party appealing." This must be the "prosecutor or informer," (according to 3 Geo. 4. c. 126. § 143.; 50 Geo. 3. c. 48. § 25.; 20 Geo. 2. c. 19. § 5.; 34 Geo. 3. c. 64. § 57.).

The words cannot mean the justice, who is compellable to act, and to act *bona fide*, though perhaps mistaken; therefore they mean the informer. It may be objected, that if no notice is required to the informer, he may be charged without being heard. To which I answer the statutes cited, which by name give costs against such "*informer*, *respondent*, or *party*," do not require notice to such person.

As to the objection that a *mandamus* will not be granted, because the person commanded will be actionable — this is the case of a Court, and not of a single magistrate; and the difference is laid down in *Gwennett* v. *Burwell*, 1 Lord Ray. 434.; *Baxter* v. *Carew*, 3 B. & C. 649.: *Garnet* v. *Seward*, 6 B. & C. 625. Sir *John Howell*'s case cited there. This *mandamus* will lie, for no indictment will lie against Gloyne, the costs being no penalty. No indictment or attachment for nonpayment of judgment costs in a superior Court will lie, therefore no indictment will lie here. The case of *Rex* v. *Boys*, cited in *Rex* v. *Robinson*, 2 Burr. 799., is an authority against indictment: the words there are, "the summary method of distress could not there be used." The *particular* remedy failed, and an indictment consequently lay. Here the particular remedy does not fail — therefore an indictment does not lie. The *mandamus* is due therefore *ex debito justiciæ*, for we have no other remedy. It is due *in subsidium justiciæ*, as it is to help us to recover a judgment.

The Court took time to consider, and subsequently

Lord *Tenterden* said — At first he had doubted of the appeal till he saw the provision taking it away from penalties of 40*s.*; consequently it lies for penalties above that amount. It is an anomaly to cause a justice, acting as such, to pay costs. Some person must be "*the party appealed against.*" There is only the *informer* to satisfy those words. He cannot pay costs and

* Vid. Storer v. Rayson, 4 D. & R. p. 739.

appeal, if the Court so adjudge. In this case they have so adjudged, and they show us no cause why they should not give the party appealing the means of recovering what they have adjudged to him. *The rule for the mandamus must be made absolute.*

## LIABILITY OF AGENTS.

KING'S BENCH. — GUILDHALL.

BEFORE THE LORD CHIEF JUSTICE AND A SPECIAL JURY.

*Ridgway* v. *Milne and another.*

SIR *James Scarlett* stated that this was an action to recover a sum of money of the defendants, Messrs. Milne and Parry, solicitors of the highest eminence and respectability. In seeking to obtain payment from them of this sum, he was ready to admit that there was not the slightest ground of imputation against them for withholding it. It was a mere question of legal right, whether under the circumstances, they were bound to sustain a loss, occasioned by their having paid a sum of 500*l.* to a person of the name of Kay, an attorney at Bolton, who had since his receiving it become a bankrupt. Some years ago the plaintiff, a gentleman residing in Lancashire, having a sum of 4000*l.* to invest in securities, transmitted it for that purpose, by a bill specially indorsed to the defendants who accordingly advanced a portion to the Duke of *Gordon* and part to another gentleman. These securities were subsequently redeemed, and the sums so advanced, respectively returned by the defendants to Mr. Ridgway, with the exception of 500*l.* which they had delivered over to Mr. Kay, without the authority of the plaintiff for so doing. Kay had become bankrupt and the plaintiff now called upon the defendants, to account to him for the money they had so paid, in their own wrong. This was the whole of the case, and having proved it, he should of course be entitled to a verdict.

Several witnesses were called upon the part of the plaintiff who proved the general features of the case, but upon their cross examination it appeared the transaction was conducted through the medium of Mr. Kay, who was the friend and confidential solicitor of the plaintiff, and that Messrs. Milne and Parry were the agents of Kay, it appeared that Kay being in London, the plaintiff transmitted the 4000*l.* to Kay, by whom it was delivered to the defendants, that the defendant paid the balance of 500*l.* remaining in their hands to Kay, as the accredited agent and immediate solicitor and friend of the plaintiff.

Mr. *Frederick Pollock*, upon the facts thus elicited in cross-examination, addressed the jury in favour of the defendants, contending against their liability. He observed that his learned friend had done no more than strict justice, when he had admitted, that more respectable and honourable gentlemen were not to be found in the profession, they certainly would be the last men to refuse the payment of any demand for which there was the least pretence. In this case there was none; they considered Kay as the party in whom the plaintiff confided, and to whom he had intrusted the control and management of his pecuniary transactions, not merely upon this occasion, but upon many others; considering Mr. Kay in that point of view, they conceived, when they paid the balance in their hands, that they were paying the money to the plaintiff himself. It was three years and upwards before the bankruptcy of Kay, when the payment had been made to him, Kay; and if the plaintiff had not been perfectly satisfied at his having received it, he would undoubtedly have remonstrated with the defendants upon the subject, and insisted upon having it paid to himself, but he had done nothing of the kind, he had acquiesced for a period of three years and upwards; it was not till after this lapse of time, and when Kay had become insolvent and bankrupt, that he turned round upon the defendants, unjustly, to fix them with this sum, which he well knew they had paid, with his own approbation, to the person in whom he reposed confidence at the time, and so continued to do till his bankruptcy.

The Learned Judge shortly addressed the jury, drawing their attention to the points in question in the cause; and the jury, after deliberating a short time, returned their verdict for the defendants.

## ON THE GENERAL REGISTRY BILL.

*Note by the Editor.* — Our readers will have observed in our last Number (p. 243.) a letter upon this subject from "A CONVEYANCING BARRISTER," in which it was said to be "among practising conveyancers at least no secret, that the members of the original commission for enquiring into the laws of real property had, in effect, abandoned the idea of a general Registry." We are requested by the author of that communication to state, he has since been informed that his impressions upon this point were not quite accurate. The fact is, that the members of the original commission, immediately after their first report, determined upon entering at once on the question of a general Registry: the particular consideration of it commenced after the three gentlemen mentioned in the letter were added to the commission; and any difficulties as to the plan of registration first occurred in the course of such consideration. The idea of a Registry was never abandoned; but it is understood that the difficulties of a plan occasioned considerable delay; and it was not finally determined to recommend the measure until Mr. Duval's plan was suggested by him in the long vacation of 1829.

22d February, 1831.

## MISCELLANEA.

RELIGION AND LAW.

"RELIGION and law, the church and the state, exercise upon each other a reciprocal action and re-action. They are inseparable. Their respective wants ally and unite them. The laws protect religion, and religion supplies the wants of the laws, vivifies them, makes them

loved and respected. They are two powers or means which concur to the same end, each in its manner and after its nature. That end is the reign of justice and true liberty. Religion tends thereto by inward means; the laws by outward means: the one takes human actions in their source, judges them by their principles, and desires to perfect them in purifying their motives. The laws take them in their effects. They are two distinct forces which have many points of contact, but which can never, and ought never, to be confounded." — *Pensées sur l'Homme, par Frederic Ancillon.*

### CHARLES THE FIRST.

Laud relates in his Diary, that when he was standing one day during dinner near his unfortunate master, then Prince Charles, the prince, who was in cheerful spirits, talking of many things as occasion offered, said, "that if necessity compelled him to choose any particular profession of life he would not be a lawyer; for," said he, "I can neither defend a bad cause, nor yield in a good one."

### ROMAN AND DUTCH ADVOCATES.

"By the Roman laws every advocate was required to swear that he would not undertake a cause which he knew to be unjust, and that he would abandon a defence which he should discover to be supported by falsehood, or iniquity [Cicero's oration *pro Milone* is a striking instance of the strict observance of this rule!] This is continued in Holland at this day; and if an advocate brings forward a cause there which appears to the Court clearly iniquitous, he is condemned in the costs of the suit; the examples will, of course, be very rare: more than one has, however, occurred within the memory of persons who are now living. The possible inconvenience that a cause just in itself might not be able to find a defender, is obviated in that country by an easy provision: a party who can find no advocate, and is nevertheless persuaded of the validity of his cause, may apply to the Court, which has in such cases a discretionary power of authorizing or appointing one." — *Quarterly Review, Jan.* 1831.

### KNIGHT TEMPLARS.

A learned correspondent, "Templarius" in his letter inserted in the sixteenth Number, speaking of the origin of the Knight Templars, has not displayed his usual accuracy. He states that "they (the Knight Templars) commenced in the year 1185." Now, that they began at Jerusalem, in the reign of Baldwin the IId., in the year 1118, is proved by the concurring authority of the following writers: — Du Puy; Gurtlerus, Monasterium, par le Père Helyot; Histoire de Franee, par le Père Daniel; Histoire de France, par Mons. l'Abbé Millot; Bzovius; Villani; Matthew Paris, Historia Major; Thomas Walsingham; Feyjoo, Cartas Criticas; Historia de los Templarios, por Santiago Lopez; Voltaire, Mélanges Historiques; Monumens Historiques, &c., des Chevaliers du Temple, &c., par M. Raynouard; Mémoires Historiques, sur les Templiers, par Ph. G * * *. He then proceeds, "Their number in the year 1128, amounted to only nine," now Honorius the IId., who, on the petition of the order, subjected it to certain rules, and to whom, we conceive our correspondent alludes, referred the matter to a Synod at Troyes in Champagne; in the year 1128. It was in that year, that the regulations of the order were formed, and it was in that year, that the number of the knights was only nine: namely, Hugh Paganis, Geoffery de Saint Omer, Godfrey Bisoi, Pagano de Monte Desiderio, Archibald de Saint Ameno, and three others, whose names are unknown. As our correspondent puts the dates it would seem somewhat extraordinary that the order should have remained forty-three years in no greater numbers than nine. But stating the dates, as we believe, correctly, it does not appear a matter of surprise, that they should not have increased beyond that number in nine years. More particularly, when it is considered, that the Christians had been in possession of the Holy Land, for little more than eighteen years, at the time when Hugh Paganis founded the order. *Vide the above authorities.*

### BOOKS FOR REVIEW.

1. Notes respecting Registration and the extrinsic Formalities of Conveyances. By *C. P. Cooper, Esq.*
2. Advice to Trustees. By *Harding Grant.*
3. Registration made easy. By *C. M. Hannington.*
4. Suggestions for the Improvement of the Law and Practice in the Bankrupt Court.
5. The Bankrupt Act, with all the recent Decisions and Orders in Chancery. By *C. Sturgeon, Esq.*

### QUERY.

A defendant, upon being arrested, puts in special bail by his attorney. A friend (probably the bail to the sheriff) employed another attorney to put in bail also; so that, in fact, there are two sets of bail in one cause, and notice thereof to the plaintiff's attorney. The plaintiff's attorney excepts to one set only, and they neglect to justify.

Can an attachment be had against the sheriff, or an assignment taken of the bail-bond, the time for excepting to the first set having expired?

J. N.

# The Legal Observer.

VOL. I. SATURDAY, MARCH 12. 1831. No. XIX.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

## TO THE LORD CHANCELLOR.

### LETTER IV.

ON LEGAL SINECURES.

MY LORD,

THE last time I had the honour of addressing you in this Journal, my feelings were very different from those which excite me at present. It was then understood that you were determined to introduce a measure which not only would have tended to degrade the legal profession, but which was founded on principles which you have opposed throughout your whole political life.* That measure is, however, abandoned, and in its place you have proposed a series of bills equally admirable in principle and in detail. It is not my purpose, however, further to advert to these. They have elsewhere been ably discussed. I merely render my humble tribute of joy and admiration, and pass on to another topic, as interesting, but not so fully investigated.

I shall first take the liberty of reminding your Lordship of some parts of your recent speech, — a speech every word of which should be familiar to the friends of law reform, — and shall then call your attention to a recent occurrence which illustrates it in a very striking manner.

"The fourth principle, and the last with which I shall trouble your Lordships at present, relates to the remuneration of the judges and *their subordinate officers;* and they ought to be remunerated; for where intellectual labour is great, the remuneration ought to be correspondingly ample. But what I say in point of principle is, that, generally speaking, the remuneration ought to be by salary, and not by fees."

"The sinecures," your Lordship then observed, "held by the Rev. Mr. Thurlow, amount to between nine and ten thousand a year. I know that they are vested interests; but I hope the owners of them may come to terms .... I am aware that the holder of the patent place I have alluded to, has vested rights in it; but if he should be very exorbitant in his demands, let him not think himself very sure of the tenure by which he holds his office ..... If I should not go out of office, I will grapple with this patent place: I will let the patentee see that I can exercise the power which the law confers upon me..... I will not say that the patentee has not not a vested interest; but it is a joke to say that he holds it on the same tenure as your Lordships hold your freehold estates..... I think, then, that the holder of this place, if he attend to morality, to honourable feelings, or if he take counsel of common sense and prudence, will take into his consideration what I have now stated to your Lordships."

I might quote other portions of your Lordship's speech to the same effect; but I refrain. They are probably still in the recollection of all; they still ring in the ears of those against whom they are directed, like a knell. You have declared yourself the open enemy of all legal sinecures; you have declared that there shall be no relaxation on your part until they are all abolished; and you call on your peers and your country for support. Be assured, my Lord, you will not call in vain; support will never be given more cheerfully; the readiest hands, the coolest intellects, minds the most firm and uncompromising, will all aid you in your glorious exertions.

I shall now direct your attention to the particular subject of this letter. I wish to allude to a conversation which is reported to have taken place in the House of Lords. I hardly believe that it is a true account. I merely state it on report. It is said to have occurred on Tuesday the 1st of March, one "little week" after your Lordship's speech.

* See the three letters on Local Courts, pp. 145. 177. and 246. — ED. L. O.

The *Lord Chancellor* stated, that he thought it right to correct an erroneous statement that had found its way into the speech of his noble and learned friend, the Chief Baron of the Exchequer. His noble friend, misunderstanding the extent of the proposed alterations, had represented that the reduction in the salary would be but 2500*l.* instead of 7000*l.* He had fallen into an error in point of fact, and an error in arithmetic. The sum of 6*l.* was paid, as he had stated, in the way of fee on a certificate that merely set forth that the bankrupt had complied with all the provisions of the law, or, in other language, was not worth a shilling in the world. All this he would prove, by laying specific accounts before the House.

Lord *Ellenborough* recapitulated the statement of Lord Lyndhurst, and professed himself still inclined to abide by that representation, notwithstanding what had fallen from the Lord Chancellor.

The *Lord Chancellor* briefly repeated his correction of what had passed on Friday evening.

Lord *Ellenborough* thought it was rather strange, that the Lord Chancellor should appear to have made himself better acquainted with the emoluments of office in three months, than his predecessor had become in the same number of years.

The *Lord Chancellor* complained of this attack.

Lord *Ellenborough* declared he meant no sarcasm. He should still retain his opinion; and said, that should the Lord Chancellor think fit to bring forward the subject of the emoluments which he lawfully derived in right of his father's services, he would be quite prepared to meet him, and abide by the decision of their Lordships; for he deemed himself as justly entitled to what he received, as any member of that house could be to his estate.

Several noble Lords came forward to support the Lord Chancellor, and Lord *Winchelsea* said, that he believed that the salary of the place enjoyed by the noble Baron as the gift of his noble relative considerably exceeded the emoluments of the Lord Chancellor, who filled so arduous and troublesome an office. The noble Baron, however well entitled to the profits which he received, would hardly be justified in expecting that he could continue in the undiminished receipt of them, at a time when so many noble Lords had been obliged to abate the rents of their private estates in order to meet the exigencies of the people.

Lord *Ellenborough* denied that his profits were so large as they were represented.

Had a generous stranger listened to the first part of this curious conversation, unacquainted with the qualities and situations of the speakers, I can picture to myself his thoughts. Full of the sound of our glorious institutions, and ready to believe and admire the lofty sacrifices of our public men, he would have exclaimed — "Here is indeed true virtue and public spirit! Here is a Lord Chancellor, who boldly comes forward, and states explicitly the sources of his emoluments; who tears the veil from what before had been a mystery; and finding a particular change both just and expedient, is willing, in order that it may be effected, to abandon a large portion of those emoluments!" These would be the feelings which your Lordship's conduct would excite. He would then turn to the other noble Lord most conspicuous on this occasion, and, great as his admiration would be of your Lordship, it would be tame and subdued to that excited by my Lord Ellenborough. "But here is a man," he would continue, "who questions the amount of this sacrifice. Doubtless he does so with the proud satisfaction of having made some more mighty exertion for his country. Already, perhaps, has he abandoned some larger revenue, which was wrung from the pockets of the needy; or, more probably, he has constantly disdained to accept any meed for his great services, but the applause and gratitude of his country. No other man could dare to cavil at the sacrifices made by the Lord Chancellor."

These, my Lord, would be the feelings of a stranger who had witnessed the scene. How different would they have been, if he had been taken aside, and the real state of the case had been told him! The Lord Chancellor, it might be mentioned to him, has just struck at the root of the evil; and as he is himself a voluntary sufferer, no other person can complain. He has done what no other Judge in his situation has ever even attempted. Most other Chancellors have brought in measures to increase their fees; no one has ever patiently listened to a plan that would decrease them. But they had their excuse — the duties and responsibility of the office were great. How noble, then, the conduct of a man who has shrunk from none of the duties, but who has been content to abandon a large portion of the emoluments!

The other noble Lord, the stranger might be also told, has acted very differently. He has for a long period, nearly twenty years, been in the receipt of the large annual sum of 10,000*l.* or 12,000*l.* This sum is paid by the suitors of the Court of King's Bench in fees, not for services actually performed, but for useless forms and signatures, which are not even done by himself. How much would this stranger be surprised, if he were informed that my Lord Ellenborough receives the sum of 2*l.* 12*s.* 6*d.* for every cause, defended or undefended, whether for 2*l.* or 2000*l.*, which is tried in the King's Bench; for which sum he does nothing whatever either to assist or expedite it! How difficult would it be to persuade this

stranger of his error! He would eagerly demand an account of the services performed, and the sums demanded, and would receive a ready answer from his too experienced friend: — "Entering issue, 9*s.* 2*d.*" "Docket, 3*s.*" "Passing record and sealer, 1*l.* 8*s.* 6*d.*" "Repassing record, 6*s.* 6*d.*" "Re-sealing record, second sitting, 6*d.*" "Resealing record, third sitting, 6*d.*" "Resealing record, sitting after term, 6*d.*" These would be some of the cabalistic sounds by which the answer would be composed. These are the services which Lord Ellenborough has to boast. The laborious duties of sealing and receiving! — operations much too servile to be performed in person, but demanding no slight effort of mind, when the number of items to be collected is remembered! "Has my Lord Ellenborough proposed any reduction of his fees? Has he diminished his number of sittings?" Has he consented to abandon a single seal?" These would be the rapid questions which the stranger would put. *He has not*, would be the melancholy answer.

This, my Lord, is not a time when this matter will be passed over lightly. Most respectfully, but most earnestly, do I exhort your Lordship to cause the proper enquiries to be made. Your Lordship has spoken boldly as to one legal sinecurist: spare not the rest. Let us see whether they have a freehold in corruption, or have a charter for selling justice. This is no time for thrusting these things before the public eye, or asserting with arrogance what every one will deny. So reckless an attempt to bully the country will not be endured, and a full and complete investigation of these abuses must be obtained.

There is a Scotch superstition, which might be traced further back*, that a person who is to be visited with sudden death frequently discovers an unnatural ebullition of spirits, or to use the Scotch expression, he becomes "*fye.*"† To some such feeling as this I can alone ascribe this remarkable interference of the noble Lord. Surely it was not decent for him to stand forward on such a subject; it was not for him, who had on no one occasion attempted to lighten the load which presses the suitor down, to embarrass those who were attempting this difficult task.

Heartily, however, my Lord, do I rejoice at his interference. For his own interest it will turn out a most disastrous day; for the country's a most fortunate one. There is a universal feeling of disgust excited by the conduct of the noble Lord, and it will not easily be satisfied. He will sooner or later most bitterly repent this uncalledfor boast, —

"Nescia mens hominum fati sortisque futuræ
Et servare modum, rebus sublata secundis;
Turno tempus erit, magno cum optaverit emptum
Intactum Pallanta; et cum spolia ista diemque
Oderit."

It will be a matter not unworthy to engage the attention of your Lordship; there is a positive grievance, and the remedy is simple and easily effected. It is only for your Lordship to see whether the power of parliament be not greater than that of my Lord Ellenborough.

I have the honour to be,
My Lord,
Your Lordship's most humble servant,
A BARRISTER.

* "Quem Deus vult perdere, prius dementit."

† The reader will remember an instance of this in the first volume of Guy Mannering. Kennedy, just before his death, exhibits unusual exhilaration of spirits, and the gypsies observe, "The guager's fye."

## BANKRUPTCY REFORM.

IN the Supplement for February will be found the new bill for reform in bankruptcy. We invite an attentive consideration of its provisions. We understand that the Lord Chancellor is not perfectly satisfied with it, and that considerable alterations will be made in it in the House of Lords. It certainly appears to us open to several objections, and some important omissions occur in it. We shall, however, give it the fullest consideration, and shall present the result of our labours to our readers in the next Number.

We have heard it stated, we know not with what truth, that Lord Henley is to be included in the new arrangements. His Lordship's familiarity with bankrupt law is well known. Mr. Abbott is to be the Accountant-general of the new Court. This gentleman was lately employed in arranging a mode of keeping the government accounts.

## THE LAW INSTITUTION.

### DESCRIPTION OF THE NEW BUILDING.

HAVING, in former Numbers, described the foundation and objects of the Institution*, we now proceed to submit to our readers a *description of the building*, the various particulars of which we have collected with some pains and trouble. They will be found in no small degree interesting

* Pages 37. and 132.

to the members of the profession. The carcase and principal elevation are completed; the interior finishing is in rapid progress; and it is confidently expected that the *Hall* and offices of business will be open for the use of the proprietors and annual subscribers in June next, and the *Library* and *Club Room* in the following November.

The style of architecture of the principal front in Chancery Lane is purely Grecian. The details and proportions appear to have been founded upon the best examples of the Ionic order in Athens and Asia Minor*, but they are not servilely copied from any of them.

Mr. Vulliamy, the architect for the Institution, who, we understand, has visited and made studies from all the principal monuments and remains of Grecian architecture in the various countries in which it flourished, has thrown into this front the true spirit of the originals; and the effect which the harmonious proportions of the building produce on the spectator, when viewing it from Chancery Lane, must have been the result of much observation and experience in ancient and classic models.

This front, extending nearly sixty feet in width, is of Portland stone. It consists of four columns and two antæ, of the Grecian Ionic order, supporting an entablature and pediment, and forming together one grand portico. To give the requisite elevation, the columns and antæ are raised upon pedestals; these, as well as the basement story and podium of the inner wall of the portico, are of Aberdeen granite; the columns and the rest of the front are formed of large blocks of Portland stone. In the front wall, within the portico, there are two ranges of windows above the basement.

The front in Bell Yard extends nearly eighty feet, and will be finished with Roman cement, in imitation of stone. It will have a portico of two columns, and two antæ of Portland stone, of the height of the ground story, which is very lofty, and the width of the entire compartment of the front. From the interior requiring to be divided into several rooms, this front must have many windows. The elevation is formed more upon the models of modern domestic architecture than of ancient public buildings, and resembles, in its general appearance, one of the palazzi in the Strada Balbi at Genoa, in the Corso at Rome, or in the Toledo at Naples. In its details, however, the extravagancies of the middle ages, and the often elegant frivolities of the *cinque cento* period, have been avoided, and the breadth and simplicity of Greek models have still been followed.

The ground plan of the building, by its general arrangement, divides itself into three parts, which may be distinguished under the heads of the *Library*, the *Hall*, and the *Club Room*. The first of these (that towards Chancery Lane) consists, on the ground floor, of a first and second vestibule, and staircase to the Library, the Secretary's Room, and Registry Office; and above these, on the first floor, the Library, occupying the height of two stories.

The *Library* is a large and lofty room, fifty-five feet by thirty-one and a half, and twenty-three and a half high, divided, by a screen of columns and pilasters of scagliola, into two unequal parts, the first forming a sort of ante-library to the other; both are surrounded by book-cases of oak, and a gallery runs round the whole, above which is another range of bookcases.

The principal light is obtained from a large lantern—light in the ceiling; but there is a range of windows (double sashed, and glazed with plate glass) towards Chancery Lane, which also admit light into the lower part.

All the floors in the building are made fire proof, generally by being arched with brick; but that of the Library is rendered secure from fire by the ceilings of the vestibules underneath being formed of real stone, supported on iron girders and bearers, and divided into panels and compartments after the manner of the roofs of the peristyles of the ancient temples.

There are three entrances from Chancery Lane: that in the centre is exclusively for members, and leads to all parts of the building; that on the right for persons going to the Registry Office, and also for persons having to speak to members; that on the left leads down to the Office for the deposit of deeds, and to the strong rooms.

The second division consists of the *Hall* and its appurtenances. It is above thirty feet high, and fifty-seven feet and a half long; and on each side it has wings or recesses, behind insulated columns of scagliola in imitation of Egyptian granite. Within these, and at the back of the columns, are galleries; the staircases to which are concealed in the angles. There are three fire places in the Hall; one in the

* The best remains of Ionic buildings at Athens are the temples of Erectheus and Minerva, Polias in the Acropolis, and the little temple on the banks of the Illissus; but in Asia Minor the examples of this order are far more numerous; and some of the finest are to be found amongst the magnificent ruins at Branchida, at Priene, and at Teos, &c.

centre opposite the principal entrance, and one in the centre of each of the recesses. The Hall is lighted by a lantern light forty feet long and twenty-four feet wide.

The third division is next Bell Yard: it is subdivided into two parts. In the first of these are three entrances from Bell Yard. That in the centre is exclusively for the members; that to the left leads to the staircase to the Secretary's apartments; and the other, to the right of the centre, is for strangers to enter who have business to transact in any of the rooms appropriated to public business. On the ground floor of this part of the third division is a large Committee Room, and an ante or waiting room adjoining, and the great staircase to the rooms above. On the first floor are the rooms for meetings on matters of business connected with the law; and above these are the Secretary's apartments.

The second part of the third division contains, on the ground floor, the *Club Room*, which occupies all the ground floor: it will be divided by columns and pilasters of scagliola, and decorated with a panelled ceiling and appropriate ornaments. Its dimensions are fifty feet by twenty-seven, and eighteen feet high. On the first floor are rooms of different dimensions for dinner parties; and over these, rooms for the resident officers. In the basement story of this part of the building are the Kitchen and other domestic offices for the use of the Club.

The Office for the deposit of Deeds is in the basement story, next to Chancery Lane.

In the remaining parts of the basement story of the building are fifty-two strong rooms, with iron doors, for the deposit of deeds, which are well ventilated and fire-proof: their average size is six feet and a half by seven feet and a half; but some are larger, and others rather less, than these dimensions. The whole are secured by one double iron door, with a very strong lock and master-key. In the basement, also, are two of Sylvester's largest sized stoves, to give warmth and dryness to every part of the building.

## THE QUARTERLY REVIEW, AND THE PRACTICE OF THE BAR.

The Quarterly Review for January, 1831, in reviewing a book by Mr. Dymond, a quaker, quotes with approbation a portion of the work, which repeats the objections to the practice of an advocate undertaking the defence of any cause whatever. We have no intention to discuss this question again: the objections are the old ones; they have been answered again and again by professional and unprofessional persons; and we leave the defence of the present system to Johnson and Paley, authorities perhaps of more weight than even Mr. Dymond or the reviewer. We allude to the article merely for the purpose of correcting an absurd story which is gravely quoted by Mr. Dymond as having occurred on the trial of Burke and Helen Macdougal.

'"It is reported," said one of the newspapers, "that they who were near enough heard him (the advocate employed to defend the female prisoner) from time to time express his own opinion, and the exultation of professional success, in whispered apostrophes of 'infernal hag!' — and 'the gudgeons swallow it!'"

Now here is a statement, that an advocate employed to defend a prisoner was so foolish as to risk the whole success of his exertions by interlocutory observations audible to those around him. The advocate on this occasion was Mr. Cockburn, an eloquent but also a judicious practitioner; and the whole profession is to be condemned in one sweeping clause, because "one of the newspapers" chooses to insert a palpable falsehood. We do not object to Mr. Dymond's or his reviewer's arguments, but we do object to absurd tales, either invented for the purpose, or repeated without authority.

## JOURNAL OF A WEEK, BY A NEW MEMBER OF PARLIAMENT.

It was always foretold my destiny would be brilliant. I was thirty years old, and had as yet done nothing. I resolved, before three days were over, to become one of "the few."

I had one friend in the world, — myself, and I knew I could depend on him. I had thirty thousand pounds in the three per cents. I knew two persons who declared that they would serve me to the utmost of their power; and as I had the ability of obliging them, I felt I could rely on their services. They vowed eternal friendship, and as they could serve me, I believed them. I was to dine on the Monday with one of them, the agent of the ———. I endured all his stupid parade, and mock gentility. I listened with patience to the genealogy of his wine, and then told him I would bet him 5000*l.* that I was member for —— in a week.

"Done!" said he, and I wrote him his check.

On the Monday after I was, of course, in the House.

I immediately went down, and the night I took the oaths was a 'great night.' We had a speech only four hours and a half long, which every body listened to attentively, and in perfect silence, except when it was interrupted by applause. This seemed to be regulated by a stop-watch. At certain periods it was sure to be given, whether the parts of the speech were pointed or not.

The speech was intended to take seven hours; but as the orator called one of the ministers a blackguard, he was asked whether he meant it in the ordinary sense of the word. He answered, that his meaning was, that the minister was the finest gentleman in existence. The circumstance, however, discomposed him, and the country was deprived of two hours and a half of eloquence.

No sooner had he concluded, than two thirds of the members rose from their seats, and rushed clamorously from the House. Three of the remaining third struggled for precedence. The friends of each bawled out his name; and an Irish member at last prevailed, from the strength of lungs manifested by his Hibernian colleagues.

The friends of the two disappointed speakers, however, had their revenge. They shouted continuously during the whole of his speech, and effectually prevented the hearing of one word he uttered.

He was followed by the wit of the House, and silence was restored. The first speaker was to be heard, whatever he might say; the wit was to be laughed at, on the same plan, it being admitted that the mere shaking his head was worth any other man's repartee.

Being always disposed to be in the fashion, I was anxious to laugh also. I found, however, I laughed in the wrong place, not knowing what parts were intended to be jocular. He once, in his speech, opened a vein of the pathetic, and I then admitted he was irresistibly comic.

Three other men were then consecutively shouted down, and the government leader was loudly called for. A rush of members was again heard, and every seat was filled. As I am not in the praising mood, I shall pass the leader's speech, reserving his character for a subsequent page.

A division was then called for: the most important members were all going to a masked ball at Lady L——'s; and the three members, who were really acquainted with the subject, were shut out even of the division.

After the grand debate, ten members, not having been invited to the ball, remained to discuss the estimates, and only voted away forty millions of the public money.

On Tuesday I went down to the house at five; but was stopped in Parliament Street by a friend, who told me that it was "up;" and on asking the reason, he said, that there was no house at four o'clock, inasmuch as ministers were anxious to avoid a motion for certain returns, notice of which had been given, and which they could not openly refuse.

Wednesday I was punctual at four, but was informed that no business was ever transacted on that day.

On Thursday I received three most pressing invitations to come down as early as possible. I found a crowd of members all busy and eager. I knew not what part of the minute paper created such interest until I was drawn aside by a county member, who told me, that the reason of the crowd was the passing a private bill for cutting a rail-road to Chester; and proved, most satisfactorily, that this rail-road, by interfering with the existing canal, would endanger the best interests of the country, and destroy the integrity of the British constitution.

On Friday I arrived somewhat later, and was just in time to hear the Chancellor of the Exchequer move, that "this House do adjourn till Monday."

Thus ended my first week as a British senator.

*** This article hardly comes within our limits; but as it is of great interest at the present moment, we have inserted it. — Ed. L. O.

---

## HINTS FOR THE IMPROVEMENT OF THE COMMON LAW.

### No. I.

#### REMEDIES AGAINST PARTNERS.

The present state of the law in suits against trading firms is found in practice productive of much delay and injustice.

It is well known, that in consequence of the extended relations of commercial men, nothing is more usual than for one partner to remain abroad for years. The practice, in such case, of proceeding to outlawry against the absent partner, and then suing the others, or of enforcing an appearance by distringas upon the partnership effects, generates great expense and delay; and

moreover, if the partner were in parts beyond seas, at the time of awarding and issuing the exigent, the plaintiff is unable to outlaw him, and is left to his remedy by distringas alone. *Bryan* v. *Wagstaff*, 5 B. & C. 314. As the plaintiff cannot distrain upon the individual property of the partners, if, subsequently to the accruing of the liability, the partnership have been dissolved, and the property divided between the members of it, a plaintiff is without any means of compelling satisfaction of a legal demand. The most effectual cure for this and other evils, arising from the present abatement of suits for non-joinder, would be to let the plaintiff, in actions against trading firms, sue such of the partners as he pleases, and thus abolish the plea of abatement for non-joinder altogether. The defendants against whom he proceeds would not be damnified by this course, as they might take credit in the partnership accounts for the debt, or damages and costs recovered against them; or if the partnership be dissolved, and the accounts finally closed, bring an action for contribution: it was the defendant's own neglect to dissolve the partnership without making provision to satisfy the demands against it. If this proposal be adopted, it would become a good replication to a plea in abatement, that the said defendants and the said parties so alleged to be omitted were partners in trade together; and in all suits against joint, or joint and several contractors not sued separately, I propose that the plaintiff should be permitted to reply to plea in abatement for non-joinder, that the parties omitted were not within the jurisdiction of the Court, or that they have been discharged by bankruptcy, &c. *Vide* 9 G. 4. c. 14. § 2.

The present doctrine of survivorship of *choses in action* is in many respects objectionable. It frequently happens that a partnership exists wherein the interests of the several members are greatly disproportioned; in such a case, if the principal partner die the plaintiff must bring his action against persons who were little more than clerks in the concern; and as the *jus accrescendi* does not attach to joint ownership of commercial property, the partnership interest of the deceased would not be liable in execution upon judgment against the survivors; *e. g.* if goods were sold and delivered to a firm, and before suit to enforce payment one or more of the partners die. The principal difficulties attendant upon a joinder of the representatives of a deceased consist in the difference of the pleadings and judgment, in suits where executors, &c. are defendants, and those in which the parties primarily liable were sued. I think these might be overcome without producing confusion on the record: there are now many instances where the parties sever in their pleadings, their defence being materially different, without inconvenience. The rules of law on the liability of executors or administrators to costs, and execution *de bonis propriis*, might remain as at present.

*Variance.*

It is now a rule of law, that in actions founded on contract, if too many persons are made defendants, the plaintiff will be defeated. The reason assigned is, that if a plaintiff declare against three, he ought to show a contract binding upon three; and if upon evidence it appear that two only entered into, or are legally liable upon, the contract, the judgment must be against him. This is, in fact, only a variance, and as it is now considered desirable, as much as possible, to get rid of objections on that ground, it should no longer be allowed to prevail. The rule that the same verdict or judgment be given for all the defendants in an action, *ex contractu*, has been already infringed by Lord Tenterden's act, which directs, that when a liability, barred by limitation of time, &c., against several joint contractors, is revived by an acknowledgment in writing of one, judgment may be given against this defendant, and for the others. Keeping in mind the alteration of the law of variance proposed by the commissioners, it seems to me that no mischief would arise from allowing a plaintiff to have judgment against those defendants whom he proves to have contracted, judgment being given for the other defendants, who never contracted, or whose contract cannot be enforced at law by reason of their infancy or coverture. Costs to be given to those defendants for whom judgment is awarded in as ample a manner as if they had been sued alone. The latter object would be attained by an extension of the 8 & 9 W. 3. to all actions in which one or more defendants have judgment in their favour.

*Substitute for real Actions.*

As it is proposed to abolish the ancient forms of real actions, it would be certainly desirable to ingraft upon the new action (the plea of land) and the personal actions used in lieu of them all the advantages attendant upon the old mode of proceeding. With this view, I venture to suggest, that on suit being brought to recover possession of real property, or damages for injury to

it, the Court should have power, at their discretion, to issue the old writ of *estrepement*. With the same object, the plaintiff, in an action on the case for a nuisance, should have, in addition to his damages, judgment to abate the nuisance, which he would have been entitled to under the old assize of nuisance. By these means application to a court of equity would, in many cases, be rendered unnecessary; and the courts of common law would not receive larger powers than they formerly possessed in actions by and against tenants of the freehold.

*Executions.*

It seems to me, also, that a plaintiff should not be restrained from suing out a *fi. fa. elegit*, &c. after he has taken the defendant in execution. By the present rule of law the plaintiff is prevented from obtaining satisfaction out of property which he may subsequently discover to belong to the defendant. M. M. T.

## MANAGEMENT OF A SOLICITOR'S OFFICE.

GENERAL ARRANGEMENTS IN THE SEVERAL DEPARTMENTS OF CONVEYANCING, CHANCERY, COMMON LAW, BANKRUPTCY, AND GENERAL BUSINESS.

We inserted in a former number* some hints to the principals of a solicitor's office in the management of professional business; and we now introduce some practical directions for the use of the clerks of an extensive establishment. We are aware that some of these may not be applicable in ordinary cases; yet even in them we think that the following suggestions will be, in many respects, useful, and, though not generally adopted, may at all events lead to some improvements in the conduct of an attorney's office, where legal affairs of magnitude obviously require a systematic method of proceeding.

It is material to bear in mind that attention and arrangement are of the utmost importance, and that nothing can or will be done well, or in a satisfactory manner, if time be wasted, attention relaxed, or arrangement not duly made. If the business of each day be arranged upon a clear and simple plan over-night, or very early in the morning, every thing will work well; otherwise disorder and confusion will creep in, and nothing will be done with pleasure or satisfaction.

In order that no part of the business of the office may be forgotten, but on the contrary may be done with regularity and despatch, a list containing the business in each department, and a log-book, containing weekly and daily memoranda of business to be transacted, should be kept, under the controul of the principal clerk of the department. Each clerk will find his advantage in attending particularly to the list and log, and should be answerable for any neglect in the observance of the directions herein contained.

The list should contain, generally, an account of all the business in each department from its commencement, with the names of the parties, the nature of the business, and what has been done.

The log-book should contain, generally, the business to be from time to time done by the clerks in the department, and particularly a selection to be attended to on each succeeding day, with the names of the clerks to whom it is intrusted.

1. When any clerk is seated for the first time in any of the departments, he will make himself thoroughly acquainted with all the business going on therein, so that he may be able to render any information required concerning it; more especially, let him make himself acquainted with the names of the parties, the nature of the business to be done, and the next procedure to be taken. The first three of these directions he can easily attain by a review of the list; and the last, by a review of the general memoranda in the log.

2. Let a full and proper entry be made in the list by the principal clerk in the department as soon as any new business is introduced.

3. Let the list be reviewed, and the progress of the business noted, at the end of every week, without failing in any instance.

4. After a review of the list, enter, under the general memoranda in the log-book, the particulars of the next necessary procedure in each business, and, when completed, make a minute to that effect.

5. On the first Saturday of every month post forward in the log-book such of the businesses in the general memoranda as remain unfinished, classing those matters which are to be attended to by the chief clerk or any of the principals.

6. Every night review the general memoranda in the log-book, and make and enter all necessary alterations and additions; at the same time select from such general memoranda the particulars in each business required to be done on the succeeding day, and enter them under the daily memoranda; placing the name of the clerk opposite the business assigned to him, classing those matters which are to be attended to by the chief clerk, or either of

* Page 137.

the principals, and entering the same in the daily agenda of the chief clerk, and of each principal.

7. A business and disbursement book to be kept by each clerk; and in such book he will every night make full, clear, and explanatory entries of the business done by him during the day. Let the entries be so perfectly intelligible and formal, that when a bill of any business is required to be made out, such entries may be used as part of the bill without alteration; and the first entry should be accompanied by a statement of the christian and surname of the client, and also of the residence.

8. Let each clerk in the several departments put away every night all such papers as he had in use during the day, that they may be readily found in their proper place when again required, whereby the mixing of papers, the delay in searching for them, and probably their loss, will be avoided.

9. Let any clerk going out of the office during office hours inform the principal or other clerk in the department when he is going, so that his absence may at all times be accounted for, and his return calculated upon; and care should be taken that at least one clerk is always left in the department to receive communications, and attend to the business of the office.

10. Whenever a clerk in any of the departments has out-door business to transact, he must apply to the principals in the other departments, and to the chief clerk, to know if there be any papers to be called for, enquiries made, or any other out-door business to be done to which he can attend, so that all the out-door business of the day may be as much as possible transacted by one clerk. A regular attention to this will save much trouble and loss of time, and tend to the despatch of business.

11. Any clerk having to transact business which requires the particular attention of the chief clerk or either of the principals should communicate with the chief clerk in the first instance; and should he be unable to attend to it, or refer to the principal, then he should see the principal. Care should be taken to let no delay arise when any business requires the above step to be taken.

12. Let a name book be kept in each department containing the names of persons calling, and of those who saw them, and their business. And let these entries be posted at night into the general name book.

13. The principal clerk in each department will be particularly attentive to the making up of the clerks' books, and he will see that the entries in them are well and fully made.

14. Let the principal clerk in each department consult the chief clerk from time to time in every business in respect of which he feels a difficulty, either from want of instructions or otherwise, in order that the chief clerk may communicate with the principal, and receive and communicate instructions; but if from the pressing nature of the business it is necessary for the clerk to communicate with either of the principals, he will do so without delay, giving them (if it can be conveniently done) a previous note of the business. Care must be taken to avoid perpetual recurrence to the principals, which consumes their time; and to this end as many matters as require attention should be mentioned at the same time, and not separately as they arise.

15. Let the principal clerk in each department draw the money necessary for disbursements. He will let the cashier know every night, if possible, the amount required for business to be done the next day, so that the cashier may be able to obtain a check for the amount, and pay the same to the principal clerks by ten o'clock in the morning. Should the sum required exceed a certain amount the occasion for a larger sum must be stated.

16. Let the principal clerk answer all letters relating to his department the same day they are received, if possible,— submitting such answers to the chief clerk, who will, if he think fit, consult the principals upon them; and in order that the principal clerk may know what letter is to be answered, and the point to be answered, he will, on seeing the letters the first thing in the morning after they are received, enter into the daily log such letter and point, so that he may write the answer; and when answered it should be marked upon the letter. If the letter refers to subjects in several departments, each principal clerk should furnish the chief clerk with that particular of the answer which relates to the business under his care, so that the chief clerk may write or direct the writing of the whole. Let all letters for the general post be written and delivered to the clerk having the care of the letter book to be entered as early as possible in the day, and at all events before four o'clock. When any letter is unavoidably delayed, so that it must be paid for, the payment must be charged to the business to which it relates. The clerk writing the letter must be responsible for its being sent off with any

papers which may have to accompany it. Immediately after such letters are answered let them be put on the answered file in the chief clerk's room, so that they be indorsed and put away with the papers to which they relate.

17. Let the principal clerk in each department make the bills of costs the subject of his particular consideration and attention; and in order to assist the bookkeeper in noting in his register any business which has been completed, he will make a memorandum of it in the log-book, so that the bill may be immediately made out. Whenever an opportunity occurs, and, if possible, one day or part of a day in a week, he will employ himself, or desire a clerk under him to be employed, in making out, or assist in making out, the whole or any part of any bill in any case when the business has been completed, or is on the point of completion.

18. If any client or other person should come for information, he is not to be referred to any other person; but the principal, or other clerk in the department, must seek the information, and either give it, or, if necessary, introduce the client to one of the principals, or to the chief clerk, or to the clerk who will be able to give the information required.

19. If any abstract, draft, letter, notice, or message, be left in any of the departments, relating to business, either new or not connected with the same, it is to be instantly taken to the chief clerk, who will direct what is to be done; and any letter received, after an entry of it in the log, must be taken immediately to the chief clerk, and put on the general file.

20. Every clerk must make up his mind to conform to the rules and discipline of the office. If he cannot do so, he will make that known to the head of the department, or to the principals, so that his seat may be occupied by another clerk in his stead.

21. The head of each department is responsible to the principals for the observance, by the clerks in his department, of the rules and discipline of the office, for their punctuality in attendance, and for their proper diligence and attention to business. If any clerk in the department oppose, or do not conform to the rules or discipline of the office, or be not punctual in his attendance, or if he be not attentive and diligent, the head of the department is required to make a communication to that effect to the principals; — first cautioning such clerk, by drawing his attention to the necessity which he, as the head of the department, will be reduced to, should the clerk persist in a course adverse to such rules and discipline, and incompatible with proper diligence and attention in the discharge of his duties.

## REVIEW.

*Familiar Exercises between an Attorney and his Articled Clerk, on the General Principles of the Laws of Real Property: being the First Book of Coke upon Littleton reduced to the Form of Questions. To which is added, the Original Text and Commentary.* By Francis Hobler, jun. Attorney at Law. J. F. Dove, Piccadilly, 1831.

We think this a very praiseworthy book. The object of the author is to initiate the young law student in the general principles of the laws of real property; and towards this end he has very carefully analysed the first book of Coke upon Littleton in the interrogative form. We have compared the questions with the text in numerous instances, and are bound to testify that the work has been faithfully done. The articled clerk who applies his mind to the subject, with an ordinary degree of attention, will be led on imperceptibly to the acquisition of the sound and valuable knowledge contained in the great legal classic which the author has judiciously selected for his purpose.

We must do Mr. Hobler the justice, also, to say, that he manifests a very just perception of the duties of a solicitor in regard to the instruction which ought to be afforded to articled clerks; and we willingly subjoin part of the author's preface, in which that subject is enforced and the general objects of the work are explained.

"The young man who is articled to an attorney is expected, from his parentage and education, to be of liberal mind, and fitted to receive instruction in that profession of which he is destined to become a member; and I have always considered it to be the imperative duty of the master, to whose care such a youth is intrusted, to do his utmost to make him acquainted with, and accomplished in, his profession. It is not the issuing a writ, or engrossing a lease, that will make him a proficient as an attorney: it is by the exercise of a right judgment on the multifarious matters which will be presented to his notice in the course of his business, the foundation of which can only be by much previous unremitting study and attention.

"As a knowledge of the principles and reasons upon which the law of England, as respects real property, is founded, should form a part of his legal education, it is the duty of the attorney to direct his attention to the sources whence such knowledge is to be derived, and render him every assistance in its acquirement. It was with this

view that the first book of Littleton was selected, as being a work of acknowledged merit and authority, and thoroughly comprehending, in a small space, all the derivative estates that arise from a fee-simple.

"If the master will assist his clerk, by writing out the questions in a section, or, where it is long, a portion of it, and let the clerk take the text-book and write out his answers to those questions, and answers to any other observations which the master may think fit to make on the section or question then before them, it will necessarily be the means of increasing the knowledge of both; for on one side it will be a reviving of former associations, and enforcing a deeper reflection in the mind; and on the other, it will be the opening of a new source of knowledge to the latter, in a manner by no means irksome or tedious; but, at the same time, requiring his invention to be called forth, and keeping his curiosity alive, in a way very different to reading to himself an equal portion of the book straight through.

"The questions are set down in order, exactly corresponding with the several texts, which will account for some seeming obscurity, and want of connection or repetition of subject; but the course I should conceive best would be, to make the clerk work through all the sections of Littleton first, and then repeat them, adding the commentary. If questions had been set upon every remark of Lord Coke, it would have been descending to too a great a minuteness, and would only have increased the bulk of the volume, without leaving any thing whereon the ingenuity of the pupil could have been exercised."

---

*The Bankrupt Act*, 6 Geo. 4. c. 16. *with all the Recent Decisions at Common Law and in Equity, the Orders in Chancery, and Abstracts from other Statutes relating to Bankruptcy.* By Charles Sturgeon, of the Inner Temple, Barrister at Law. Saunders and Benning.

THIS little work consists of a reprint of the General Bankrupt Act, the decision on each section being appended by way of note. These do not admit of extract; but we have read them with much satisfaction, and they appear accurate and useful. The general interest at present excited upon the subject to which Mr. Sturgeon's work relates, will probably attract attention to it.

---

## THE LORD CHANCELLOR'S SPEECH ON CHANCERY REFORM.

### TAXATION OF ATTORNEY'S COSTS AND GRATUITIES TO MASTERS' CLERKS.

*To the Editor of the Legal Observer.*

SIR,

IN your Monthly Record of Jurisprudence, for February*, the Lord Chancellor is reported to have said, that on the Master's clerk falls the delicate and difficult operation of taxing the bill of costs of the attorney who has paid him the money, — of course, on account of using expedition for his client. And the Lord Chancellor then proceeded to say: —

"Your Lordships now begin to see the light thrown on these transactions. The *judicious* clerk has received from the solicitor, a very *worthy* man, and one who, it will be perceived, knows how to invest his capital to advantage, the sum of 50*l.* of expedition money on account of the interests of the client; and then, when it comes to the turn of the *judicious* man, he repays this sum, with interest, to the *worthy* man, and passes lightly over some 100*l.* of his bill, which he might not otherwise be disposed to tax with so much lenity. It will be seen, therefore, that the *worthy* and the *judicious* man both thrive by this means in their separate calling, and that the *worthy* man's seeds produce a most excellent and abundant harvest; and the better, perhaps, as he does not pay as others for his seed."

Now, Sir, whether this was really uttered in the House of Lords, or whether your reporter has succeeded in a happy imitation of the vivacious and sarcastic way in which his Lordship is accustomed to express himself, I know not; but I can assure you the facts do not bear out either your reporter or his Lordship.

It is true that the bill of the "worthy man" is left at the Master's Office, where copies are made for all the worthy men concerned, including the worthy man himself, and numerous warrants to tax are issued; but the taxation is effected by *the clerks in Court* for the several parties; and in case of any difference of opinion, the Master himself, and not his clerk, "the judicious man," decides the question. The clerks in Court follow the established rules of allowance, and being concerned for hostile parties, there can be no fear of collusion.

Nay, further, if the case were precisely as represented in the report of the speech, the "judicious" man might safely be trusted; for his supposed partiality to one "worthy" man (the solicitor for the plaintiff) is neutralized by the like partiality for the other worthy man (the solicitor for the defendant), and who, in the same or in some other cause, has paid the accustomed gratuity.

Again, the temptation to the worthy man to sow these seeds of corruption is very powerfully checked by the consider-

* Page 51.

ation that it will be a long time before he can reap the harvest, and in many instances it is blighted altogether; for the costs of solicitors are not always paid — the fund in dispute sometimes falls short — after years of delay, the payment is frequently no more than a return of the money advanced and ordinary interest, and sometimes the means of remuneration fail entirely.

Trusting you will find room for this correction of your Monthly Record,

I am, Sir,

Your humble servant,

A. A.

March 8. 1831.

## INCENDIARIES. — REMEDY AGAINST THE HUNDRED.

*To the Editor of the Legal Observer.*

Sir,

The letter of your correspondent in p. 267., gives me an opportunity of correcting an error committed in the communication I forwarded to you (p. 141.); viz. after referring to the acts of 7 & 8 Geo. 4. c. 27. & 31. I wrote as follows: "consequently there is now no remedy whatever against the hundred, &c." whereas it is printed, "consequently there is no *summary* remedy whatever against the Hundred, &c." This alteration, you will observe, makes a material differencet: my proposition being, tha he acts of 9 Geo. 1. c. 22. (the Black Act) and 3 Geo. 4. c. 33. having both been repealed, and the provisions of such acts referred to not being re-enacted by the 7 & 8 Geo. 4. c. 31., there certainly is not at the present moment any remedy against the hundred, either in a summary way or otherwise, for persons suffering from incendiaries.

I was perfectly aware of the facts of the case in 9 B. & C. 134. alluded to by your correspondent, the decision in which case I did not attempt to question; and my only object in noticing it was to call the attention of our branch of the pro- fession to the repeal of the act, on the construction of which the case turned. I considered it necessary to notice the case cited from the following title of the act of 7 & 8 Geo. 4. c. 31. viz. "An Act for *consolidating and amending* the Laws in England relative to Remedies against the Hundred;" and it appeared to me that, on re ading the above case with a knowledge of the last mentioned act having passed, but without a particular perusal of it and a reference to the several acts before noticed, many persons were likely to be misled in their general idea of the law on this subject, as you must be aware that few professional men in active practice canspare the time to compare different clauses in acts of parliament of this nature, unless with a view to a case in which theyare immediately concerned.

The 8th section of the 7 & 8 Geo. 4. c. 31. noticed by your correspondent, does not affect my statement of the law in the case of *incendiaries*, as the act relates solely to damage done by *rioters*. In addition to what I have stated in my former communication on the subject of this last mentioned statute, I beg to point out to the attention of your readers, sections 4. & 8. of the concurrent act of the 7 & 8 Geo. 4. c. 30. which seem completely to confirm the construction I put upon the statute of the same session, c. 31. in cases of threshing and other agricultural machines not fixed in a building and destroyed by rioters: I should however observe, that under the concluding words of the 2d section of the 7 & 8 Geo. 4. c. 31. it seems probable that a party suffering, might recover where a threshing or other agricultural machine is fixed in a building, and the building and machine are destroyed together. Your obedient servant,

A. B.

Gray's Inn, March 1. 1831.

## STAMP LAWS.

Sir,

Having read in the *Legal Observer* of last week, a letter on the subject of the bill about to be laid before the House for the purpose of altering the laws relating to stamps, suggesting the insertion of a clause in the new act, which he flatters himself may be of material service to the public at large, to the effect that "the solicitor of stamps be bound, on the tender of any engrossment or writing, to make a memorandum on the margin, of the amount of the stamp proper to be affixed; that such memorandum be an indemnity to all parties interested in such instrument for the accuracy of the stamp; and that for such memorandum the solicitor be entitled to 6*s.* 8*d.* as his remuneration;" I would beg to ask, through the medium of your valuable and useful miscellany, whether the probability would not be great, in the event of the solicitor not duly considering the nature of the engrossment or instrument tendered for such memorandum, or he having considered it, and entertaining a doubt on the amount of stamp proper to be affixed, that he should affix a stamp in amount *more than sufficient* for the validity of the same, and consequently incur an additional expense, and thereby increase instead of remedying the evil already so much complained of.

I am, Sir,

Your obedient servant,

2. Inner Temple-Lane, F. I. H.

Feb. 28. 1831.

## SUPERIOR COURTS.

### LORD CHANCELLOR'S COURT.

INJUNCTION. — COPYRIGHT.

In this case an author had stipulated with the defendant, a printer, that he should print a certain number of a work, being a Greek Lexicon, and that each copy should be sold at a certain specified sum. The defendant, notwithstanding this stipulation, had sold, and was selling, the copies at a higher price than was agreed upon.

Mr. *Wright* moved for an injunction to restrain the defendant from so doing, and supported his application by an affidavit of these circumstances.

The *Lord Chancellor* at first refused to grant an injunction, thinking that the plaintiff had a sufficient remedy for the injury he had sustained by an action at law; but consented to hear the case further on notice being given on the other side. *Donneghan* v. *Dove.* L. C. Feb. 26.

## VICE-CHANCELLOR'S COURT.

### CANAL. — RAILROAD.

This was a bill filed by the plaintiff for the purpose of restraining the defendants from making application to parliament for a bill to convert the Manchester, Bolton, and Bury canal into a rail-road. A similar bill had been filed, in which a Mr. Cunliffe, the law clerk of the company, was plaintiff, and an injunction against the defendants had then been granted. The company had since, to avoid legal proceedings, bought the shares that had belonged to that gentleman; but the plaintiff, being also a shareholder, had, while the subject was before parliament, filed his bill in order to prevent the proposed conversion, to which the defendants had demurred.

The *Vice-Chancellor* said it was not necessary to advert to what had taken place before him when the injunction was granted, because, supposing that he had since completely changed his opinion, it would not in the slightest degree affect the present question. The question now was, whether, upon the plaintiff's own showing, there ought to be any relief administered? The bill, after the usual preliminary matter in such cases, prayed that the defendants might be restrained from employing the funds of the company, in any way, towards effecting the proposed conversion. It was obvious that the Court was bound to restrain the parties from applying the funds of the company to purposes essentially opposed to the original provisions of the act of parliament. — His Honour was, therefore, of opinion, that the demurrer should be overruled. *Maudsley* v. *Manchester Canal Company.* V. C. Feb. 23. 1831.

## ROLLS COURT.

### JUDGMENT.

In this case the defendant was entitled, under a will, to an annuity, to her separate use for her life, charged upon real estate. Having become thus entitled, she, along with her husband, for a valuable consideration conveyed and assigned her interest to the plaintiff. At this time, the gift being to her separate use, she was entitled in equity to the whole beneficial interest, and had power by the rules of the Court to dispose of it. The husband, taking the legal interest in her right, was entitled to it for the joint lives of her and himself. He died, and the legal interest accrued to her; and she insisted that the assignment of the equitable interest which she had assigned to the plaintiff, ceased, at her husband's death, to operate in his favour.

The *Master of the Rolls* was of opinion, however, that, this contract having been for a valuable consideration, she could not be relieved from the assignment of the equitable interest, which was made at a time when she had power to dispose of it.—The plaintiff is therefore entitled to the relief he seeks. *Mayor* v. *Landsley.* M. R. Feb. 24.

## COURT OF KING'S BENCH.

### STATUTE OF LIMITATIONS.

Assumpsit for goods sold and delivered. Plea, the general issue and statute of limitations. Replication, that the defendant was, at the time the credit expired, beyond seas.

The defendant, Mr. Thomas Turton, was a barrister, and had long practised in the East Indies. The plaintiffs, Messrs. Rundell and Bridge, were silversmiths. Their demand upon him was for plate furnished at different times before he went to India, during the years 1819, 1820, and 1821. It was sold at twelve months' credit, and the defendant was to remit the money from India. Letters were written to him demanding payment, and no answer was returned. In September, 1829, he returned to England; and in April following, the plaintiffs' clerk waited on him with a copy of their bill, amounting to 95*l.* 6*s.* 8*d.*, with interest at five per cent. from the expiration of the twelve months' credit. The bill not being paid, the present action was brought. It was proved that the defendant went to India on the 4th of August, 1822, and returned to England in September, 1829.

Sir *James Scarlett* submitted, upon this evidence, that the plaintiffs must be nonsuited. The last item in the bill was dated the 2d of August, 1821. The twelve months' credit, therefore, expired on the 2d of August, 1822. This fact disproved the allegation in the replication, that the defendant was beyond seas at the time the credit expired, for it appeared he did not leave England till the 4th of August, 1822.

Mr *Gurney*, for the plaintiffs, admitted the objection was good. Plaintiffs nonsuited. — *Bridge and another* v. *Turton.* Sit. after H. T. 1831. K. B.

### PROMISSORY NOTE, BILL OF EXCHANGE — NOT NEGOTIABLE.

Assumpsit to recover 102*l.* 16*s.* 1*d.* due upon a promissory note and a bill of exchange.

The note and bill had been given to Messrs. Key, Brothers, and Son, by Messrs. T. and J. Allman, in the years 1823 and 1824. The note was for 97*l.* 2*s.* 7*d.* at thirty months after date, and the bill for 50*l.* at twenty-four months. Messrs. Key and Co. endorsed them over to Mr. Webber, one of their creditors. Their affairs becoming embarrassed, they applied to their creditors for time, and an arrangement was made for payment of their debts by instalments at five shillings in the pound. Mr. Webber made no objection to receiving his debt by instalments, but he refused to execute the deed which the other creditors had, and the note and bill of Messrs. Allman remained in his hands. Messrs. Allman also made an arrangement with their creditors to pay instalments at the rate of 2*s.* 6*d.* in the pound They paid three instalments upon the note and bill in the hands of Mr. Webber. On the 3d of January, 1828, there remained a balance due upon those two instruments of 102*l.* 16*s.* 1*d.*, which sum was made up by Mr. Tilleard, an attorney, a friend and relation to Messrs. Allman. The object of that payment was stated at the time to be to release Messrs.

Allman from their liability to Mr. Webber, Mr. Tilleard claiming at the time a right to recover the amount from Messrs. Key's estate. He then endorsed it to the present plaintiff. The present action was therefore brought to recover the 102*l.* 16*s.* 1*d.* which he had advanced.

*Gurney* and *Kelly*, for the defendants, submitted, that the plaintiff Graves had no *locus standi*. He sued upon a note of hand and bill of exchange, which the declaration alleged had been endorsed to him according to the custom of merchants; but how could any instrument of this description be endorsed to him, or to any other person, after it had been satisfied? The whole of the money having been paid upon these two instruments, neither Mr. Tilleard, who paid the money, nor Mr. Graves, to whom he subsequently endorsed the note and bill, could have a right of action upon them against any of the parties. Having been paid, they were no longer negotiable instruments, and could not be transferred from hand to hand according to the custom of merchants.

Sir *James Scarlett* and *D. Pollock* contended, for the plaintiff, that the payment by Mr. Tilleard was distinguishable from that of an ordinary payment in discharge of a note or bill. Here, the payment had not been made in extinguishment of the instruments, it had not been made on account of Messrs. Allman, or with their money; but expressly with a view to stand in the shoes of Mr. Webber, and to have a right of recovering against Messrs. Key or their estate. This was the avowed object, and it had been expressly stated and understood by Mr. Key at the time. The instruments were, therefore, still alive, and Mr. Tilleard had consequently a right to endorse them to whom he pleased.

Lord *Tenterden* C. J. said he was clearly of opinion that the negotiable character of the instruments was destroyed by the course which had been adopted, and that consequently the plaintiff could not recover. Plaintiff nonsuited. — *Graves* v. *Key and another*. Sit. after H. T. 1831. K. B.

---

BANKRUPT. — ASSIGNEES. — LIEN. — REGISTRY.

In an action by the assignees of George Pound, a bankrupt, to recover a sum of 114*l.* 7*s.* 6*d.*, the following circumstance appeared:—Pound, who was formerly a builder residing in the neighbourhood of the New North Road, had had dealings with the defendant, a builder in Drury Lane, prior to the year 1827. In that year, having agreed to enter into a speculation in some houses, they purchased at the Auction Mart several leasehold and copyhold houses for 1000*l.* The money was advanced by the defendant. Pound was to pay him a moiety, and they were to be equally interested in the property, holding it as tenants in common. A conveyance having been made in their joint names, the deeds were deposited in the hands of the attorney, to be holden by him until Pound should have paid his moiety of the purchase money. Pound had been employed in building the Brunswick Theatre, and had invested the greater part of his capital in that work. At the time the theatre fell down, the proprietors were indebted to him in between 4000*l.* and 5000*l.* He at that time owed the defendant 1200*l.* or 1300*l.*, including his moiety of the purchase money for the houses; and having no means of satisfying his debt, he made an assignment of his interest in the houses to the defendant in consideration of 550*l.* The assignment was dated March 31st, 1828. On January 8th, 1829, a commission of bankrupt was taken out against him. The defendant had, since the assignment, received the rents of the houses, amounting to 228*l.* 15*s.*; a moiety of which sum, *viz.* 114*l.* 7*s.* 6*d.*, the plaintiffs, the assignees, now sought to recover, 1st, on the ground that the assignment was a fraudulent preference to the defendant, in contemplation of the bankruptcy; 2dly, that the transaction was usurious, the consideration being the satisfaction *pro tanto* of a bill of exchange for 600*l.*, which the defendant had discounted for the bankrupt at more than the legal rate of interest; 3dly, that the assignment had not been registered in Middlesex, pursuant to the statute of 7 Ann. c. 20. s. 1.

Sir *James Scarlett*, for the defendant, submitted, that as the title deeds and conveyance to the bankrupt and the defendant had been lodged in the hands of the attorney, to be held by him, on behalf of the defendant, until the bankrupt's moiety of the money should be paid, the defendant had, independently of the assignment to him, an equitable lien on the bankrupt's moiety, and was entitled to retain it until the moiety of the purchase money which he had advanced on the bankrupt's account should be paid. If the plaintiffs, the assignees, had wished to remove the equitable lien, they should have paid or tendered the moiety of the purchase money.

Lord *Tenterden* C. J. concurred in this view of the case, and directed a nonsuit; giving leave to Mr. *Campbell* to move upon the point as to the registration. Plaintiffs nonsuited. — *Sumpter and others* v. *Cooper*. Sit. after H. T. 1831. K. B.

---

EJECTMENT.

*Holt* moved for judgment against the casual ejector. The only difficulty in serving the declaration was on those premises, of which the Manchester Railway Company was in possession. The service there was on their book-keeper, on a part of the premises which he occupied, and where he slept.

*Parke* J. That will do. Rule absolute. — *Doe* v. *Roe*. H. T. 1831. K. B.

---

BAIL IN ERROR.

*Lee* applied for further time to put in bail in error, on the ground that the original bail had been alarmed by the defendant in error, and therefore would not become bail.

*Parke* J. refused to allow further time, unless some error on the record was shown, and the amount of the judgment deposited in the hands of the Master. — *Anonymous*. H. T. 1831. K. B.

---

## COURT OF COMMON PLEAS.

CHAMPERTY.

In an action of covenant on a deed, by which the defendant contracted, in consideration of the plaintiff undertaking to use his best exertions

and influence to procure evidence, whereby the defendant would be enabled to recover a large sum of money, that he would pay to the plaintiff one eighth share of the sum so recovered. It appeared that the plaintiff fulfilled his part of the contract, and the defendant recovered 14,000*l.* Defendant refused to pay the stipulated share to the plaintiff, and the present action was brought. The defendant demurred, on the ground that the contract was void for champerty. After argument

*Tindal* C. J. pronounced the judgment of the court. His Lordship reviewed the law of maintenance and champerty, as laid down in the books; and then expressed his opinion that the contract in the present case clearly amounted to the offence of champerty. It was a contract for the purchase of an interest in a lawsuit; for although the plaintiff had not stipulated to pay money for such interest, he had done that which was still more calculated to prevent the administration of justice, namely, stipulated to procure evidence to support that claim, in the issue of which he was to have in return, for the procuring of such evidence, an interest to the amount of one eighth of the sum recovered. The contract was manifestly illegal, and therefore altogether void. Judgment for the defendant. *Stanley* v. *Jones*. H. T. 1831. C. T.

### EXCHEQUER OF PLEAS.

#### JUSTICATION OF BAIL.

In Hilary Term last, the following rule was made in this Court, which we insert *verbatim*, as some misapprehension has occurred regarding it. It will be observed that it applies only to justification of bail in term time.

"Whereas by a rule of this honourable Court, made in Michaelmas Term last past, it was ordered, That thereafter all special bail should be justified before a Baron at chambers as well in term as in vacation. And whereas it is expedient to repeal so much of the said rule as relates to the justification of bail in term time.

"It is therefore ordered, That from and after the present term, the justification of bail in term time shall (unless by consent) take place as heretofore in open Court, and that the justification of bail before a Baron at chambers shall be confined to cases of *consent* and to justification in *vacation*."

ERRATUM. — In the case of *Simpson* v. *Jones*, p. 285, *for* "until she should attain the age of twenty-one, or marry under that age," *read* "to be assigned to her on attaining the age of twenty-one, or marrying under that age."

## MINOR CORRESPONDENCE.

### QUERIES.

1. A party is arrested, and justifies bail, by the name of *A.* B. *C.* He afterwards pleads infancy in the name of *A.* D. *C.*, sued by the name *A.* B. *C. Quære.* — Can this plea be set aside? or what remedy has the plaintiff to correct the irregularity? G.

2. *A.* and *B.* are English subjects. They go to the United States, and are married at New York. In consequence of quarrels, they are there divorced. Is *B.* entitled to dower of her husband's estates in England?

3. *C.* and *D.* are married in England, and are divorced in Scotland. Are they, by that divorce, at liberty to marry again? or would either party, in case of a second marriage, be liable to an indictment for bigamy? I must observe that *C.* is an Englishman, *D.* a Scotchwoman.

4. What is the law with respect to pawned goods being destroyed by fire? whether the pawnee is liable to the pawner for the difference between the value of the pawn and the amount of the sum lent thereon and the interest, or should the pawner insure the articles against such an occurrence?

### ANSWERS TO QUERIES.

A similar case to the "Query" in this week's Number (page 256.) of the *Legal Observer* was decided in the King's Bench last term; where it was holden that *A.*, who rented a house as a granary in parish *B.*, but always resided with his family in parish *C.*, was not liable to the parochial rates for parish *B.*; and it was observed, that rates were payable by occupiers, but *A.* did not occupy, although he held. C. P. F.

*** Our correspondent should favour us with the name of the case; and if reported, refer to the authority.

In answer to the query in No. 18, page 288. I submit that there cannot, *technically* speaking, be two sets of bail in the same cause for the same defendant. The defendant is said to be "*delivered* to bail, on a *cepi corpus*, to *A. B.* and *C. D.*;" he cannot, therefore, be delivered likewise to *E. F.* and *G. H.* Putting in bail being the act of the Court itself (1 Tidd, ch. 12.), the Court cannot be imagined to have committed such an error. *One* of the bail pieces must, therefore, be a nullity; and *which* of them it is, depends, I think, on the question which was first filed?

F. G.

In answer to the query of I. N. p. 288, as to whether an attachment would lie against the sheriff, or an assignment of bail bond taken, for the reasons mentioned by him in page 288. in your last Number, I beg to say that, in my opinion, the plaintiff's attorney could not attach the sheriff, or take an assignment of the bond, until he had entered an exception to each set of bail put in for the defendant, and have regularly given notice of such exception to the defendant's attorneys; for the very ground of the application for an attachment against a sheriff, or an action upon the bond, would be, that there had been no bail above put in, or that it had been put in, but not perfected; and how could this be said when there were *two* sets? and by the plaintiff's attorney excepting to *one set only*, he would *clearly* admit the sufficiency of the other, and consequently that set would be perfect until an exception should be entered thereto; and if he allow the time to elapse, *viz.* twenty days, before he enter

such exception, they would be considered as justified, and an exception entered afterwards would be of no effect.

New Inn, March 7. 1831.

## MISCELLANEA.

### LAW AND POPULAR FEELING.

THE law, in all vicissitudes of government, fluctuations of passions, or flights of enthusiasm, will preserve a steady undeviating course: it will not bend to the uncertain wishes, imaginations, and wanton tempers of men. To use the words of a great and worthy man, I mean Algernon Sidney, who, from his earliest infancy, sought a tranquil retirement under the shadow of the tree of liberty, with his tongue, his pen, and his sword; "The law," says he, "no passion can disturb: it is void of desire and fear, lust and anger; it is *mens sine affectu*, written reason; retaining some measure of the divine perfection. It does not enjoin that which pleases a weak, frail man, but, without any regard to persons, commands that which is good, and punishes evil in all, whether rich or poor, high or low. It is deaf, inexorable, inflexible. Yes: on the one hand, it is inexorable to the cries and lamentations of the prisoners; on the other, it is deaf, deaf as an adder, to the clamours of the populace."—*From a speech by President John Adams.*

### STATE OF THE LAW IN SARDINIA.

In the provinces, justice is distributed by the prefects, whose functions seem to correspond in many respects with those of the Scottish sheriffs. When any particular case occurs, in which the King considers it expedient to appoint a Judge of the supreme Court in the capital, on purpose to try the cause on the spot, wherever this extraordinary justiciary passes, the provincial Courts of justice are silent, and superseded by his presence. There are no periodical circuits of the justices.

* * * *

The Judges receive a small stipend from the King, upon which they cannot subsist. They are allowed also a certain sum for each award that they deliver, which has the effect of making them greedy of jurisdiction, and interested in promoting revisions. The administration of justice is in consequence precarious, and gifts to the Judges are of powerful advocacy.

*Galt's Voyages and Travels.*

### LEGAL BENEFITS OF DISCOURSE.

He used constantly the commons in the hall at noons and nights, and fell into the way of putting cases (as they call it), which much improved him; and he was very good at it, being of a ready apprehension, a nice, distinguished, and prompt speaker. He used to say, that no one could be a good lawyer that was not a put-case. Reading goes off with some cloud, but discourse makes all notions limpid and just; for in speaking, a man is his own auditor (if he had no others at hand), to correct himself. Besides, there are diversities of opinions and contentions in reasoning which excite thoughts that otherwise would never have risen. And mistakes almost incredible to the mistaker being observed, cause a recurrence for surety to the authorities, where an inspection convinceth, and withal corrects the faulty assurance some will have in a mere memory. . . . . He was most sensible of the benefits of discourse, which I mentioned before; for I have observed him often saying that, after his day's reading (as in London if he had the opportunity), at his night's congress with his friends either at commons or over a chop, whatever the subject was, he made it the subject of his discourse in the company; "for," said he, "I read many things which I am sensible I forget, but I found withal this — if I had once talked over what I had read, I never forgot that." This agrees with a direction to a student said to have come from the Earl of Nottingham, "that he should study all the morning, and talk all the afternoon;" because a ready speech (if it be not nature's gift) is acquirable only by practice, and is very necessary for a bar practiser. I remember that after the fire in the Temple * it was considered whether the old cloister walks should be rebuilt or rather improved into chambers; which latter had been for the benefit of the Middle Temple. But in regard it could not be done without the consent of the Inner House, the Masters of the Middle House waited upon Mr. Attorney Finch, to desire the concurrence of his society, upon a proposition of some benefit to be thrown in on that side. But Mr. Attorney would by no means give way to it, and reproved the Middle Templars very wittily and eloquently upon the subject of students walking in evenings there, and putting cases; "which," he said, "was done in his time, as mean and low as the buildings were then, however it comes," said he, "that such a benefit to students is now made so little account of." And thereupon the cloisters, by the order and disposition of Sir Christopher Wren, were built as they now stand. And agreeable to this, Serjeant Maynard, the best old book-lawyer in his time, used to say that the law was "*ars bablativa*," which humoursomely enough declares the advantage that discoursing brings to the students of the law. And certainly, above all things, the act of prompt speaking is to be cultivated, as far as may be, according to the aptest rules of oratory, because it wonderfully sets off a bar practiser. And many by that very talent, uncultivated, and owing to pure nature, have succeeded beyond others much more learned. . . . . He was also an attendant (as well as an exerciser) at the ordinary moots in the Middle Temple and at New Inn; whereof the former is the superior, and governs the exercises; and took notes. In those days the moots were very carefully performed.—*North's Life of Lord Guilford*, ed. 1826, vol. i. p. 19. 32.

* The brick buildings in the Temple are said to have put a stop to the fire of London in that quarter, though many of them were consumed, and the conflagration reached the church.

# The Legal Observer.

VOL. I. SATURDAY, MARCH 19. 1831. No. XX.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## NEW BANKRUPTCY COURT.

THE NEW BILL AS AMENDED IN COMMITTEE.

We now hasten to redeem our pledge on the subject of the new bill for altering the administration of the law relating to bankruptcy. We have, from time to time*, in our late Numbers, given our earnest consideration to the important measures for the reform of our law, introduced by the present Lord Chancellor. Agreeing most cordially in the principles on which they are founded, and in most of the great alterations they are intended to effect, and wishing sincerely that they may soon pass into laws, we think we shall be able best to serve the cause of law reform, by rigidly examining the bills while they are in progress through parliament, and freely pointing out their errors and omissions.

This we intend to do, not only in the present instance, but in all others, we trust, not captiously, but with the prudence and caution of practical men. We shall be most happy to facilitate all measures intended to remedy the abuses in our present system. We have proposed, and we shall continue to propose, such measures, as are in our opinion calculated to effect this desired end; but we shall most carefully examine all plans, and proposals of this nature, endeavouring, if possible, to avoid both a heedless or inconsiderate craving for innovation, and a bigoted or prejudiced love of existing institutions.

We have thus ventured a short exposition of our general principles; and we shall now proceed to the consideration of the measure which has suggested them. We had perused the original bill with great attention; and as we understood the Lord Chancellor was not entirely satisfied with it as it stood, we had the less hesitation in pointing out its defects. We had just completed our observations, having proceeded through the bill section by section, when a copy of a new bill, wet from the press, "as amended in committee," was put into our hands. We then learned that it had been read a second time, and that the Lords had gone into committee on it *pro formâ*, for the purpose of enabling the Lord Chancellor to introduce his alterations; for we were quite correct in our information†, that the Lord Chancellor was not satisfied with it as originally drawn.

We now therefore proceed to mention the alterations made in the bill, having had the advantage of hearing the eloquent commentary on some of them, delivered by the Lord Chancellor on Monday last. The alterations are of some importance; and we hope we shall be able, in the space which we can afford, to make them intelligible to our readers, if they will take into their hands the original bill‡; and we have the gratification of finding that the clauses which we had marked for alteration, are those which have been remodelled. Many of the sections have been transposed; we shall, however, only give the new provisions.

By the original bill, a barrister of ten years' standing might be made the chief judge in bankruptcy; and three other persons, being *serjeants at law*, or barristers of not less than ten years' standing, might be appointed the senior judges of the court. Thus, as it stood, it would have been impossible to appoint a serjeant to the office of chief judge, although he might be the most proper person for the situation. By the present bill a serjeant may be appointed.

* See *ante*, pp. 225. 254. 257. 275. 284.

† See *ante*, p. 291.

‡ See a copy of it in the Monthly Record for February, p. 68.

The appointment of the officers of the new court, "registrar, two deputy registrars and seven chief clerks," is given to the King, and not to the Lord Chancellor.

Perhaps, it is meant these subordinate officers should be appointed by the judges of the new court, inasmuch as it would seem more advantageous that the capabilities of the officers should be known to the judges.

The only important new clauses are as follow:—

Provision is made for all the six junior Judges having separate courts.

"And be it enacted, that the six Junior Judges may be formed into subdivision courts, for hearing and determining the matters and things, and for making the examinations herein set forth; and that the said courts may be composed of such number of judges, and shall sit at such times, as may be directed by the rules to be made for regulating the practice of the said court, and shall sit in public or in private, as they shall see fit, unless when it is otherwise specified in the said rules or in this act."

Power is vested in the new court to direct an issue.

"And be it enacted, that the like powers as are by law vested in any of his majesty's courts of record, for issuing process to compel the attendance of jurors at the trial of issues by jury, and to compel the attendance of witnesses, shall be and they are hereby vested in the said court of bankruptcy, so far as the same may be necessary for the trial of any issue authorised or directed by this act."

Provision is made for the appointment of official assignees for the country; and the following additional clauses, as to all the official assignees, are inserted.

"And be it enacted, that it shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners as aforesaid, from time to time as any vacancy may occur in the said beforementioned number of London official assignees, to choose another of such merchants, brokers, or accountants as aforesaid, to fill any vacancy so occurring, and also from time to time to choose other fit and proper persons, as occasion may require, to act as country official assignees.

"And be it enacted, that all the real and personal estate, whether in the United Kingdom of Great Britain and Ireland, or any of the dominions, plantations, or colonies belonging to his majesty, (except copyhold or customary hereditaments, and except such hereditaments as are mentioned in the provision hereinafter contained relative to estates tail,) of any trader who shall be adjudged a bankrupt, of or to which he shall be seised, possessed, or entitled at law or in equity, in possession, remainder, reversion, or otherwise, at the time of his becoming a bankrupt, or at any time afterwards, and before he shall have obtained his certificate, shall, upon such adjudication, and by force and virtue thereof, be vested in the official assignee to be named in such adjudication, as fully and effectually as if such real and personal estate had been conveyed and assigned respectively to such official assignee by virtue of the provisions contained in the said recited act; and immediately upon any co-assignee or new assignee of such bankrupt's real and personal estate being chosen and appointed, all the real and personal estate abovementioned shall, from time to time and as often as such co-assignee or new assignee shall be chosen or appointed, vest in such co-assignee or new assignee, jointly with the existing assignee, or solely, as the case may require, in like manner in all respects as if such real and personal estate had been respectively conveyed and assigned to them or him by virtue of the provisions contained in the said recited act; and upon the removal of any assignee all his right, title, and interest which he shall then have in any of the said bankrupt's real or personal estate, by virtue of this act, shall forthwith cease and determine: provided always, that in case of the reversal of any such adjudication it shall be lawful for the court directing such reversal, to order that all and every the real and personal estate and effects of the said bankrupt, which by virtue hereof shall have vested in an assignee or assignees, or so much thereof as such assignee or assignees shall be then seised or possessed of or entitled to, shall immediately re-vest in the said bankrupt, and the same shall thereupon, by force and virtue of the said order and of this act, re-vest in the said bankrupt, as fully and effectually, to all intents and purposes whatsoever, as though such adjudication had never been made.

"And be it enacted, that the assignees aforesaid may, by deed indented and enrolled in one of his majesty's courts at Westminster, or in the said court of bankruptcy, make sale of and absolutely convey, for the benefit of the creditors, any lands, tenements, and hereditaments in England, Wales, or Ireland, whereof the bankrupt is or at any time before obtaining his certificate shall become seised of any estate tail, in possession, reversion, or remainder, and whereof no reversion or remainder is in the crown, [or] the gift or provision of the crown; and every such deed shall be good against the said bankrupt and the issue of his body, and against all persons whom the said bankrupt by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements and hereditaments."

The three following clauses are also new. The last supplies the great omission in the bill — that no provision was inserted as to existing business.

"And be it enacted, that in all cases of appeal under or by virtue of this act to the Lord Chancellor, Lord Keeper or Lords Commissioners aforesaid, such appeal shall be on a special case, to be approved and certified by the Court or Judge from whose decision such appeal shall be made, and in no other mode whatsoever, except the said Lord Chancellor, Lord Keeper, or Lords Commissioners aforesaid, shall in any case otherwise direct.

"And be it enacted, that the said court of review and subdivision courts shall in all matters hereby referred to their respective jurisdictions, have the power of taking the whole or any part of the evidence in any case referred to them either *vivâ voce* on oath sworn before one of the said ten Judges or one of the officers of the said court, by virtue of the provision herein-after contained, or upon affidavits to be sworn before a Master Ordinary or Extraordinary in Chancery, as the said courts respectively may in any case direct, or as the said Lord Chancellor, Lord Keeper, or Lords Commissioners aforesaid, may from time to time by any general rule prescribe.

"And be it enacted, that it shall be lawful for the said Lord Chancellor, Lord Keeper or Lords Commissioners aforesaid, by fiat under his or their hand or hands, to appoint one or more of the Judges or Commissioners to be appointed by virtue of this act to act under any commission of bankrupt already issued, with all such powers as are vested in the commissioners named in such commission; and after such fiat shall have been granted as aforesaid, all proceedings under every commission for which such fiat shall be granted shall thenceforth be taken and conducted in all respects subject to and conformably with the provisions of this act, and before such Judge or Commissioner only; any thing contained in any act or acts of parliament to the contrary notwithstanding."

The new bill concludes with three fresh clauses of some importance.

"And be it enacted, that this act shall be construed beneficially for creditors; and that nothing herein contained shall alter the present practice in bankruptcy, except where any such alteration is expressly declared or necessarily consequent; and that it shall extend to aliens, denizens, and women, both to make them subject thereto and to entitle them to all the benefits given thereby; and all powers given to or duties directed to be performed by assignees may be exercised and shall be performed by one assignee, where only one shall have been chosen; and that wherever this statute hath used words importing the singular number or the masculine gender only, yet it shall be understood to include several matters as well as one matter, and several persons as well as one person, and females as well as males, and bodies corporate as well as individuals, unless it be otherwise specially provided, or there be something in the subject or context repugnant to such construction; and that this act shall not extend either to Scotland or Ireland, except where the same are expressly mentioned or referred to.

"And be it enacted, that from and after the passing of this act no commission of bankrupt shall be superseded, nor any fiat annulled, nor any adjudication reversed, by reason only that the commission, fiat, or adjudication has been concerted by and between the petitioning creditor, his solicitor, or agent, or any of them, save and except where any petition to supersede a commission for any such cause shall have been already presented and shall be now pending.

"And be it enacted, that if any assignee of any bankrupt's estate shall agree to refer any matter in dispute with any party to arbitration in such manner as by law they are empowered to do, such agreement of reference may be made a rule of the court of bankruptcy by this act constituted, and thereupon all such rights and remedies, duties and liabilities, shall accrue from such reference so made a rule of the said court, in respect of arbitration and award, and non-performance of such award, and otherwise howsoever, as by law at present accrue upon any submission of reference made a rule of any of his majesty's other courts of record."

On Monday the Lord Chancellor declared, as we had understood, that compensation to the commissioners was not a necessary part of his plan; but said, that he thought it was unfair and unjust not to give it to them. This is, and has always been, our own opinion, and we hope that the moderate compensation provided by the present bill will be granted to them by the legislature.

We presume that the bill now stands in the form in which it will pass. We cannot refrain, however, from again mentioning our only objection to it — the appeal to the Lord Chancellor. Lord Wynford, in the late debate, also pointed this out, and suggested an appeal to the Judges of two common law courts.

It is well known that the jurisdiction of the Lord Chancellor in bankruptcy is comparatively of modern origin. It was not until the commencement of the reign of Queen Anne that he had any great authority, and he did not exercise his present important powers until the time of Lord Hardwicke. This authority is, in fact, founded in a great measure on usurpation. This has been fully proved by Mr. Cooper. Lord Eldon could never satisfactorily explain the nature of the Chancellor's power. The argument of the antiquity of the jurisdiction, therefore, cannot be employed, whatever may be its weight.

We have stated our reasons for urging the entire separation of the jurisdiction in bankruptcies from the great seal in a former number. We shall now quote the opinions of several great statesmen and lawyers which coincide with our own; and if the question could thus be decided, no further difficulty could remain.

Sir Samuel Romilly in the second debate on the Vice Chancellor's bill, (11th February 1813) said, that if he were called on to suggest a remedy for the evil complained of, (the arrear in the court of chancery,) he should say, that what appeared to him the least objectionable mode, would be to separate the bankrupt business from that of the chancery; and that he would not allow that the decision of the Chancellor in

matters relating to bankruptcy was absolutely necessary. Men could easily be found who were competent to this part of the duty; and in the same debate, Mr. Courtenay, the present clerk in parliament, expressed a similar opinion.

But the great body of evidence in favour of the separation of this jurisdiction from the great seal, is to be found appended to the report of the chancery commissioners. It here appears that the present Vice Chancellor was decidedly in favour of a new court, to which all the bankrupt business should be confined. The late Chief Baron, Sir William Alexander, thought also, that there should be a separate court, and that there should be no appeal from it. Messrs. Cooke and Bickersteth gave similar opinions.

It is proper, however, to observe, that Mr. Bell, Mr. Montagu, and Mr. Roupell, were of opinion that there should be an ultimate appeal to the Chancellor.

We still hope that this part of the measure will receive reconsideration.

## WESTMINSTER HALL AND LORD CHANCELLOR BROUGHAM.

LETTERS OF A HEIDELBURG STUDENT ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

### LETTER I.

My Dearest Friend,

I arrived in the Thames last week and should have written sooner to you, but that I have since that time been constantly engaged in seeing the most striking wonders of the great city in which I have now the good fortune to reside. According to my promise, I propose to give you from time to time some account of the Juridical Institutions of this country and of the learned men who now preside over them. We have often attempted together to gain some precise intelligence on these subjects; but although there is no want of information on the earlier history of the English laws, thanks to German* industry, you will remember that our information as to the present state of her institutions remained extremely scanty and deficient. I now hope to be able, my dearest Charles, to supply you with abundant information on the subject. Thanks to my letters I have already made the acquaintance of several English advocates and other eminent persons connected with the law, and I am promised by them not only ample instruction on this important subject, but a personal introduction to most of the great men who now preside over the courts and all other persons from whom I can obtain the proper information.

Your heart will rejoice when I tell you that I have met the kindest reception from those gentlemen to whom I carried introductions; and they all declare the utmost willingness to serve me and to enable me me to prosecute my enquiries with vigour. You shall be my judge whether I am successful in them, for I shall detail them all to you. Instead of filling my letters with useless or insignificant descriptions, I shall devote them to this interesting subject; and I have the satisfaction of knowing that this will be as agreeable to you to read, as it will be delightful for me to write.

I will forthwith tell you then, my dearest friend, my first day's adventures in the courts of law in London. Accompanied by a friend who undertook to be my guide, I soon approached the great Hall of Justice which is called Westminster Hall. It is admirably situated for the purpose: being close to both Houses of Parliament, and the venerable Abbey of the same name. I entered Westminster Hall with a certain feeling of awe which was greatly heightened as I contemplated its majestic proportions. When the courts are sitting the scene which it presents is extremely lively and interesting. It is crowded with persons whose hasty steps and anxious faces show at once that they are not there as mere spectators. In another part of the Hall you will see some leading advocate slowly pacing its whole length, his client following his steps and detailing the merits and the demerits of his cause. A little further on may be observed a group of persons disputing some matter with the greatest earnestness; on approaching nearer to them you will find that they are the parties in a cause which has just been tried and are now fighting the battle over again. The smiling countenance and joyful demeanour of those who have succeeded are here not attempted to be disguised for the victory is too recent not to be proclaimed. Distress is also sometimes painted on the countenance of those you meet; frequently heightened by the gloom occasioned by a positive defeat. Westminster Hall, is, indeed a highly interesting scene, on more accounts than one. I will

* The most learned work on the Anglo Saxon laws is written by a Göttingen student. It is entitled, "Versuch einer Darstellung der Geschichte des Angelsächsischen Rechts, Von George Phillips, Beider Rechte Doctor. Göttingen, 1825." Nor is this the only work to which we are indebted from the same author and other Germans on the subject of our laws. *Translator.*

venture to say from what I have seen, that man appears more as he is within its walls than in any other place in London. The stake which is here hazarded is so important that the chance of losing it arouses all the feelings. The scene is so agitating that they cannot be concealed, and they frequently burst forth in angry execration or tumultuous joy.

The courts of equity and of law are all newly built and are ranged on one side of the Hall. The other side of the Hall is occupied by new wooden sheds which greatly offend the eye and suit the general character of the building extremely ill. I fancied that these sheds, which are made of common deal boards, which seem hardly to have gone through the process of planing, were the temporary sheds erected for the convenience of the workmen who have been recently employed in fitting up the courts. My friend informed me however, that in them are actually deposited the records of the court! He must surely be mistaken in this, however: I cannot believe that these miserable hovels can contain such important documents, for it is not credible that a great nation should be at an immense expense to erect Courts of Justice and give every facility for the hearing of causes; and should provide no place for the preservation of their decrees. My friend, however, assures me, that this is positively the case.

The first court at the top of the Hall is the High Court of Chancery; the first in dignity and importance in the country. It is perhaps the most convenient of the whole, but, although light, spacious, and handsome has too much of the air of a theatre, and is contrasted very disadvantageously with the solemnity of the Hall.

And who do you think presides in this great court, my friend? The change is so recent that you may not have heard it; although report with eagle-wing, has probably long ago spread it through Europe. It is the well known Henry Brougham who here presides. How often have we drank this name at Prince Karl's*! How long and long continued have been the shouts when the health of this great man, to whom we looked up as a deliverer from tyranny, was proposed! I remember translating his great speech against the Holy Alliance and reading it amidst the most enthusiastic cheering to the assembled *burschen!* † Each brother fervently blessed the eloquent statesman, and his name was again shouted forth with a vehemence sufficient to hurl down the remaining fragments of the castle.

This man, then, is now High Chancellor of England. The office is judicial‡ as well as political, and is the most exalted station in the empire.

When I was told that this was his court, I own my dear friend, I could not keep my feelings perfectly composed; and I entered it with the deepest emotion of reverence. It was crowded with advocates and attorneys, and also with spectators. He sat on a bench slightly elevated from the floor; fronted by a desk. He is tall and thin; and his face pale and colourless; his features taken separately, might be thought unpleasing; but there is something thoughtful and commanding in his brow; there is a lustre and variety of expression in his eye; that arrest the attention and are strikingly impressive. All his actions and expressions prove to the conviction of him who looks upon him that he is no ordinary man. He is original in all his ideas; and he enters into the business of his court with great energy. He seems fully to be aware that all eyes are upon him, but at the same time he is perfectly careless of it. He is familiar almost to vulgarity in some of his phrases. The idea in his mind is frequently expressed in language the most homely; but it always conveys the exact meaning which he is desirous to express, and he seems perfectly satisfied to prefer sense to sound. He does not suffer himself simply to listen to the addresses made to him by the advocates. He frequently interrupts them, sometimes a little impatiently, but never unkindly. He has, however, been involved in two or three little *scenes* with some of the most eminent of the counsel; but he is so used to wordy warfare of a more fearful nature that it must be mere child's play to him. He has already shown his contempt for useless forms and unmeaning ceremonies. It was the duty of certain officers to attend him at the sitting of the court. This was not only an idle form, but diverted the attention of these persons from their own duties. The present Chancellor, greatly to the scandal of the old ladies of his court, has dispensed with their attendance entirely. He has also directed an extensive enquiry as to the present state of the law with a view to reforming its defects, and much benefit to the country is expected from it. He has hitherto been bold even to rashness in his

* A tavern frequented by the Heidelburg Students.

† Students.

‡ The Germans merely associate political functions with the name of the Chancellor.

decisions; he looks stedfastly into the merits of the cause to be decided, and will not suffer his judgment to be led away by authoritative declarations of what the law is; he enquires into it himself, and if he thinks that, either that or the facts of the case will authorise a particular decision, he will make it; and will fearlessly reverse the judgment of the court below, although that judgment may have been pronounced by a man who has been all his life employed in the Courts of Equity. There have been many men exalted to the situation of Chancellor from the courts of common law; but no man so exalted ever showed himself so unembarrassed and fully at his ease as Lord Brougham. He now exerts all his best energies to the duties of his office and to diminish the arrears which preceding Judges have left. He has already displayed great talent and industry in this point, and generally delivers his judgment soon after he has heard a cause. He is not therefore exposed to the painful task of hearing applications from suitors imploring an early decision of their case. His great occupations in his own court have had an evident effect on his labours elsewhere. It is said that he has declared, "he was never more at leisure." This however, if he said it, I consider a mere *bon mot*, because if so in fact, I am told it ought not to be. His time doubtless must be fully occupied. It is true that many of his former occupations have ceased; he is no longer the political journalist; he has probably ceased to edit scientific *brochures*, but he must still find enough and more than enough to employ him in the multitudinous duties of Lord Chancellor; and if proof were wanting of this, it may be found in the few addresses which he makes on any other than legal subjects in the House of Lords.

On leaving the Lord Chancellor's Court, I proceeded with Mr. B., the gentleman who had accompanied me, to the other courts. On entering one of them we met Mr.——— the well known advocate, to whom Mr. B. was known. After the usual ceremonies of introduction were over, he asked us both to dine with him that day, and assured us that we should meet some eminent persons in the course of the evening. We accordingly accepted his invitation, and met some other barristers at his table, and passed a delightful evening; but imagine my joy and surprize, when soon after we went up stairs, in came the great person whom I have just been describing. Lord Brougham and our host were intimate at the bar, and his Lordship had waived all ceremony, and we thus found him among us. Nothing I assure you can be more delightful than his society. He is the most unassuming as well as intelligent man I ever knew. He allows every one to have his share in the conversation, to tell his story, or add his illustration. He laughs heartily and unaffectedly at any thing which is ludicrous, whether said by himself or another. He has an infinite fund of humour and anecdote, and is most ready to communicate them. He has not the slightest shade of mystery or pretence about him, he seems to have no ill feeling or jealousy, and in listening to his conversation, you cannot believe that you hear the man who, in the House of Commons, could hardly speak without bitterness or sarcasm; but thus he is in private life; lively, amusing, and kind hearted. After cheering and delighting the whole circle (which was composed of some other distinguished persons) for about an hour, he left us full of admiration and pleasure. Thus is he in the habit of keeping up his old friendships, and is the last man to forget any one he formerly knew. You will be able to conceive that I soon afterwards left the party, anxious not to disturb the feelings which his company had occasioned.

Farewell, my dear friend, you shall soon hear again from your's most heartily and sincerely

* * *

## LAW REPORTING.

*Reports of Cases argued and determined in the Vice Chancellor's Court. Vol. II. Part* 4. By N. Simons, Esq. of Lincoln's Inn, Barrister at Law. Clarkes, 1831.

Our readers will probably remember the observations which we had occasion to make in a recent Number, on the subject of law reporting.* We are not inclined to abandon the task that we there prescribed to ourselves; and we shall from time to time reiterate the objections, which we then made to the present system, and occasionally illustrate our observation by specimens of the mode in which reports are "got up." To show that we have not formed a hasty or inconsiderate opinion of the impropriety of the modern practice we shall shortly advert to the former customs in this respect, and if we do not entirely approve of them we infinitely prefer them to the present system.

It is well known that at the earliest period of our legal history, certain persons

* See ante p. 217.

were appointed by the court to report the decisions. Chief Baron Gilbert, and Mr. Justice Blackstone both inform us that the Year Books were thus composed.* Their number was limited, and they were at first paid by the king as officers of the court.† These official reports seem to have been discontinued about the beginning of the reign of Henry VIII. although they were afterwards revived for a short period.‡ Subsequently to these official reports, the profession had not to depend on the spare time of any gentleman who might choose to give an account of what was passing in the courts, but on the notes made by the judges themselves. Thus Dyer's Reports consist of the notes made by Sir James Dyer himself, and were published after his death by his executors. Keilwey's Reports were edited by Sergeant Croke, who was afterwards created a judge. Coke's Reports, as is generally known, were the reports of that most learned and eminent person himself, and consisted, as he tells us himself, of "cases adjudged upon mature deliberation,"§ and he was requested to continue them by the king. Hobart's Reports have the same authority: they were compiled by that able judge. The subsequent reports were all more or less of the same character, although not of the same authority. They all were, or purported to be, notes actually made by judges. They were however so numerous that in the reign of James II. it was thought proper to prohibit the publication of law books, without the licence of the Lord Chancellor, the Lord Chief Justice, and Chief Baron, or one or more of them. This licence appears, with one or two exceptions, in all the reports down to Douglas; when the judges refused to grant it any longer.‖ It became at last indeed a mere form, and was therefore useless.

The new æra of law reporting was commenced in 1786, by the reports known by the name of the *Term Reports*. From this time any person who chooses to employ his time in reporting cases, however inexperienced and unqualified he may be, may, by the assistance of a bookseller, send forth his "reports" of the decisions of the judges. Now this appears to us manifestly absurd and improper. It tends greatly to confuse and unsettle the law. There is no security for the practitioner. In many cases he cannot be certain that the report is correct, and yet he has no power to act contrary to it. It can only be nullified by the court itself. These are, among others, our reasons for objecting to the present system. We think there should be some persons especially appointed to hand down the decisions of the court. Every facility should be afforded to him and he should devote his time entirely to this important duty. At present the reporter, although properly qualified, may, or may not be in court: he may or may not have it in his power to procure all the papers in the cause; he may or may not have the most ample information on every thing connected with it; he may or may not be favoured with the judge's notes of his judgment; it is left to accident. The most important case of the Term or Sittings may thus be imperfectly reported or entirely omitted. This state of things should no longer exist. It is one of those practical grievances that may be easily and speedily remedied, and we sincerely hope that it will be attended to.

Mr. Simons' reports are, as every one knows, in continuation of those edited by himself and Mr. Stuart. We have always considered these last as some of the ablest reports of the present day, and we have no reason to complain of any falling off in them since the whole labour has devolved on Mr. Simons.

Some few of the cases are perhaps more fully stated than is necessary, as for instance the *Attorney-General* v. *Mayor, &c. of Carlisle*, p. 37., but they are always well selected and accurate. We shall notice some of the most important decisions in this Number, none of which, however, are very striking. Most of the cases are on points of practice and pleading, which we shall not now discuss, but shall pass to those which relate to the principles of equity.

The first of these which we shall notice is the case of *Lear* v. *Leggett*, p. 479., in which a testator bequeathed a certai nsum of stock to trustees upon trust for *A.* for life, and after his death in trust for his children, and declares that the interest of *A.* should not be subject to any alienation or disposition by sale, mortgage, or otherwise, or by anticipation of the receipts; and if he should make or attempt to make any alienation of it, then it was limited to other persons, — in this case to the children of *A.* — *A.* became a bankrupt, and the question was whether his interest passed to his assignees, or devolved on his children. The Vice Chancellor held, that it passed to his assignees, and not to his children, and he

* Hist. Common Pleas, 46. 1 Com. p. 72.
† 1 Pref. Plowd. Rep. 4.
‡ Dougl. Pref. 3. 5 Mod. Pref. 6. 1 Blac. Com. 72.
§ 3 Co. 350.
‖ See Dou. Pref. 3.

thus discussed the former cases on the point.

"This is not a case in which I can hold, on the words of this proviso, that the limitation over took effect; and it appears to me that the cases which have been cited in support of the children's claim do not warrant the argument in their favour.

The words of this will must, as in all cases of the like nature, be construed with great strictness. In *Dommet* v. *Bidford*, 6 T. R. 684., the annuity on which the question arose was given by reference to the annuity given to the niece. There the testator gave the said annuity to his niece, Anne Ireland, and declared that the same should, from time to time, be paid to herself only; and that a receipt under her hand, and no other, should be a sufficient discharge for the payment thereof; his intent being that the said annuity, or any part thereof, should not be alienated for the whole term of her life, or for any part of the said term; and that if the same should be so alienated the said annuity should immediately cease and determine. The testator does not say, that if the annuity was alienated by the act of the party it should cease, therefore that is not a case in which the benefit was to go over on an act done by the party. The case of *Cooper* v. *Wyatt*, 5 Madd. 482. is totally different from the one now before me. The Vice Chancellor, in giving judgment, calls in aid his construction of the proviso, the mode in which the benefit is given to the nephew, and says, here is no gift to the nephew other than a direction that the payment should be made into his proper hands, but not to his assigns, and for his own use and benefit, which expressions naturally import an intention of personal enjoyment by the nephew, and the exclusion of all who attempt to claim through him; and in this sense the words 'his assigns' will as well comprehend the assignees by operation of law as the assignees by his own act; the judgment therefore did not rest on the proviso alone, but on the proviso taken in connection with the limited words of the gift. [His Honour here read the part of the will in this case in which the trusts were declared, and then proceeded.] Now, here is a gift totally unlike the gifts in *Dommet* v. *Bidford*, and *Cooper* v. *Wyatt*. The testator there directs that the gift shall not be subject to any alienation or disposition by sale, mortgage, or otherwise, in any manner whatsoever. Now these words alone do not create any forfeiture. The testator then declares, that in case his son or daughters should charge, or attempt to charge, affect, or encounter, &c. Now all these words refer to a voluntary act of the party, and point at a voluntary alienation; and I am of opinion that no act has been done, in this case, which can be said to be a voluntary alienation, or an attempt to alienate; and I must therefore declare that the assignees are entitled to the life interest of Alexander Goudge, the son, in the fund in question."

The next case which we shall present to our readers is *Hodson* v. *Murray*, p. 515. which we shall give more fully.

"The bill prayed that a promissory note for 8000*l*., which had been given by the plaintiff to Rowland Stephenson, and which the latter, after it became due, had delivered to the defendant as a security for a debt to a greater amount, due from him to the defendant might be delivered up to be cancelled, and that the defendant might be restrained from proceeding in the action which he had commenced against the plaintiff upon the note. The bill alleged that Stephenson had agreed to advance the 8000*l*. to the plaintiff, to enable him to pay for an estate which he had contracted for; that the contract failed, and consequently that nothing was ever advanced upon the note, and that the note was, from inadvertence, left in Stephenson's hands. The defendant by his answer denied any knowledge of the transactions between Stephenson and the plaintiff: he admitted, that when Stephenson produced the note to him, Stephenson's indorsement on it was cancelled; that the reason assigned by Stephenson for the cancellation was to prevent the amount being recovered in case the note should be lost, and that Stephenson afterwards reindorsed it.

Mr. *Sugden* and Mr. *Ching*, for the plaintiff, said, that a person who took a note when it was over-due held it subject to all the equities that it was liable to in the hands of the original holder: that, although he, the plaintiff, might avail himself of that defence in a court of law, this Court was not ousted of its jurisdiction.

Mr. *Horne*, Mr. *Burge*, and Mr. *Swann*, for the defendant, said, that the Court could not direct that the bill should be delivered up to be cancelled, as the defendant might sue Stephenson, if he could not sue the plaintiff for the amount; that the principle on which the plaintiff sought relief was originally established in the courts of law, and was not adopted by them from this court: that the bill sought to oust the courts of law of their jurisdiction in a case where they did complete justice; and that therefore the plaintiff had no right to apply to this court for its extraordinary interference: that the answer did not show that there was nothing due on the note, as between the plaintiff and Stephenson, but stated that the defendant knew nothing of the transactions between the plaintiff and Stephenson; and therefore the plaintiff had not proved, as he ought to have done, that there was nothing due from the one to the other: that the plaintiff, by suffering the note to remain in Stephenson's hands, had enabled the latter to commit a fraud upon the defendant, and been guilty of greater negligence than the defendant had: that the defendant, if permitted to go to trial, might be able to prove facts, from which a judge would infer that the plaintiff suffered Stephenson to retain the note for the purpose for which it had been applied, and would thereby get rid of the equity arising from the defendant's having taken it when it was over-due.

The *Vice Chancellor* said:—This is a very suspicious case on the part of the defendant. Although a court of law may not allow a defendant to recover upon this note, it is no reason that this court should be deprived of its jurisdiction. It appears to me to be a question that

ought to be further enquired into in this court. — Motion granted."

The case of *Porter* v. *Clark*, p. 520., is of some importance to Dissenters.

A chapel and buildings were vested in trustees, upon the following trusts: to permit and suffer the said messuage, meeting-house, buildings, and premises, to be used as and for a place for the worship of Almighty God, by the congregation of protestants dissenting from the church of England, under the denomination of particular baptists, holding the doctrine of personal election, imputation of original sin, effectual calling, free justification, and final perseverance of the saints, and by the members and successors of the same congregation of protestants holding the same doctrines. Shortly before the filing of the bill, differences had arisen in the congregation; some of the members being desirous of appointing Owen Clark to be co-pastor with Porter, while others were averse to such appointment. However, on the 13th of March, 1828, a church meeting was held, at which it was resolved to invite Clark to preach at the chapel for three months, as a probationer to be co-pastor with Porter. Clark came accordingly, and at the end of that period was elected joint minister with Porter. To this election Porter refused to consent, alleging that the congregation had not the power to appoint a co-pastor without such consent; further disputes and differences were the consequences of this refusal, and eventually, on the 6th of November, 1828, a church meeting was held, at which it was resolved that Porter should be no longer pastor, and that the defendant Clark should, from that time, be sole pastor; and on the following Sunday Porter was forcibly prevented from entering the pulpit, and Clark, the defendant, took possession of it.

"There was no endowment for the minister, nor any trust property, except the chapel and premises, nor was the minister paid by the pewrents, but solely by the voluntary contributions of persons attending the chapel.

"The bill was filed by Porter, by the trustees of the chapel, and by two of the members of the congregation, on behalf of themselves and all other the members, except such as were made defendants, against Clark and nine of the members, by whose orders Porter had been forcibly expelled. It prayed that the trusts upon which the premises were held might be ascertained and declared, and carried into execution, by and under the direction and decree of the court, so far as it might be deemed proper or necessary; and that a sufficient number of proper persons might be appointed new trustees, in the room of such as were dead, or desirous of being released from the burden of their trust; and that it might be declared that Porter was the lawful pastor and minister of the chapel and congregation, and that he might be quieted in the possession of such rights as appertained to him in that capacity; and also, that the defendant Clark might be restrained by the injunction of the court from performing the duty of pastor or minister of the chapel and congregation, or officiating or performing divine worship in the chapel, that he and the other defendants might be restrained, in like manner, from impeding, or in any manner interfering with Porter in the exercise of his duties as pastor and minister thereof.

A motion was now made for an injunction in the terms of the prayer. In support of the motion numerous affidavits, made by dissenting ministers of this denomination, were read, who all agreed, that when a minister has been duly elected to be pastor of a congregation, and has been ordained according to the form usual amongst them, he held this office until he thinks fit to decline it; and that no person, or body of persons, has power to remove him, or to appoint a co-pastor with him, without his consent.

The *Vice Chancellor* said, that he had looked into the deed creating the trust, and that he could find no directions as to the mode of electing ministers, or as to the duration of their office, when elected; neither could he find that there was any provision made for the minister by the trust deed; but that he was dependent entirely on the voluntary contributions of the members of the congregation: and he, therefore, could not see that the plaintiff, Porter, had made any case for the interference of the court.

His Honour added, that, independently of the want of jurisdiction, he was of opinion that it was very reasonable that a minister who depended entirely upon voluntary contributions, should be dismissible at will by the persons so voluntarily contributing."

We have no room for some other cases which we could have wished to have noticed, and for these we must refer the reader to the work itself.

## THE LORD CHANCELLOR'S LEVEES.

We are glad to learn that the Lord Chancellor intends to hold two or more levees annually. We confess a partiality for these professional gatherings, and could wish them even more frequent. During the time of Lord Hardwicke's Chancellorship there were weekly levees on Sunday evenings, which were, of course, numerously attended. They were retained, although given less frequently, by succeeding Chancellors, until the time of Lord Eldon, who after holding one or two during the first years of his Chancellorship discontinued them. Lord Lyndhurst revived the custom in the first year in which he held the great seal, having three levees, but thought proper not to continue it. We hope that the present Chancellor will hold them regularly. They tend greatly to promote a good feeling and better acquaintance between the Chancellor and the bar, which it is very important should subsist. The Lord

Chancellor is generally too much removed from the profession. He is different from all other judges; he moves in a different sphere, and is too apt to get separated and isolated from the profession. We think that frequent levees would tend to prevent this, and are therefore anxious for their continuance.

## THE UNIVERSITY OF LONDON — LAW CLASS.

### LECTURES OF MR. THEOBALD* ON THE LAW OF PRINCIPAL AND SURETY.

In the first Lecture, beginning with the definition of the contract of surety, and a brief notice of the corollaries that result from it, the lecturer proceeded to notice the different modes in which the obligation of surety may be contracted. These, he observed, are three: 1. By acknowledgment made before a Judge or other public officer. Acknowledgments so made are commonly called recognizances, and in some cases statutes, and when enrolled of record, the obligation raised by them has the force of *res judicata*. 2. By deed. 3. By simple contract, or parol. The class of simple contract includes written as well as verbal agreements; but by the statute of frauds, 29 Car. 2. c. 3. & 4., a simple contract of guarantee is required to be in writing.

Postponing the consideration of the peculiar consequences which take place when the obligation of surety is contracted by record, or by deed, the requisites of a simple contract of guarantee were next considered, 1st, with reference to the common law; 2d, with reference to the statute. 1. By the common law a consideration is necessary for the validity of a parol agreement; whatever would be sufficient as a consideration in the case of any other kind of parol agreement, would be so in the case of a parol agreement of guarantee. In general, said the lecturer, any act by which the person who promises, or any other person at his request, has benefit, or by which the person to whom the promise is made has trouble or detriment, is sufficient; and the amount of benefit or trouble, or its comparative value in relation to the promise, is immaterial. But the act intended to be the consideration of a promise must be of some legal value. Of this qualification on the previous rule the lecturer gave the following illustration: — forbearance to sue is an act of no legal value, if the person to whom suit is forborne is not liable in an action, and therefore, in that case, would not be a sufficient consideration; as for instance, forbearance to sue an heir on the bond of his ancestor, in which the heir is not named, is not a sufficient consideration to support a promise to pay the bond, made either by the heir himself, or by another person as his surety. Definiteness and certainty, as opposed to the vague and general, were also stated to be requisite in every consideration. Therefore forbearance to sue for a time, for some time, for a little time, are insufficient considerations, although any time, however short, would be sufficient, were its duration specified. The consideration, also, must be either wholly or in part executory at the time the promise is made, unless the act which constitutes the consideration was done at the request of the promiser, in which case, though past, and executed when the promise is made, it is sufficient. Each of these rules were illustrated by examples appropriate to the contract of surety, and for other illustrations, and a fuller statement of cases on this subject, practical treatises were referred to, and finally the lecturer remarked, that a minute attention to the consideration was pre-eminently necessary in respect of guarantees, two out of three of which he stated, from his experience, to be bad in this particular. 2. With reference to the statute of frauds, the lecturer said, it had been decided, that the promise alone being in writing is not sufficient. The statute requires the *agreement* to be in writing; and as the promise and consideration together constitute the agreement, both must be in writing; for which *Wain* v. *Warlters*†, *Saunders* v. *Wakefield* ‡, *Jenkins* v. *Reynolds*§, *Britten* v. *Webb*‖, and *Lush* v. *Whitcomb*¶, were cited. The rule contained in these cases was a departure from the interpretation which had prevailed for nearly a century; and from its remoteness from the apprehension of men of business was likely to occasion extensive practical mischief, in which view it had been repeatedly censured in the courts of equity; but the mischief anticipated had been lessened by the laxity with which the courts enforce it. "If," said Mr. Theobald, "a shadow of a consideration is expressed, it is sufficient." In illustration of

* We are favoured, by the kindness of Mr. Theobald, who lectures during Mr. Amos's absence on circuit, with these notes of his useful lectures.

† 5 East 10.; ‡ 4 Barn. & Ald. 595.
§ 7 T. B. Moore 86.
‖ 2 Barn. & Cres. 483. ¶ 5 Bing. 34.

which position, he reviewed *Stadt* v. *Lill**, *Borlem* v. *Campbell*†, *Marley* v. *Boothby*‡, *Newbury* v. *Armstrong*.§ In the last case, *Tindal* Ch. J. said, "If by fair construction we can, as it were, spell out from the contract the consideration, it is enough. The *dictum* contained in *Wain* v. *Warlters*, and the other similar cases, has been carried to the extreme edge of the law."

Next as to the writing. There is no prescribed form: but a note or memorandum is sufficient, if it contains all the terms of the agreement. A letter containing the terms is sufficient; or if it does not itself contain them, but refers to an insignia paper, alleging that that does, the letter and paper together are sufficient. From these decisions it appears the courts regard the writing, not as a constituent part of the agreement, but merely as necessary evidence, and therefore it is immaterial whether the writing takes place at the same time as the agreement, or whether it is made with the view of authenticating the agreement. A letter addressed by the party to his own agent, or to a stranger, is sufficient. An agreement once in writing, but afterwards receded from, may be revived by parol; as also might an agreement which was bound by the statute of limitations‖, previous to Lord Tenterden's act, 9 Geo. 4. c. 14.

"The statute," the lecturer proceeded, "requires a writing signed either by the party himself, or by his agent thereunto lawfully authorised. With respect to agents under this provision, the law prescribes no particular mode of authorisation; an agent, therefore, may be appointed verbally; but an express authorisation is not necessary. The existence of an authority to act as an agent, either for general or particular purposes, may be inferred; and from the inference results as complete a liability on the side of the principal, as if he had made an express appointment. In an action upon a guarantee it appeared that the guarantee was in the handwriting of the defendant's son, who was a minor, evidence was given of the son having, in three or four instances, signed for his father, and this Lord Ellenborough thought sufficient evidence of the son being authorised, and the plaintiff had a verdict.¶"

The ratification of the act of another is equivalent in effect to a prior authority. In its application to a guarantee this rule is illustrated in *Busby* v. *Culvinnatt*.** Persons incapacitated from contracting on their own account are competent to be agents. Several cases were next referred to, in which persons contracting under the style of agents were held to be liable as principals. The rules respecting guarantees given by and to one of several partners were also considered. A guarantee given by one of a firm, in the course of a transaction which had been adopted by the firm, or of which the firm was cognisant, would bind the firm, though the transaction was not within the regular scope of the partnership business, and though the guarantee itself was not actually known to have been given.†† The converse of this proposition was illustrated by *Duncan* v. *Lowndes*.‡‡ With respect to guarantees given to one of several partners, the lecturer referred to *Garrett* v. *Handley*.§§

In the above sketch we have chiefly wished to follow the delineation of topics pursued by the lecturer; more our limits will not allow our attempting, and in our next Number we hope to be able to give the second lecture.

* 9 East 348. † 3 T. B. Moore 15.
‡ 3 Bing. 107. ‖ Moody & Mal. N. P. C. 389.
§ *Gibbons* v. *M'Casland*, 1 Barn. & Ald. 660.
¶ *Watkins* v. *Vince*, 2 Stark. N. P. C. 368.

** 8 Barn. & Cres. 448.
†† *Sandilands* v. *Marsh*, 2 Barn. & Ald. 673.
‡‡ 3 Camp. N. P. C. 477.
§§ 3 Barn. & Cres. 462.; and 4 Barn. & Cres. 664.

## DEEDS INCORRECTLY STAMPED.

*To the Editor of the Legal Observer.*

Sir,

Perhaps you will be good enough to notice the following remarks on the rule which rejects the evidence of deeds not duly stamped. I think the suggested alteration worthy of being attended to, and I am not aware of any medium through which it would be so likely to meet the eye of those who have the power to adopt it, as in the pages of the "Legal Observer."

If, on a trial, a deed appears to be incorrectly stamped, the judge rejects it as inadmissible evidence, and the consequence is, that if the party pronouncing it relied upon its contents to prove his case, he, if plaintiff, is nonsuited; or, if defendant, a verdict must pass against him. A plaintiff so nonsuited may, after having paid the defendant's costs of the trial, get the stamp corrected and proceed *de novo;* but I am at a loss to know *how a defendant, whose grounds of defence is thus subduced, can relieve himself from the difficult situation in which he is thus placed.* Now as the amount of the stamp ought not, as between the litigating parties, to become a question mixed with the merits of the case, (as the stamp cannot possibly affect the veracity of the deed on which it is impressed,) I submit that

it would obviously be much more consistent with the principles of justice, that if an instrument, in all other respects duly authenticated as evidence, appear to be defectively stamped, the judge should let the case proceed, but direct his associate to make a minute of the sum the stamp is deficient; and that the postea should not be delivered to the party in whose favour the case is determined, until the deed is produced properly stamped. Thus justice between the litigants would not be interfered with, and the judge would see that the revenue is not cheated. By rejecting the evidence one party is most unreasonably compelled to pay costs to the other, who, is in many cases a party to the deed, and (if any fraud upon the revenue were contemplated) was most likely *particeps criminis*.

I apprehend that a defendant so situated as mentioned above in italics is without remedy. If so, much injustice may be done; the law certainly ought to be altered.

I am Sir,
Your most obedient servant,
T. P.

Feb. 18. 1831.

*** Of course the commissioners would not allow the proper stamp to be affixed without payment of the penalty, if any were incurred.

## SUPERIOR COURTS.

### LORD CHANCELLOR'S COURT.

#### INFORMATION. — CHARITY.

This was an information filed to obtain the possession of certain lands situate at Ripon, in the county of York, which had been given about the year 1230, by a former Archbishop of York to the hospital of St. Mary Magdalen, which was founded for the benefit of poor lepers and blind chaplains. The value of the property was now between 400*l.* and 500*l.* a year, and had been chiefly enjoyed of late years by the Deans of Ripon as wardens of the said hospital. It was contended on the part of the crown, that the Dean was not entitled to the income as part of his benefice, it being contrary to the original intention of the foundation; and a great quantity of documentary evidence, recognising the said hospital, and furthering its purposes, was adduced. On the other side, letters patent from James I. were put in, wherein it was stated that the Archbishop of York having made donations to the Dean and Chapter of Ripon, and appointed the Dean to the wardenship of the hospital, the Archbishop's power of appointing such a warden was confirmed; and it was contended that under the letters patent the Dean must be considered as having a beneficial interest in the lands. The information had been heard before the Vice-Chancellor, who had dismissed it on the ground that a court of equity had no jurisdiction in the matter.

It now came on before the Lord Chancellor, on appeal from the decree.

The *Solicitor-General* and Mr. *W. Brougham* for the informant; and Mr. *Skirrow* and Mr. *Bagshaw* for the defendants.

The *Lord Chancellor* reversed the order of the Vice-Chancellor, and directed a reference to the Master to enquire into a proper scheme, but ordered that the costs of all parties should come out of the property. *Attorney-General* v. *Archbishop of York*, L. C. March 5. 1831.

#### INJUNCTION. — COPYRIGHT.

Mr. *Hughes* appplied for an injunction to restrain Mr. Chitty from editing, or joining in editing, Burn's Justice. This application was made on the ground that Mr. Chitty had already written a work on criminal law, and covenanted to publish no similar work, the copyright of which he had assigned to the plaintiff, and a new edition of Burn's Justice, purporting to be edited by the defendant, had been advertised. A similar application had been made to Lord *Lyndhurst*, who had directed that the advertisement should specify the particular parts of the new edition which were to be edited by Mr. Chitty; such parts were not to interfere with the treatise on criminal law.

The *Lord Chancellor* thought that he had no power to restrain another from writing any thing in his study that he pleased, so long as he did not publish it. It would be time enough to interfere when the work, which was supposed to interfere with the plaintiff's copyright should be published; and therefore refused the motion with costs. *Brooks* v. *Chitty*, L. C. March 4.

#### DEVAYNES *v.* NOBLE.

The decision of Sir *W. Grant* M. R. in *Devaynes* v. *Noble*, 1 Meriv. 529., was confirmed by the Lord Chancellor. *Devaynes* v. *Noble*, L. C. March 9.

### ROLLS COURT.

#### BANKER'S INDEMNITY. — COSTS.

This case came on to be heard on further directions. The plaintiff was agent for the Commercial Bank at Edinburgh, in the name of which he was entitled to sue. The plaintiffs had accepted a bill for 250*l.* which had been indorsed to the bank, but in its transmission from Crief to Edinburgh was lost. The bank then called upon the defendant to pay the amount of the bill, upon receiving as an indemnity against any future demand, in case the bill should be found, the bond of Messrs. Jones, Lloyd, and Co. Graham refused to pay upon any condition but that of the production and deliverance up of the acceptance. The present bill was filed to compel him to accept the indemnity; but on the former hearing before the Vice-Chancellor, the defendant had questioned the security of the indemnity, and had required a reference to ascertain its validity. The reference had been granted, and each party was directed to pay his own costs up to the hearing. The Master made his report in favour of the security offered to the defendant. The chief question was the costs of the reference.

The *Master of the Rolls* said, that when the

bank called upon the defendant to pay the amount of the lost bill, it had offered him a bond to indemnify him against all future claim respecting it. He questioned the security of that bond, and compelled a reference to the Master to ascertain its validity; he had, therefore, very improperly refused a proper security, and must therefore pay the costs since the former hearing. *Macartney* v. *Graham*, M. R. Feb. 18. 1831.

DEVISE. — CHARITY.

Robert How, the testator in this cause, bequeathed a sum of 2000*l.* to found two exhibitions in Balliol College, Oxford, but directed that the master and fellows of that college should confine the benefit of these exhibitions to the sons of clergymen of Somersetshire and Devonshire, who should be nineteen years of age, and properly qualified; and further requested that any relation of the testator should be preferred; and next to such person, the sons of those clergymen of the above-named counties who should have the smallest income; but if no such candidate should apply, then he directed that the funds should accumulate until they should do so. The exhibitions were refused by Balliol College under these conditions, and the present bill had been filed to establish the will; and on a reference to the Master, he had reported that Exeter College would accept the exhibitions, and had proposed as an alteration in the scheme, that the sons, not of the poorest clergymen in the said counties, should be preferred, but of the poorest of those who should apply. The cause now came on for further directions.

The *Master of the Rolls* approved of this alteration, and thought the plan proposed by the testator was so wild, that it could not be established by a court of equity, as a century might elapse before a person under it might apply. *Attorney-General* v. *Lee*, M. R. Mar. 11. 1831.

## VICE-CHANCELLOR'S COURT.

WILL. — PRACTICE.

In this case a will had been made in Ireland, and written in sheets, and one of the sheets was found separate from the others. On the hearing of the cause, the Vice-Chancellor had directed an issue to a court of common law, to try whether this sheet formed part of the will. This decree was appealed from; and Sir *C. Wetherell* and Mr. *Pepys* now applied to the court to stay the trial on the issue, until the appeal should have been heard.

Mr. *Knight* opposed the motion on the ground that the witnesses who could prove the facts were aged, and might die before the appeal could be disposed of.

The *Vice-Chancellor* was of the same opinion, and dismissed the application with costs. *Miller* v. *Travers*, V. C. March 11. 1831.

CANAL. — RAILROAD.

*Cunliffe* v. *The Manchester and Rochdale Canal Company.*

This case, which we alluded to in the report of *Maudsley* v. *The same Company*, No. xix. p. 301, came on before the Vice Chancellor on a motion by the plaintiff, who was a share-holder, for an injunction to restrain the defendanst from applying the funds of the company in obtaining an act of parliament for converting the canal into a rail-road, which had been resolved on at a meeting of proprietors.

The *Vice-Chancellor* granted an injunction on the ground that the plaintiff was a partner, and that the funds of the company could not be so applied.

The case of *Maudsley* v. *The Canal Company* was different, as there the plaintiff had purchased *after* the resolution to apply to parliament, and with a full knowledge of it.

## COURT OF KING'S BENCH.

THIRD COMMISSION OF BANKRUPT.

In an action for goods sold, the defendant, on a plea of bankruptcy, gave in evidence a commission of bankrupt, and his certificate under it. The plaintiff in reply proved a former commission, under which no dividend had been paid. *Platt*, for the defendant, contended that was no answer to the action.

Lord *Tenterden* C. J. held that it was, and referred to a recent decision in the case of *Fowler* v. *Coster**, where, after an argument before the court *in banco*, and full consideration of all the authorities, the court held that a third commission issued against a trader, who had not paid any dividend under a first and second commission was a nullity. He had observed in that case, that frequent discharges under the bankrupt laws, were a great injury to the honest tradesman, and the legislature had therefore required the payment of 15*s.* in the pound, under the first commission, to enable the man to trade again. It was the opinion of the whole court, after reference to all the authorities, that the Lord Chancellor had no power under the bankrupt act, to issue a commission for the distribution of effects, which were already vested in assignees under a former commission, and that such commission was a nullity. *Anonymous*, N. P. Sit. after H. T. 1831. K. B.

BANKRUPTCY. — CLAIM NOT PROVEABLE.

Assumpsit to recover 800*l.* under the following circumstances: — the plaintiff, who had been lessee or manager of the Opera House, gave up that establishment to the defendant on a certain arrangement. Part of that arrangement was, that the defendant should pay a bill of 800*l.* in the hands of Messrs. Chambers, Bankers, which had been accepted by the plaintiff, and this the defendant undertook to do. The defendant became bankrupt before the bill was due, and the plaintiff was obliged to pay the bill, and then brought his action against the defendant on his undertaking. The defendant pleaded his bankruptcy and certificate. The Judge who tried the case being inclined to the opinion, that this undertaking was not a debt which could be proved under the commission, and the verdict was therefore given for the plaintiff, with leave to the defendant's counsel to move to enter a nonsuit,

* 1 *Lloyd* v. *Welsby's Merc. Rep.* 203.

*F. Pollock* moved for a rule to show cause why the verdict should not be set aside and a nonsuit entered, on two grounds; first, that it was a debt which might, by the Bankrupt Act, be proved under the commission, in which case, the certificate was a discharge; and, secondly, that if the defendant's undertaking was not a debt proveable under the commission, then the plaintiff might have proved under that part of the act which related to sureties *, and he contended that by the agreement between the parties, the defendant had become the principal and the plaintiff the surety.

Lord *Tenterden* C. J. was of opinion that there ought to be no rule. The discharge of bankrupts from their liabilities by the certificate was purely a creature of the act of parliament; and the cases in which the bankrupt would be discharged must be limited to those distinctly set forth in the act. The certificate discharged the bankrupt from debts due from him at the time of the commission issuing; from debts for which he was undoubtedly liable at the time of the commission; and from debts which he was then undoubtedly liable to pay upon a contingency, of which proof was in a certain special way admitted. But this was no debt at all, but a mere undertaking to pay a bill if the plaintiff, who was the person liable on the face of it, should not pay. As to the second point, the plaintiff was clearly the person liable to the Messrs. Chambers on the face of the instrument; and, therefore, whatever might be the arrangement between the plaintiff and the defendant, the plaintiff was the principal and not the surety, and could not have proved in the character of surety. He was therefore of opinion that the defendant still remained liable on his undertaking, notwithstanding the certificate.

*Littledale* J. It was one of the purposes of the late Bankrupt Act to extend the cases in which the certificate should be discharged; but unfortunately for the defendant, there was no provision in the act which applied to his case. The act was confined to cases of *debt* only; and this was not a debt, but an undertaking.

*Taunton* J. was of the same opinion.

Rule refused. *Yallop* v. *Ebers*, H. T. 1831. K. B.

LIABILITY TO PAROCHIAL RATE.

On a case for the opinion of the court, it appeared, that a person rented a house as a granary, in the parish of *F.*, but always resided in the parish of *G.* The question for the determination of the Court was, whether he was liable to payment of parochial rates for the parish of *F.*

The court was of opinion that he was not. The parochial rates were payable by occupiers, and he did not occupy though he held. *Rex* v. *Sharpe.* H. T. 1831. K. B.

RETURN TO WRIT BY BAILIFF.

Sir *J. Scarlett* showed cause why a return of *nulla bonâ* should not be taken off the file, on the ground that it had not been made by the proper returning officer. It appeared that about two years ago the plaintiff having obtained a judgment against the defendant, who had effects within the Liberty of Gower in Glamorganshire, sued out a *fi. fa.* indorsed to levy 1000*l.* The sheriff issued his mandate to the bailiff of the liberty, that bailiff then being a person of the name of Lewis Thomas, the appointee of the Duke of Beaufort under a charter granted by James I., in the fifth year of his reign, to Edmund Earl of Worcester, an ancestor of the present Duke, the latter had, by his bailiff, the return of all writs within the liberty of Gower. The mandate was duly received by Lewis Thomas, but he becoming insane, no return to it was made. The Duke of Beaufort as the returning officer was ruled to return it, and his Grace having made default, a writ of *distringas* issued against him. In June last an application was made on the part of his Grace to set aside that writ, and to allow the new bailiff, Thomas Thomas, to make a return to the original mandate, *nunc pro tunc*, in any action. The plaintiff opposed the application, and the court directed the Duke or his bailiff to make such return as he might be advised. A return of *nulla bona* having been since made in the name of Thomas Thomas, the successor of the insane bailiff, a rule to show cause was obtained by the plaintiff, why that return should not be taken off the file, on the ground that the new bailiff was not the proper person to make the return, he not having been appointed to his office until after the mandate was returnable.

It was contended that the object of this application really was to compel the Duke of Beaufort to make the return in his own name, and that his Grace would never do as long as he could resist the proceedings. By the charter his Grace had the return of all writs within the liberty of Gower, but the returns were, by the very terms of the charter, to be made "by his bailiff." The return had been properly made in the name of the new bailiff, but the Duke of Beaufort had no objection to let a fresh return be made in the name of Lewis Thomas, the former bailiff, if that would satisfy the plaintiff.

*Ludlow* Serjeant, and *Talfourd* also opposed the rule.

*J. Williams*, *Campbell*, and *Cresswell* were heard in support of the rule. The Court had decided on a former occasion upon the construction of the charter, that the Duke was the returning officer. That question being determined, it was difficult to understand the reason of his Grace's objection to make the return in his own name.

Lord *Tenterden* C. J. We think that Thomas Thomas was not the proper officer to make the return, inasmuch as he was not the bailiff until after the mandate was returnable. The rule, therefore, for taking the return off the file must be absolute. Rule absolute.—*Newland* v. *Cliff*, H. T. 1831. K. B.

COURT OF COMMON PLEAS.

PUBLICATION OF DEPOSITIONS.

*Wilde* Serjt. showed cause against a rule of *Taddy* Serjt., calling on the defendant to show

* 6 Geo. 4. c. 16. § 52.

cause why the secondary should not be restrained from giving to the plaintiff copies of the depositions taken at Bombay under a writ of mandamus, directed by this court to the chief justice of the supreme court of that presidency, for the examination of certain witnesses residing in India. The action was brought against the defendant for negligence in the disposal of goods belonging to the plaintiff. The affidavit on which the rule had been obtained stated, that although the court, in granting the mandamus, made it part of the rule, that the plaintiff might be a party to it if he pleased, yet the latter had declined to avail himself of that permission, and refused to bear any part in the expense; that he now sought to obtain copies of the depositions taken in obedience to the writ, which would have the effect of prejudicing the defendant's case. In opposition to that rule an affidavit was produced, stating that it was the invariable practice of all the superior courts, both equity, law, and ecclesiastical, to allow either party in the cause to have a copy of such depositions from the officer of the court, whether he were a party to the writ or commision under which they were taken, or not; and the learned serjeant contended that such practice was the sound construction of the 13 Geo. 3. c. 63. § 40. and 44., on which this proceeding was founded.

*Taddy* Serjt., in support of the sale, contended that, according to the true construction of the act, it was only the persons who had been parties to the application for the writ or commission, and not the parties to the cause generally, who were entitled to have copies of the depositions.

The court were unanimously of opinion that the practice proved to have invariably existed on this subject was in perfect accordance with the true and manifest construction of the act of parliament. Rule discharged. *Dandson* v. *Nicholls*, H. T. 1831. C. P.

---

ADDENDA TO ANSWER TO QUERIES IN NO. XVIII. p. 288.

Where there are two sets of bail, both must be excepted to, and notice given; otherwise the plaintiff cannot attach the sheriff or proceed on the bond. 2 B. & A. 604. 7 D. & R. 259.

---

## *IRELAND.*

[We shall occasionally present our readers with important decisions in Ireland. We quote at present from the *Law Recorder*.]

### CHANCERY COURT.

A MISTAKE IN A DECREE NOT RECTIFIED, ALTHOUGH THE DECREE WAS NOT ENROLLED.

*French* v. *Morgan.*

" Mr. *Litton* (with whom was Mr. *Blacker*) moved, that what could be considered a clerical error only in the report, and in the decree in this cause, should now be amended. They omitted to state an arrear of several years, due on the foot of the annuity deed. The decree was not enrolled, so there could be no objection on that score. The bill was filed for an arrear of ten years' annuity, due under an annuity deed, and the defendants alleged not only usury, but fraud. The case was heard by Lord *Manners*, who was satisfied there was no fraud, but he sent it to the Court of King's Bench to say whether the payment of the insurance, which was covenanted to be paid by the grantor, could be considered usury, and the Court decided it was not. Accordingly, his Lordship made a decree, declaring this annuity to be a good charge on the lands in the pleadings mentioned. The plaintiff charges, that one shilling was never paid, and the defendant admits that, and says he resisted the payment on the ground of gross fraud. The leaving out this arrear was quite an accidental omission, and when your Lordship has the facts in the answer, and that the answer appears on the final decree, the Court will not hesitate to correct what was merely left out by mistake.

*Lord Chancellor.*—You want, after a report and decree, that I should superadd so many payments.

Mr. *Litton.*—I think the Court may amend, from the authority of *Wyatt's Practical Register.*

*Lord Chancellor.*—If that is the best case you can cite, you certainly are at liberty to make the best use you can of it.

Mr. *Blacker.*—We really do not seek to disturb any point of right or equity, but merely to amend the report and decree, and that by the usual thing to amend by, the record itself. If it is left as it is, it is quite an incongruous decree. On the very admission of the party, we are entitled to what we seek.

Mr. *Richards* (*contra*).—They are entitled to no favour. Their case was a suspicious case, for we applied to them for a copy of the annuity deed, and they refused to give it to us. This motion too is not made until after the death of our solicitor.

*Lord Chancellor.*—I should be laying a very bad precedent if I granted this motion. There is neither surprise nor mistake alleged. The motion must be refused, with costs. Dec. 14. 1830.

---

AN ASSIGNEE WHO ONCE ACCEPTS THE SITUATION, MUST BE REMOVED AT HIS OWN EXPENSE.

*Ex parte Bainbridge, In the matter of Palmer, a Bankrupt.*

Mr. *Creighton* moved that Mr. Bainbridge should be discharged from being assignee, to which he was elected in conjunction with a Mr. White, and that Mr. White should continue sole assignee. There was no inconvenience from this, for although he had accepted of the trust by power of attorney, he had not otherwise interfered in the receipts of any money, or in any proceedings taken; but finding that the affairs of this bankrupt were involved in many different equity and other suits, in which it would be necessary the assignees should be parties, it is thought it would be much more convenient for him to resign the assigneeship, and almost all the creditors have agreed to his doing so, and to Mr. White being continued the sole assignee.

*Lord Chancellor.*— He must be discharged on the usual terms, a meeting being called to choose another assignee, or to continue Mr. White as the sole assignee, and all this must be at Mr. Bainbridge's expense.

Mr. *Creighton.*—I think you will find there

is a distinction in 5 Mad. 70. when an assignee is moved for the convenience of the estate, and when he moves himself for his own convenience. It is here done by the consent of the majority of the creditors, and also of Mr. White.

*Lord Chancellor.* — There is no one I see on the other side; but Mr. Bainbridge, unfortunately, has undertaken a trust without looking at the consequences, or the inconvenience that would arise from his doing so. He must, therefore, call a meeting of the creditors, who may take the option whether they will appoint a new assignee or not; and according to that option let him either convey to the new assignee, or release to the old one, and he must pay all the costs of the proceedings. Nov. 6. 1830.

## MINOR CORRESPONDENCE.

### METROPOLITAN REGISTRY.

I have waited for some time in the expectation of seeing your attention directed to an error in calculation, which occurs in the report of the commissioners on real property, and the strictures of all your correspondents on the subject of a general registry. The error I allude is this: — It is supposed that 300 deeds will be registered daily; and then it is asserted that this number will amount to one million annually. Now, in fact, it will not amount to one tithe of that number; as $365 \times 300 = 109{,}500$; and if Sundays, Good Friday, and Christmas Day are deducted, it will stand thus: $365 - 54 = 311 \times 300 = 93{,}300$.

I do not know whether the commissioners have founded any measure or theory upon the supposed million of deeds to be registered; but what becomes of the argument of your correspondent, in the Number for Saturday, Feb. 12? and where was his knowledge of the first rules of arithmetic, when comparing the size of a building which would be required, with that now erected in Dublin?

W. P. S.

### WITNESSES. — REMUNERATION.

The case of *Collins* v. *Godferoy*, reported in the Legal Observer, p. 235., decides the point, that an attorney cannot maintain an action for the loss of time, in attending as a witness in the courts of Westminster; but does the rule apply also to the *assizes?* If so, the decision bears exceedingly hard on the members of the profession. An attorney who is under subpœna to give evidence in a cause to be tried at the sittings in London or Westminster, may generally calculate on the probable period of his being wanted in court, and regulate his attendance there without its materially interfering with his general duties; but does it not appear unjust that a professional man should be compelled to abandon his clients, and special duties, to attend on a subpœna at the Cornwall or other distant assizes, where he may be detained a week or ten days, and yet receive no remuneration beyond his bare travelling and tavern expenses?

## MISCELLANEA.

### SIR THOMAS MORE AND THE PRESENT MASTER OF THE ROLLS.

Sir Thomas More, when lord chancellor, succeeded in disposing of all the causes that were ready for hearing; and on his desiring the registrar to call the next cause, he was told that none remained on the list, which fact he ordered to be recorded. This event was also commemorated in doggrel, as follows: —

"When More some years had chancellor been,
No more suits did remain;
The same shall never more be seen,
Till More be there again."

The poet was wrong, however. We need not go far for an instance of a living judge to whom the same merit may be as justly ascribed; and a correspondent has enabled us to celebrate the circumstance as melodiously: —

"A judge sat on the judgment seat,
A goodly judge was he;
He said unto the registrar,
'Now call a cause to me.'
'There is no cause,' said registrar,
And loud laughed he with glee,
'A cunning *Leach* hath despatched them all,
I can call no cause to thee.'"

### EVIDENCE OF SLAVES.

Both in Greece and Rome nothing was so common in all trials, both civil and criminal, as to resort to the evidence of slaves, which was always extorted by the most exquisite torments. Demosthenes says, (in Oratorem, orat. i.) that when it was possible to produce for the same fact either freemen or slaves as witnesses, the judges always preferred the torturing of slaves as a more certain evidence. Cicero, however, seems to think this evidence not so certain as the testimony of free citizens. Orat. pro Cœlio.

### JUDGE ROOKE.

Judge Rooke, in going the Western circuit, had a large stone thrown at his head; but from the circumstance of his stooping very much, it passed over him. "You see," said he to his friends, "that had I been an upright judge, I might have been killed."

### MR. CURRAN.

The Irish judge, Day, who was not overburdened with briefs when a barrister, obtained his promotion, through court favour, to the judicial chair of the county Dublin sessions — house at Kilmainham, and it was rumoured that he had declined all further bar practice. It was asked, on whom the chairman conferred the bar bag? (A phrase implying all his briefs, fees, and recommendations to practice.) Curran answered, that "the chairman would certainly keep it himself, for he was too generous a man to confer an empty compliment."

# The Legal Observer.

VOL. I. SATURDAY, MARCH 26. 1831. No. XXI.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## TO THE LORD CHANCELLOR.

### LETTER V.

ON HIS LORDSHIP'S MODE OF DESPATCHING APPEALS.

MY LORD,

PERMIT me once more to intrude upon your notice in a matter of the highest importance to the country and to your Lordship. I may be first allowed to disclaim any want of confidence in your talents, integrity, or fitness for the situation into which your Lordship has elevated yourself. I have watched most carefully the whole of your conduct since you have held the great seal. I have scrutinised most severely all your actions and all your speeches, and am satisfied you have the good of the country at heart. I most cordially despise the attempts which have been made to detract from your noble efforts to relieve the administration of justice from some of its burdens, and rejoice that your Lordship has been able so triumphantly to defend your conduct. No assistance is necessary to you, or it would be most heartily rendered; but you have only to follow up the rational and moderate reforms you have commenced, and singly you may take the field against all the foes that attempt to assail them.

It has indeed been said, my Lord, and the opinion has received the countenance of some persons whose words are entitled to some attention, that your Lordship's measures are, to use a familiar but expressive term, "a mere job;" that you have availed yourself of the absence of the Chief Baron to hurry through a measure which will displace almost all the persons whom he considered competent to fulfil the duties of office, and which will enable you to bestow on your own friends ten or twelve valuable appointments. All this I merely allude to in order to declare my sincere belief that no such unworthy motive has actuated your Lordship. On the contrary, as I have said before, I am confident that your Lordship had the good of your country at heart when you proposed your late measures. My hopes then mainly rest on your Lordship, and I should be grieved if there were any real ground of complaint against you.

These being my feelings, my Lord, I have heard with great regret of a late decision of your Lordship, and of the words in which that decision was made. I allude, my Lord, to the case of *Portman* v. *Mills*, which came on before your Lordship for hearing on Thursday and Friday, the 17th and 18th of the present month. I understand, that throughout the whole of this important and difficult cause, considerable impatience was manifested by the Court; but that it was shown most conspicuously on a dispute between the counsel concerned in the cause whether the word "*customary*" was inserted in a particular agreement. I understand, your Lordship at the close of the discussion, hastily exclaimed, addressing one of the counsel who had been most strenuous in the argument, "Would to God, Mr. Lynch, that it (the word customary) had been there, as I should then have been spared all this discussion." I am told, moreover, that at the close of the argument of counsel, your Lordship, without one moment's hesitation, confirmed the decision of the court below, adding only these extraordinary words, "I shall not assign my reasons, nor can I ever do so when the arguments of counsel have been so long as they have been in this cause."

Now, my Lord, if these, or any others having the same meaning, were your words, allow me to say that if they are to be adhered to, there is an end of the administration of justice in this country. You will

indeed dispose of the business; the appeals will be despatched most truly; but your Lordship's registrar, or your Lordship's footman, will answer as well as your Lordship. If no reasons are to be given, there is an end of all security to the suitor. Lots or dice will be as satisfactory. It is as much your duty, my Lord, to give your reasons for your decisions, as it is your duty to decide. Should you adhere to your determination, thus hastily expressed, the lodging an appeal to your Lordship will be a wretched and useless mockery. Better would it be for you to take the list at once, and decide them all in one half hour, than go through the form of appearing to hear them. There would then indeed be no delay! Your paper would then be clear; your arrears at once cut off; you might then come forward and declare that you had surpassed all other Chancellors; you might then deliver a beautiful speech in the House of Lords, and this might be its form, "I am now able to acquaint your Lordships that there is no cause remaining unheard in the court in which I preside. I have adopted a course, which, although it be without precedent, is simple and clear, and which has been completely effectual. I am of opinion that the greatest quality in a judge is despatch. If I only can save time I shall justly merit the applause of my country. If a cause be only decided, that is all that is necessary. If right, well, but if wrong, still well, so that it be decided. The practice of giving reasons for the judgment merely occupied the valuable time of the court, and I have, therefore, discontinued it. Moreover it occupied the valuable time of the judge, which was much worse; because he could employ it for the benefit of his country if it were not thus engaged. It is absurd, my Lords, to suppose that a judge need listen to counsel; or that he need trouble himself with the wearisome details of the cause. I have proved to your Lordships that he need give no reasons for his decision; why, then, embarrass himself with its facts, or the conclusions from those facts. If he need give no reasons, which I have proved, he need not care about either the facts, or the law of the case: the drama may still be played, the decision may be made; and the parties are the more likely to be satisfied, because there will be nothing that they can lay hold of. If no reasons be given, the ignorance or inattention of the judge cannot be discovered; and while he is apparently listening to a cause, he can be employing his faculties in schemes of universal philanthropy, and projects which will benefit the whole world."

This, my Lord, may be your happy task. You may thus announce the delightful news of there being no longer any arrear in the Courts of Chancery; and felicitate yourself on the success of your plan.

Permit me one word more, my Lord, as to the reason assigned by your Lordship for not giving your judgments at length, which you say is the length of the addresses made by counsel. Surely you must be aware, that if you refuse to hear counsel, or render it irksome for them to address you, you refuse to hear the suitor. It is the right of the suitor that is injured; in general he can only address the court in person, or by counsel. Your Lordship will hardly prefer a personal application to the course more usually adopted. The counsel employed in each particular case are selected to represent the interests of the suitor, and if they are not heard and attended to, nay, if they have not every facility in discharging their duty, it is the suitor who is injured. Justice is, to a greater or smaller extent, denied. The whole case must be fully heard. It may be tedious and wearisome; the same arguments as your Lordship has complained of, may be repeated over and over again; all this may be irksome and distressing to your Lordship, but it must be endured: far better is it that the decision should be somewhat delayed, if it be made at last after a complete exposition of all the matters necessary to render it just and beneficial; far better is it that it should be somewhat protracted than that it should be founded on false reasons, or on no reasons at all. The decision of a judge is to be a beacon to those who are wandering in pursuit of justice; its foundation must be sure and stedfast, or it will only mislead. *Lex plus laudatur quando ratione probatur*, is the old law maxim which has been handed down to us from judge to judge, and your Lordship has brought forward no argument to make us think it incorrect.

And now, my Lord, permit me to assure you that this letter is written in no unfriendly feeling to you. I have been and shall be ready to give the humble tribute of my admiration to any measure of your Lordship which deserves it. I have thought it my duty, however, thus boldly to address you, because I have an earnest desire to see you continue to benefit your country by holding your present office, and I shall not shrink from any personal responsibility attending it, "*potestas modo veniendi in publicum sit, dicendi periculum non recuso.*" But I

repeat that I shall be the first to hail a change of opinion or practice on the part of your Lordship.

I have the honour to be,
My Lord,
Your Lordship's most humble servant,
A BARRISTER.

Lincoln's Inn, March 23. 1251.

## SKETCHES OF THE BAR. No. III.

### LORD PLUNKET.

WE had intended from our own sources to have given a sketch of the forensic talents of Lord Plunket: but are willing to suppose them more imperfect than those which arise on the spot of his birth. We therefore make the following extracts from a sketch of this eloquent advocate in a Dublin publication, the *National Magazine*. Making allowances for a little extra rhetoric, it appears to us an interesting paper.

Lord Plunket was the son of a presbyterian minister, who died, leaving his family plunged in distress: by the assistance of a friend he was enabled to pursue his collegiate studies, as the preparatory step to the attainment of a profession. The fact of his Lordship's having been brought up among dissenters may have had no slight influence on the formation of his character. Whatever may be the peculiarities of dissenters, it must be admitted that their tenets and conduct encourage boldness of thought and freedom of discussion, prompt men to express their feelings freely and maintain them resolutely, to respect the sacred rights of conscience, and worship liberty as a goddess deserving of unmixed and continual devotion. The presbyterians were foremost in spirit, intelligence, and power; they had raised Ireland from the degradation into which she had fallen, achieved her independence, and they were justly proud of the noble work which they had accomplished. Bred up amongst such a class, his Lordship must have imbibed liberal opinions — his enemies assert they bordered upon republicanism; but heartless men cannot discriminate between a virtuous enthusiasm for liberty and a wild revolutionary spirit. His Lordship became a member of the Historical Society, in its best days a society which, whatever bad habits it may have engendered, is entitled to the lofty praise of having been a noble school for the instruction of the noblest faculty which the bounty of heaven has bestowed on man. He soon attained eminence as a speaker; his eloquence was bold and rapid, nervous and impressive, as it continues at the present day, save that it is matured by wisdom and tempered by experience. He quoted no verses; he delivered no mean conceptions wrapped up in pompous words. avoided rant and declamation; speaking logically and brilliantly, he delighted his audience by the charms of his eloquence, no less than he convinced their judgments by the soundness of his reasonings.

Lord Plunket's university character travelled before him to the bar, and prepared his friends for his early and signal success. When keeping terms in London he was an ardent student, and never man devoted himself more eagerly to the mastery of the most recondite learning of his profession. In his person was strikingly disproved the silly but too prevalent opinion, that unabated perseverance is incompatible with splendid genius. One of his earliest friends was Archbishop Magee, with whose capacity and learning the public have been long familiar; the intercourse and intimacy of such men must have been equally beneficial to both; the literary triumphs of the one must have stimulated the other by a noble rivalry to perseverance. Their political disagreement in after life diminished the friendship which had been formed and cemented in their youth, when their opinions could scarcely have been discordant. The charge of inconsistency brought against either might be obviated by considering that the question on which they differed most widely had not then engrossed the attention of the public. But Lord Plunket had another and dearer friend in Mr. Burrowes; their attachment has been deep and lasting — alike honourable to both — the growth of mutual esteem and mutual affection. And no circumstance reflects more honour on Lord Plunket's character as a man than the unalterable regard with which he has repaid the unshaken friendship of Mr. Burrowes — a friendship of which the highest individual in the land might feel justly proud.

The success of Lord Plunket at the bar was prompt and decisive, and that at a time when eminence was not of easy attainment — when every inch of the ground was disputed by numerous rivals of extraordinary merit. He had to contend with the sweet tongued and persuasive Burke, whose seductive oratory enchanted every ear — the sound learning and serious logic of Saurin — the wisdom and experience of Burston — the power and simplicity of Burrowes — the irresistible wit, the deep and touching pathos of Curran. I am tempted to pause and ask, where are we to look for the worthy successors of such men? The attorneys may answer, Messrs. Bennet, Perrin, Litton, Wallace, O'Lochlin, Doherty — unquestionably good lawyers, and respectable men. They are modest, I am satisfied; and would feel conscious that they could be compared to the illustrious individuals, who, fortunately for them, have now left the field, only in the bitterness of derision. The oratory of the Irish bar has been sneered at, it will now be sneered at no more. The genius of eloquence has nearly fled to make way for declamatory ebullitions, nerveless insipidity, or prosing tameness.

Lord Plunket was engaged in the celebrated case of the petition to the Irish House of Commons against the return of Hutchinson for the University of Dublin. His printed speech on that memorable occasion is excellent of course, but certainly not superior to that delivered by his friend Mr. Burrowes. They did all that men could do, and failed; for what can the sublimest

eloquence achieve when matched against hardened and profligate corruption? His practice at this time was extensive, and he possessed every requisite as a lawyer, to preserve and extend it; while his acknowledged superiority as a public speaker marked him out as likely to be a powerful ally to any political party to which he might become attached. He was introduced accordingly into the Irish parliament, in the days of its grossest corruption, and soon became one of the most conspicuous public characters of the time. The speeches delivered by his Lordship in the Irish House of Commons are deeply interesting. There is a recklessness about them which seizes the attention, and compels you to believe in the earnest sincerity of the man who could employ such daring language. He thundered forth his invectives with the most unsparing fury, and lashed his opponents with merciless and incessant sarcasms; ridicule he disdained; scorn, hatred, and revenge were the weapons of his wrath.

In the debates upon the union his passion was ungovernable, his indignation boundless; he vented his rage upon the devoted head of Lord Castlereagh with relentless bitterness. The few sentences in which he drew a comparison between Mr. Pitt and Lord Castlereagh are unequalled for the unmingled expressions of contempt: "The example of the prime minister of England may deceive the noble lord. He has his faults; he abandoned in his latter years the principles of reform, by professing which he had obtained the early confidence of the people of England, and in the whole of his political conduct he has shown himself haughty and untractable; but he has shown himself by nature endowed with a towering and transcendant intellect, and that the vastness of his moral resources keeps pace with the magnificence and unboundedness of his projects. I thank God that it is much more easy for him to transfer his apostasy and his insolence than his comprehension and sagacity; and I feel the safety of my country in the wretched feebleness of her enemy. I cannot fear that the constitution which has been formed by the wisdom of sages, and cemented by the blood of patriots and of heroes, is to be smitten to its centre by such a green and limber twig as this." Of quotations he has ever been most sparing, especially of poetical morceaux, which are the vulgar embellishments of inferior orators; but whenever he did adopt them, they were singularly felicitous, and pointed in their application. The following passage from a speech upon the union furnishes a striking exemplification of this. "The independence of a nation I must own does not appear to me to be exactly that kind of bagatelle which is to be offered by way of compliment, either to the youth of the noble lord who honours us by his presence in this house, or to the old age of the noble marquis, who occasionally sheds his setting lustre over the other: to the first I am disposed to say, in the words of Waller,

'I pray thee, gentle boy,
Press me no more for that slight toy.'

And to the latter, I might apply the language of Lady Constance; 'that's a good child, — go to its grandam, — give grandam a kingdom, and its grandam will give it a plum, a cherry, and a fig — there's a good grandam.' I hope therefore, sir, I shall not be thought impolite if I decline the offer of the constitution of Ireland either as a garland to adorn the youthful brow of the secretary, or to be suspended over the pillow of the viceroy." A classical quotation of his lordship in the Imperial Parliament was likewise remarkable for strength and application; it was that wherein he compared the fury of the excluded Catholics to the

'Iræ leonum
Vincla recusantum.'

It must be admitted that however the vehement adjuration and passionate appeals in his union speeches, may have been warranted by the excitement of the moment, yet when perused calmly at this distance of time they appear to border upon the ridiculous; as where he exclaims, "for my own part I will resist it to the last gasp of my existence and with the last drop of my blood, and when I feel the hour of my dissolution approaching, I will, like the father of Hannibal, take my children to the altar, and swear them to eternal hostility against the invaders of their country's freedom." His lordship has changed his mind wonderfully for the better; and relaxing somewhat from the sternness of his Roman (?) resolution deemed it more consistent with the character of parental affection instead of swearing his sons to eternal hostility at the altar to swear them into snug official situations.

He entered the imperial parliament, member for the University of Dublin; nor could that learned corporation have selected a representative better qualified to uphold their dignity and the honour of the country. How unlike the fate of Flood was that of Plunkett, in the English House of Commons; the first with every attribute of greatness failed, the triumph of the latter was complete. His sound judgment soon taught him to adapt his style to the serious character of his hearers. Hence it is that although a sarcastic vein prevails in many of his speeches delivered in St. Stephen's, yet the total absence of that haughty and most insulting spirit of irony, which pervades his earlier efforts, is easily perceivable. The members on the other hand soon saw the sort of man they had to deal with, they feared and respected him, and the character which he once gained amongst them he never subsequently lost. He was not a talkative member, nor did he delight in making rapid observations on the presentation of petitions; he held himself in reserve for the proper opportunity, and then showed that he knew how to use it.

The Catholic question was the theme in which his abilities shone most conspicuously; his name became identified with that great measure, and he was ever regarded as its best and ablest advocate: he was master of the subject in its principles and details, for he had considered it long and attentively; he was likewise intimately acquainted with the country which it more immediately concerned; his speeches consequently teemed with cogent arguments and valuable information on the matter. His admirers say

that his speech delivered in 1813, in bringing forward the Catholic question, was his most brilliant and triumphant effort in the British senate: but I conceive that all his speeches on this subject are equally excellent and convincing; they are even finished compositions — every sentence is perfect and compact; the speaker seems resolved not to detain you a moment longer than is necessary, his mind hurries on to the conclusion. How forcible are his illustrations; "The time to have paused was before we had heaved from those sons of earth the mountains which the wisdom and terrors of our ancestors have heaped upon them: but we have raised them up and placed them erect — are we prepared to hurl them down, and bury them again?" It is admitted that in the debate on this question, he excelled every other speaker; Canning joked sometimes, Castlereagh blundered, Brougham got furious, but Plunket, equally elegant, was more guarded and convincing. All was respect and attention when he spoke; I never saw a man listened to with such marked attention, nor heard cheers so loud and triumphant, as those which accompanied his forcible and conclusive sentences. The most remarkable of his speeches upon other subjects, was that spoken on the Manchester riots; his power was such, that by turning round to assist the government and assault the radical faction, he may be said to have saved the country from ruin. At that unhappy time the discontent of the people was so fierce and violent, the schemes of sedition so numerous and powerful, that the government of the country might be said to be reeling from its position. Plunket lent his aid to prop it up, and by what was considered an astonishing effort of argument and eloquence, gave to the frightened House of Commons the tone and the temper which the house required; he spoke to the radicals of the day as "incendiaries, with their levers placed under the great pillars of social order, and heaving the constitution from its foundation." And yet distinguished critics have termed this speech feeble and degenerate, compared with those inimitable specimens of masculine, chaste, epigrammatic, vehement eloquence, which the oration on the Catholic question betrayed. He has been accused of resting too much "*upon the general notoriety of facts*," in the debate on the Manchester riots; the Edinburgh Review observing it was just such a speech as a lawyer might make up from his brief. After this criticism from the Edinburgh, it is amusing to turn to the Quarterly; — what does it say of Plunket and his speech? "As might have been expected from the known character of Mr. Plunket's public speaking, his speech is eminent for the unlaboured clearness and compactness of its reasoning, for the noble simplicity of its style and manner, and for the soundness and devotion of its political views." The reviewer then descants upon Irish eloquence, and bestowing upon it a just and splendid encomium proceeds to observe, that Plunket's style *was all over English*. A most admired passage may not be entirely inapplicable to the present times. "To whom are these calamities to be attributed? Is it not to those, who, actuated by selfish motives of ambition, (no, I will not say ambition, I will not squander away a word often applied to nobler aspirations, to such base designs,) is it not to those who seek mischief for mischief's sake, who would let loose the whirlwind, though with the conscious incapacity to direct it? Who would lay the fabric of social order in ruin, not so much in the hope of rising upon that ruin, as for the satisfaction of contemplating the havoc they have made?" It is most strange to find two such eminent publications differing upon the merits of a speech, even as a composition. I entirely subscribe to the criticism of the tory journal, although I do not assent to the fairness of the observation that his style is all over English.

Lord Plunket preserved his reputation in the senate by speaking but seldom and speaking well, but still it must be admitted that men like learning; and Brougham who displayed such abilities and information in a vast variety of subjects discussed in parliament, deserves far higher praise than the subject of this sketch, whose exertions were confined within a comparatively narrow sphere.

With Lord Plunket's powerful forensic efforts, every person of taste must be intimately acquainted. Considering his talents as an advocate, it seems somewhat strange, in looking over the mournful catalogue of Irish state trials, not to find his name appearing as counsel for the accused. He seems to have stood aloof; to have given way to Curran, his less solid, but more brilliant, contemporary; the ardent character of the latter eminent person tempted him to mingle more with the people: he was one of themselves, and it was natural that they should fly to him for help, when the strong arm was raised against them.

For nearly twenty years his lordship practised only in chancery; for the business of which court his wonderful sagacity peculiarly fitted him; he was not remarkable for his knowledge of case law, nor did he bolster up his argument with decisions in point; frequently, however, his purpose appeared to have been rather to puzzle the judge than to establish his client's case. It has been said, that Plunket ought always to have been counsel for the defendant; for out of the plaintiff's case he was able to extract arguments to defeat him; and I have heard, but cannot vouch for the fact, although it seems not improbable, that when a case would be called on in which he had hardly looked at his brief, he would say, "Well, no matter; Saurin knows the case, and will say enough for himself, and for my purpose too:" thus he always cut a staff at his adversary's hedge to beat him with. Two memorable jury cases prove, in a signal manner, the depth of his understanding, and the vigour of his eloquence. The first — the case of the prerogative information against the chief barons, in 1816, is still fresh in the recollection of the profession and the public; such a blaze of eloquence, on so dry a subject, never before astonished and delighted an Irish audience. Plunket's speech was not showy and ornamental, but replete with antiquarian and recondite learning; sometimes, amidst the profoundest train of reasoning, a sarcastic reflection would escape him. His attack upon Mr. Saurin was intemperate, but

useful, as it afforded an opportunity for the present chief justice for the delivery of one of the most beautiful speeches in reply, ever made in a court of justice. The second trial to which I allude, was that of Hardwick and others, for a conspiracy to create a riot, in 1823. The statement of the then attorney general, Plunket, was classical, energetic, and luminous; many parts, on a calm perusal, resemble a beautiful historical composition; as, for example, the following character of William the Third:—"Perhaps, my lords, there is not to be found in the annals of history, a character more truly great than that of William the Third. Perhaps no person has ever appeared on the theatre of the world, who has conferred more essential or more lasting benefits on mankind; in these countries, certainly none. When I look at the abstract merits of his character, and contemplate him with admiration and reverence—lord of a petty principality—destitute of all resources but those with which nature endowed him—regarded with jealousy and envy by those whose battles he fought,—thwarted in all his counsels, embarrassed in all his movements, deserted in his most critical enterprises, he continued to mould all those discordant materials, to govern all these warring interests; and merely by the force of his genius, the ascendency of his integrity, and the immoveable firmness and constancy of his nature, to combine them into an indissoluble alliance against the schemes of despotism and universal domination of the most powerful monarch of Europe, seconded by the ablest generals, at the head of the bravest and best disciplined armies in the world, and wielding without check or controul the unlimited resources of his empire. He was not a consummate general—military men will point out his errors in that respect—fortune did not favour him, save by throwing the lustre of adversity over all his victories. He sustained defeat after defeat, but always rose *adversis rerum immersabilis nudis*. Looking merely at his shining qualities and achievements, I admire him as I do a Scipio, a Regulus, a Fabius; a model of tranquil courage and probity, and armed with a resolution and constancy in the cause of truth and freedom, which rendered him superior to the accidents that controul the fate of ordinary men." The excellence of this glowing description will induce the reader to pardon the length of the quotation.

Enough has been said of his forensic eloquence to show that it was of matchless force, and sufficiently elevated to raise the imagination to the level of great and vigourous conceptions. Has not such a man as this a right to the highest honours of his profession? And must not every one who admits and admires the supremacy of genius feel indignation, that reproaches should be hurled against a ministry for elevating to the highest station in the land, one whose talents are so various and so splendid. He possesses the rare union of high and commanding eloquence, with the most acute and vigourous reasoning powers: his natural logic exceeds that of any living public man. It is astonishing with what might he grasps the argument of an adversary, and, while he crushes it to pieces, extracts from it the matter that is to serve his purpose. But there is no trickery, no *finesse*, in this: he is not only a subtle, but a bold, logician; he does not nibble away a point from his antagonist, but tears it from him by main force; yet always so as to appear to have reason and fairness on his side. He is collected in debate, but never cold; he is seldom fiery, but then he is never frigid: he is at once skilful and strong; and when his adversary is once thrown, we scarcely know whether it was by adroitness or by force. And yet, after all, I cannot help thinking, that if he had accepted the office of Master of the Rolls, and settled in England, he would have injured his fame, and lost a portion of that high renown he now happily enjoys. In parliament he would always have maintained his ground; he might have made a good equity judge; but the bar over whom he was to preside had been accustomed to the immense erudition of Lord Eldon, to the profound wisdom and luminous decisions of Sir William Grant; to either of whom, as equity judges, it may not be deemed presumptuous to assert, Lord Plunket would have been decidedly inferior. Mackintosh must have ranked above him as a philosopher and an author; for Plunket has given the world no proofs that he is either; while Brougham, his equal in the senate, would have cast him completely into the shade as a universal scholar, as the founder of noble institutions, the friend of science, the encourager of learning, the patron of every good and useful work. Lord Plunket's memory and talents cannot speedily be forgotten; but these illustrious persons have better and more substantial claims upon the attachment of mankind, and their glory will assuredly be more solid and enduring.

## THE UNIVERSITY OF LONDON—LAW CLASS.

### LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

No. II.

THE chief subject announced for consideration in this lecture was, the extent or meaning of the words "special promise to answer for the debt, default, or miscarriage of another person," with the view to determine in what cases a compliance with the enactment relative to that description of promise is necessary.

From a review and minute critical examination of several of the earlier cases, Mr. Theobald inferred, that at first the words quoted were understood by the courts to apply to promises of guarantee exclusively. Thus in *Buckmyr* v. *Darnell**, the defendant's promise, namely, that if the plaintiff would lend his horse to *A. B.*, *A. B.* should return it safe, was held to be within the statute, "because, (says Salkeld, abridging the reasoning of the court) the promise came in aid only (that is, he was

* 1 Salkeld, 27.

an accessory or surety, and not a principal) to procure a credit (that is, the loan of the horse) to the party, and there is a remedy against both according to their distinct engagements." In *Read* v. *Nash*[a], on the contrary, where it appeared that no other person was obliged as principal debtor, and therefore that the defendant was a surety, the case was held not within the statute. Now, said the lecturer, had it not been previously determined that the statute applied to guarantees only, the consideration that the promise in the former case was a guarantee, and that that in the latter was not, would not have been decisive of the question, whether those promises were within the statute. The lecturer next adverted to the recent case of *Kirkham* v. *Martyr*.[b] There the defendant's son was alleged to have ridden to death the plaintiff's horse, and the defendant promised him a sum of money in compensation. The material facts in this case were identical with those in *Read* v. *Nash*. In both cases an injury had been, or was alleged to have been, committed; in both, a third person promised a compensation; in neither was the person who committed the injury a party to the agreement for a compensation; yet, in the latter case (*Kirkham* v. *Martyr*) the court decided the defendant's promise to be within the statute, on the ground that it was a promise to answer for a "miscarriage." *Read* v. *Nash* therefore is overruled, and in future, not only promises of guarantee, but promises to answer for the *torts* of others, must be in writing.

We have not space for more than an illustration of Mr. Theobald's views respecting the policy of this decision. Whilst, said he, the words alluded to were understood in their most probable sense as applicable to guarantees only, principle and harmony prevailed in the decisions; but, from giving the word "miscarriage" a literal interpretation, without regard to the context, the question arises, whether a literal interpretation should not be applied to the rest of the enactment; and if not, two inconsistent rules of interpretation exist concurrently, according to one of which many cases which have been excluded from the statute ought to be included, and according to the other, many included which ought to be excluded. For instance, upon a literal interpretation of the words "promise to answer for the debt of another," *Goodman* v. *Chase*[c], and many analogous cases which have been excepted from the statute, would be within it; because, although the defendant was not a surety by reason of the effect of his agreement in extinguishing the liability of the principal debtor, still, at the time his promise was made, the debt was not his own, but strictly and literally "the debt of another."

Mr. Theobald next reviewed the cases taken by judicial decision out of the statute. *Goodman* v. *Chase*[d], *Browning* v. *Stallard*[e], *Tomlinson* v. *Gill*[f], *Anstey* v. *Marden*[g], *Williams* v. *Leper*[h], *Bampton* v. *Paulin*[i], *Burrell* v. *Trussell*[k], *Houlditch* v. *Milne*[l], and *Castling* v. *Aubert*[m], were the chief of those cited; and the results of which he stated to be that the following agreements are not within the statute: 1. Agreements, by the express terms of which the creditor loses his right to recover against his original debtor. 2. Agreements, by the legal operation of which the creditor loses his right to recover against his original debtor. 3. Agreements, accompanied with a relinquishment by the creditor to the surety or promiser of any securities of any kind, on which he has a lien for the sum promised. 4. Wherever the creditor sells his debt, the promise of the purchaser to pay the price is not within the statute.

Referring to *Gall* v. *Comber*[n], and *Grove* v. *Dubois*[o], Mr. Theobald next discussed, whether the guarantee of a broker on a *del credere* commission was within the statute, and he concluded by announcing for his next lecture, the subject of the extent and the construction of the obligation of surety.

## REVIEW.

*Supplement to the Practice of the Courts of King's Bench and Common Pleas, &c.* By William Tidd, Esq. London, 1830: Saunders and Benning. H. Butterworth.

THE industry of Mr. Tidd has been again employed for the benefit of the profession in preparing his Supplement to the Practice. In this work he has introduced the cases on the subject of Practice which have been decided since the last edition of his work: and the alterations effected by the new statutes. In an appendix will be found at full length the 1 Wil. 4. c. 70. "for the

[a] 1 Wils. 305. [b] 2 Barn. & Ald. 613. [c] 1 Barn. & Ald. 297. [d] 1 Barn. & Ald. 297. [e] 5 Taunt. 450. [f] Ambler, 330. [g] 1 New R. 127. [h] 3 Burr. 1887. [i] 4 Bing. 264. [k] 4 Taunt. 118. [l] 3 Esp. N. P. C. 86. [m] 2 East. 325. [n] 1 J. B. Moore, 279. [o] 1 Term R. 115.

more effectual Administration of Justice in England and Wales," and forms altered according to the provisions of that statute.

Among the additions which are to be found in the Supplement is a full treatise on the law of "tender." It commences at page 10, and extends to page 36 of the Practice. He begins by giving a definition of a tender as "an offer to pay a debt or perform a duty." He proceeds to point out, in what cases it is allowed, and in what not allowed: — when it is necessary, and when not, — in what cases it is a perpetual bar, — when it should be made, — by and to whom, — in money or bank notes, and when production of money is necessary. He then considers the cases in which a larger sum than that due is tendered; when change is required where the debt is due to several persons. It is then shown that it must be unconditional. He points out the instances in which it ought to be pleaded, — where it may be pleaded with the general issue, — the form of the plea and when it may be pleaded, — shows the effect of a tender in admitting the contract, and describes the subsequent proceedings in the cause. He concludes with a statement of the law on the subject of costs in such cases which we subjoin. "Where the defendant in *assumpsit* pleaded *non assumpsit* as to all but a particular sum, and as to that sum a tender, and on the trial the fact of the tender is found for him, but that the sum tendered was not sufficient, by which the plaintiff has a verdict on the general issue and judgment for his damages and costs, in such case there is not an instance of the costs of the issue on the plea of tender ever having been taxed for the defendant. So where in a similar case the issue on the plea of tender was found for the plaintiff and on *non assumpsit* for the defendant, the plaintiff was holden to be entitled to the general costs of the cause. And a tender and payment into court, by which the plaintiff's claim is reduced below forty shillings will not entitle the defendant to enter a suggestion on the London Court of Conscience Act, although the issue on the tender be found for the defendant."

We make the following extracts on the subject of fees receivable by the officers of the courts.

"It has been made a question, whether the officers are entitled to take extra fees for business done on legal holidays in *vacation*: and upon this subject Lord Ellenborough is reported to have said, in the case of *Tweddale* v. *Fennell*, that the officers, though they may *keep* holidays, must not be allowed to *sell* or make a traffic of them: but it should be observed, that in this case an extra fee had been taken by the clerk of the declarations, on the feast of St. Peter; which, though mentioned in the statute of 5 & 6 Edw. 6. is not considered as a legal holiday in *term* time. This question, however, came directly before the Court of Common Pleas, in the case of *Martin* v. *Bold*, but was not decided. In that case, the deputy sealer of writs, being at his office on a legal holiday, (that of St. Luke, which falls on the 18th of October,) a writ was offered him to seal, which he refused to do, without an extra fee; and the Court, without deciding on his right to make such a demand, held that at all events his refusal to seal the writs was not an offence, for which they would grant an attachment: so that the question may be considered as still unsettled. It has been determined, that the clerk of the papers in the Fleet Prison is entitled to the fee of 2*s.* 6*d.* on every action from which a prisoner is discharged: but the warden of the Fleet cannot demand an additional fee for expedition in returning a writ of *habeas corpus*: and it seems, that the prothonotary of the Whitechapel Court of Requests is not authorized in receiving of a plaintiff, at one payment, all the fees necessary to bring his cause to issue, *before* the suit is at issue.

"The *quantum* or amount of fees, anciently payable to the officers of the Courts, have been settled and ascertained from time to time, by acts of parliament, or the king's letters patent; or by commissioners appointed under the great seal, to enquire into and examine the same; or by the judges; or a jury of officers, clerks, and attorneys, impannelled and sworn for that purpose; or by the verdict of a jury, on a *quantum meruit*.

"In the King's Bench, a table or note of the fees due and time out of mind used to be paid to the prothonotaries, or chief clerks, on the *plea* side of the Court, and to their clerks, was presented by a jury of attorneys, upon oath, by virtue of his majesty's commission, in April 1630; which table was kept in the King's Bench Office, where it was burnt in the great fire of London. In the Common Pleas, it appears that certain fees belonging to the prothonotaries, *custos brevium*, clerk of the treasury and his clerks, and the filazers for common process, were allowed and ascertained by the Judges of that court, as far back as the thirty-fifth year of the reign of Henry the Sixth: and, in the reign of James the First, orders were made by the Judges, concerning the exaction and excessive taking of fees; by which it was ordered, that 'an exact examination should be had in every court, and in every office, what fees were anciently taken and due, for every thing done in that Court, and what had been exacted by colour of erecting new offices, or for *post diems*, or in respect of expedition, or upon any other pretence or colour whatsoever; and that the like should be done by the justices of assize, for fees belonging to the clerk of assize, or of the peace, sheriffs, or other officers whatsoever, within their circuits; and that then, the true and ancient fees being known, they should be set down in tables in every court, and for every circuit, there to remain in such places as the Judges of those several courts and circuits should assign and

appoint.' Lists were accordingly prepared of the fees claimed by the *custos brevium*, and other officers of the Court of Common Pleas, in right of their offices; which were referred to a jury of attorneys, who certified thereon: and, in the beginning of the reign of Charles the First, the king having appointed commissioners for enquiring after exacted fees, and innovated offices, tables were made out of the fees due to the chief justice and other justices, and to the *custos brevium*, and other officers of the Court of Common Pleas: and in 12 Car. 1. (1636) the fees due and belonging to the three prothonotaries of that Court, for entries of declarations, pleas, and judgments, and also for the making and entering of writs in their several offices, and for other dues belonging to them, were confirmed and allowed by King Charles the First, by his letters patent, under the great seal of England.

"In the time of the Commonwealth, a rule of Court was made, in the Upper Bench and Common Pleas, that 'a jury of able and credible officers, clerks and attorneys, should, once in *three* years, be impannelled and sworn, to enquire, (amongst other things,) of new or exacted fees, and of those that had taken them, under whatsoever pretence, and to prepare and present a table of the true and just fees, that the same might be fixed and continue in every office, and likewise for the Marshalsea and Fleet prisons;' but these rules have fallen into disuse. Tables of fees, however, of all the courts at Westminster, appear to have been presented to the House of Commons, in 1693, pursuant to an order for that purpose: which tables contained not only the fees due to the Judges and officers of the Court of Common Pleas, but also to the officers on the *plea* side of the Court of King's Bench, and of the Crown Office: and to the Masters of the Court of Chancery, and their clerks; and the fees taken in the office of pleas of the Exchequer, for writs, entries, and other proceedings; together with the fees of the clerk of the peace of Middlesex, and Surrey, and clerk of the assize of the Home Circuit; and the fees of the cursitor's office. Lists of the officers, and their deputies, belonging to the several courts in Westminster Hall, with the lists, accounts, and tables of fees claimed by them, were also presented, in 1730, to the House of Commons."

## REMEDY OF ATTORNEYS IN PARTNERSHIP.

*To the Editor of the Legal Observer.*

SIR,

A CASE involving a question of considerable importance to the profession recently came before the Court of Common Pleas *, to which I would beg to call your attention. I allude to the question as to the right of an attorney, or of attorney partners, after dissolution, to commence an action for the recovery of costs for business done in a suit still pending. The circumstances were these:—The defendant Brown, a personal friend of Vansandau during his partnership with Tindale, employed him to conduct a suit in Chancery, which was carried on by V. and T. down to the time of their dissolution of partnership, afterwards by Vansandau alone, and then continued by the new partnership of Vansandau and Brown till they dissolved, and then again by Vansandau alone. At the time of the dissolution of the second partnership of Vansandau and Brown, a special case had been directed by the Court of Chancery, and up to that period the defendant had paid a considerable sum on account to Vansandau. Signed bills were delivered to the defendant separately by V. and T. and V. and Brown, with a cash account as between the defendant and the partnerships.

V. and T. and V. and B. arrested the defendant in separate actions, for the amount of each bill, and both causes came on before *Gaselee* J., when a special case was directed for the opinion of the Court.

The objections raised on the part of defendant were, 1st, that he was not liable to be sued until the termination of the suit; — 2dly, he denied a joint retainer, and insisted that he was indebted only to Vansandau solely; — and, 3dly, as to the action at the suit of V. and B., he contended that there was business charged for therein, which had been transacted by Vansandau alone, after his dissolution with Tindale, and prior to the partnership of V. and Brown, and therefore, as to that part, the latter partnership were not entitled to recover.

The defendant gave notice to produce the joint retainers. The plaintiffs' clerks proved that the defendant called repeatedly at the offices of the partnership, and that their names were painted in a conspicuous place upon the door: but on cross examination, the plaintiffs' clerks stated that the defendant had always enquired for Mr. Vansandau, and that he had not on any occasion seen Mr. Tindale. The defendant's correspondence appeared also to have been always addressed to Mr. V. and, not to the partnerships.

On the part of the defendant it was said, that the client had nothing to do with a partnership between attorneys — that a separate retainer could not be converted into a joint one against his consent—and that, as it could not be shown he had ever recognised the partnerships, the plaintiffs could not maintain their joint actions against him. It appeared too, on the trial, that Vansandau was still proceeding with the special case directed in the suit. It was attempted to distinguish partnerships between attorneys, and between others carrying on a *trade*, and that the names of the *firm*, in the case of attorneys, did not appear upon the *Roll*, &c.†

It should seem that the defendant had the benefit of the advice and exertions of the partnerships; and it may be observed, that solicitors cannot dissolve as against their client, he being entitled to their united exertions. *Cholmondeley*

* Vansandau and Tindale v. Brown.

† A party can only appoint one attorney, and cannot appear, or plead, in the name of a firm. 4 East, 195. *Ellenborough* C. J.

v. *Clinton*, 19 Ves. 275. *Cook* v. *Rhodes*, ib. in note.

And it is questionable, whether the defendant would not have been entitled to sue the partnerships for negligence, if any had been committed; and the production of the papers marked in the name of the firm, by the attorneys themselves, would probably have been evidence against them of joint employment. See *Hill* v. *Tucker*, 1 Taunt. 9. *Hellings* v. *Gregory*, 1 C. & P. 627; and *Carne* v. *Legh*, 6 B. & Cres. 124.

As to an attorney's right to withdraw his services, the cases, which are principally in equity, lay it down that he cannot do so. I have always thought that such a general rule, under all circumstances, was a hard one: for suppose the attorney to quarrel with his client, because he will not act *improperly*, as the client may require; or the client otherwise misconducts himself; it would be very unjust that the attorney should be *obliged* to continue to act against his inclination.

I understand, however, that Lord *Tenterden* has, at *nisi prius*, in more than one case, decided that an attorney may withdraw *where the client misconducts himself*. Here there is *one* exception to the general rule, and I apprehend other circumstances might arise, which would justify the attorney in declining to act any longer; and wherever he would be so justified, I should think he might clearly sue for the amount of his bill, in whatever stage he might quit the proceedings. Messrs. *How* and *Heptinstall* were concerned in an action, wherein Lord *Tenterden* held that an attorney might withdraw his services.

X. D.

## ENCLOSURE OF COMMONS.

By an Enclosure Act passed in 1760, the wastes sought to be enclosed were estimated at 3500 acres; and it was enacted, that "all" the waste grounds should, before a stated day in that year, be allotted by five commissioners therein named, "and their successors, or any three or more of them;" except such parts as should by the commissioners or their successors, or any three or more of them, be deemed incapable of cultivation, which unimprovable parts should remain common. The commissioners duly made their award by which they allotted about 1500 acres, and left 2000 acres unenclosed waste.

A clause provides, that if any of the commissioners, or any new ones appointed in their stead, should die or refuse to act, it should be lawful for the commissioners for the time being, or any three or more of them, by *writing*, to appoint commissioners in their stead. All the original commissioners died without exercising the power of appointment, and the freeholders now wish the 2000 acres to be enclosed and allotted upon the basis of the above act. Can any correspondent of the Legal Observer suggest a mode of effecting this object without obtaining a new act of parliament?

R.

## SUPERIOR COURTS.

### COURT OF CHANCERY.

#### INJUNCTION.— COMPANY.

Mr. *Knight*, with whom was Mr. *Girdlestone*, Jun. moved for an injunction to restrain the Grand Junction Water Company from applying the funds of the company bringing water from Colne in Buckinghamshire, to other purposes not contemplated by the original deed of incorporation; and moreover, to restrain them from applying to parliament to obtain an act for that purpose. The application was made on behalf of the plaintiff, a shareholder to the extent of 10,000*l*., and originated in the intention of the Company to enter into speculations which were estimated at the lowest at 120,000*l*., and which were not contemplated by the original deed of settlement.

Mr. *Solicitor-General*, Mr. *Pepys*, and Mr. *W. Russell*, opposed the motion.

The *Vice-Chancellor* thought that the Company had no right to apply the funds for any purpose not contemplated by the original deed of settlement, and granted the injunction. V. C. Mar. 12. 1831.

The defendants appealed from this order to the Lord Chancellor.

The *Lord Chancellor* thought that as to the first part of the case, the plaintiff, having become a shareholder, could not object to the application of the funds of the company which had been agreed upon by the directors of the company; and as to the last part of the application, he thought that he had no power to restrain the defendants from making an application to parliament. *Ware* v. *Grand Junction Water Works Company*, L. C. March 14. 1831.

#### MOTION TO WITHDRAW FROM SUIT.

*Garratt* moved, that upon payment of the costs incurred by three of the plaintiffs, they might be allowed to withdraw themselves from the suit; and contended that plaintiffs might always withdraw from a suit, the court taking care at the same time that the remaining plaintiff or plaintiffs, should not be in a worse situation than they were before the withdrawal of their co-plaintiffs.

*Chandless* opposed the motion.

The *Vice Chancellor* granted the motion, the three plaintiffs paying the costs up to the present time; and undertaking, if they should become defendants, to put in their answer in three weeks, and also to pay the costs of amending the bill. *Burton and others* v. ——— V. C. Feb. 18.

### COURT OF EXCHEQUER.

#### FLOGGING.

*Richards* moved for a rule to show cause, why the verdict in this case should not be set aside and a new trial granted. It was tried by Mr. Baron Bayley at the last sittings at Guildhall, and the jury found a verdict for the defendant. The plaintiff was a quarter-master on board the Scalesby Castle, one of the largest vessels in the

service of the East India Company. She sailed from the Downs in April 1829, and arrived in Macao Roads in September in the same year. The action was brought against the defendant, who was the captain of the ship, for flogging the plaintiff, on the ground of alleged mutinous and disorderly conduct. The defendant pleaded that he was obliged to inflict the flogging on the plaintiff in order to preserve discipline on board the ship. On this allegation the plaintiff took issue. The assault in question had been committed in December 1829, at the time when the ship was lying at anchor in the Macao Roads. It was now contended, that if the ship had been upon the high seas, where no assistance could have been afforded to the defendant, the case would have been materially different, the captain then might have been justified in the course he had adopted; but when the ship was in still water he was not.

*Lord Lyndhurst* C. B. It does not appear to me that there is any question raised on this record on which we can say that this rule ought to be granted. It is clear that the plaintiff took part in the mutinous proceedings on board the Scalesby Castle, and that, in consequence, he was flogged. Now, I apprehend, that the captain of a vessel has a right to inflict moderate punishment on any of the crew, for the purpose of enforcing discipline. No question can be be raised as to the right to inflict moderate punishment. As to the extent of punishment no question has been raised. On this record, therefore, I do not think any question has been raised which can enable us to grant the present rule.

*Garrow* B. I entirely concur in the opinion of his lordship. And I think that the persons most interested in this decision are the sailors themselves. For it would be dreadful for them to set out on their voyages with an opinion, that it was for them, and not for their responsible officers, to decide how the discipline of the vessel is to be carried on.

*Vaughan* B. concurred.

*Bayley* B. I think the verdict was right; and I think we should be creating a prejudice to the service by granting a rule to show cause, as we should thereby intimate that a doubt could exist on the subject. The law gives power to the captain to inflict moderate chastisement in cases of mutiny. The plaintiff says there was no cause for punishment at all; now, the defendant alleges that the plaintiff behaved in a riotous and mutinous manner. If it can only be made out that the ship was in a state of mutiny at the time, that is sufficient to justify the captain in inflicting this punishment. Now it is clear from the evidence, that the jury were justified in finding that it was so. I think, therefore, that the verdict ought to stand.

Rule refused. *Lamb* v. *Burnett*, H. T. 1831.

The learned barons in their judgments do not directly notice the objection taken to the verdict, that the captain had no right to inflict punishment when the vessel was in still water in the Macao Roads, although he might, if the vessel were at sea. But their general principle, that where the vessel is in a state of mutiny the captain has a right to inflict punishment for the enforcement of discipline, clearly shows, that the place in which the vessel may happen to be, can make no difference in the power of the captain.

---

## COURT OF KING'S BENCH.

### ECCLESIASTICAL PROPERTY.

*A.*, the plaintiff, in 1821 purchased an annuity from the defendant, a clergyman, then 76 years of age. The annuity was calculated at three years' purchase, the sum paid being 900*l.* for an annuity of 300*l.* To secure the payment of the annuity a warrant of attorney was taken from the defendant, in order to enable the plaintiff to sequestrate the defendant's living in case the annuity should be in arrear. The annuity was in arrear, and the living in point of fact sequestrated. On the death of the defendant in 1829, without process issuing, a motion was made on the part of his son to set aside the transaction on various grounds; but the objection principally insisted on was, that the warrant of attorney and sequestration issuing thereon were bad, as contrary to the statute of the 13 Eliz. c. 20. § 1. with respect to church livings.

The *Court* was of opinion, that as the warrant of attorney in this case was granted with a view to the sequestration, that and the proceedings under it were bad under the statute. — Rule absolute accordingly.* *Flight* v. *Slater*, Clerk, H. T. 1831. K. B.

---

### QUO WARRANTO. — TOWN-CLERK.

*Campbell* obtained a rule *nisi* for a *quo warranto*, calling on the defendant to show by what authority he claimed to hold the office of town-clerk of the borough of Cambridge, on the ground, that when the defendant was appointed the office was full.

The *Attorney-General* showed cause. The facts were, that a bill of indictment for forgery had been preferred against a Mr. White, who was formerly town-clerk of the borough. He fled the country, leaving a Mr. Hoare to act as his deputy, and Hoare acted as such till April last, he then died. Mr. Cowper, who had been an under clerk in the office, then claimed to be allowed to act for Mr. White, but had then no appointment, and the corporation proceeded to appoint the defendant, as if the office were vacant, with all the necessary forms. They summoned Mr. White to appear, by affixing the summons on the door of the Town Hall, and made the matter as public as possible. This was all they could do in the case of a person who had abandoned the country, and of whose return there was scarcely any hope. Mr. Cowper afterwards got an appointment executed by White in America, produced it, and claimed to act under it The corporation, however, refused to admit him, and then he applied for a *quo warranto*. It was hoped, that the rule would be discharged, as the corporation had done nothing but what it was entitled to do.

Mr. *Campbell* in support of the rule con-

---

* *Vide Monus* v. *Leake*, Clerk, and *Jones*, 8 T. R. 411. 43 Geo. 3. c. 84.; 57 Geo. 3. c. 99. *Doe d. Cates* v. *Somerville*, 6 B. & C. 126. *Doe d. Boughton* v. *Stow*, 9 B. & C. 544.

tended, that as Mr. White was alive, and had duly authorised another to act in his stead, the corporation had no right to deprive him of his office. The summons, too, was irregular; and they had not given due notice of the day on which they would appoint another clerk.

*Lord Tenterden* C. J. was of opinion, that the corporation had no right to proceed against White on the ground of the felony, because it had not been proved; but, at the same time, when a person had fled the country on an accusation of felony, and had left no appointment with any person to act for him, he thought the corporation had a right to consider the office as vacant. Hoare had been appointed, and they allowed him to act; but at his death there was no appointment, and the corporation was entitled to appoint another; and the subsequent appointment by White was not sufficient. Under other circumstances, perhaps, the summons would not have been sufficient. If a person was absent from ill-health, or any other cause, which precluded the hope of his speedy return, then it might be proper that he should have some indulgence. Here, however, the corporation could not be supposed to know where White was; nor, from the circumstances under which he absconded, could they have much expectation that he would soon or ever return. As to the day on which the defendant was appointed, it was an adjourned day, and one on which the corporation usually met, so that notice could hardly be considered as necessary. —Rule discharged. *Rex* v. *Harris*. H. T. 1831. K. B.

LEX DOMICILII.

On an appeal from the Prerogative Court in a suit respecting two codicils to the will of Mr. *John Stanley*. This gentleman was a British subject by origin, and died at Madeira in 1826, after taking out letters of naturalisation in Portugal, marrying a Portuguese subject, and renouncing the protestant religion. His will and two codicils were made according to the forms of the law of Portugal; the two codicils in question were not made according to the form of that law, but to that of the English law. They were consequently void by the law of Portugal. The codicils, which made provision for a natural son, *José Maria Bernes*, and his issue, resident at Madeira, out of personal property in the English funds, were disputed by the only legitimate son of the testator, Mr. *John Stanley* jun., born a Portuguese subject, and resident in Portugal. The question was, first, whether the testator was a domiciled subject of Portugal at the time of his death; and, secondly, supposing him to have been so, whether the *lex domicilii* should be applied to the two codicils in question, so as to defeat the declared and express intentions of the testator, who had forbidden his legitimate son to dispute their validity.

After a very elaborate argument in the court below in Hilary term, 1830, Sir *J. Nicholl* decided in favor of the codicils. From this decision Mr. *Stanley* appealed.

Their Lordships, after a full argument, pronounced their judgment against the validity of the two codicils in question.

Thus the *lex domicilii* is ruled to apply not only in cases of intestacy, but to a testamentary paper executed by a natural born British subject domiciled abroad, disposing of personal property in England. The common law judges in the commission were, Mr. J. *James Parke*, Mr. J. *Bosanquet*, and Mr. Baron *Bolland*. *Stanley* v. *Bernes*, H. T. 1831. High Court of Delegates.

COURT OF PECULIARS.

DIVORCE.

In a suit promoted by Ann Hewit against John Hewit, her husband, for a divorce, on the ground of adultery and cruelty,

Dr. *Adams* appeared for the wife. No one appeared for the husband.

Sir *John Nicholl* pronounced sentence. The husband in this case had been a widower with one daughter, and the parties were married in November 1824, at St. Andrew's, Holborn. They cohabited, first in lodgings in Hatton Garden, and afterwards removed to Mr. Hewit's house, Crofton Hall, Kent. They had issue, twins, a son and a daughter, who were born at Boulogne, in August, 1825. After the birth of the children, there had been no subsequent cohabitation between the parties. Acts of ill treatment on the part of the husband, at Hatton Garden, such as ordering the servants not to obey his wife; forcing her into her bedroom and locking her up there; compelling her to sleep separate in a garret, then in the drawing room, and finally, in the kitchen. After their removal to the country, the same treatment continued, and was aggravated by its taking place while the wife was in a state of pregnancy. Towards the end of July, 1825, he removed her to France, not allowing her to take clothes for the expected birth of a child; and, on arriving at Boulogne, he went first to one hotel and then to another, where he hired a bedroom for his wife in the garret, at the same time abusing her. The next day labour came on; but he provided no assistance for her. She was indebted to the humanity of others for assistance, and was delivered of twins. The husband stayed at Boulogne that day; but, the next morning, he abandoned his wife, leaving her without clothes or money. She remained at the hotel six weeks, supported by the kindness and humanity of the British consul at Boulogne. Mrs. Hewit wrote to her brother-in-law, and he came over and brought her to England, after paying all the debts she had contracted at Boulogne. It was with great difficulty, and then only by arresting the husband, that he could obtain repayment. The brother-in-law, under a misapprehension that the wife could not apply to this court unless she paid the costs, recommended a deed of separation, under which the wife was allowed 101*l.* the first year, and a smaller sum annually afterwards. This deed, however, was no bar to the suit in this court; and accordingly, proceedings were commenced against the husband. There was a difficulty in getting the process served on him. At length, in November, 1827, he was served with the process of the court. The charge of adultery, it had been admitted, was

not sufficiently proved; but there was quite sufficient proof of *sævitia* on the part of the husband to entitle the wife to a separation. There was extreme cruelty at Boulogne — something even more than brutal in leaving his wife in such a situation. The wife was therefore entitled to the separation prayed.

On the question of permanent alimony, on the part of the wife it was alleged that Mr. Hewit was in the receipt of 1,500*l.* or 2,000*l.* a year. On the part of Mr. Hewit, his income was alleged to be 200*l.* a year.

The court allotted 120*l.* a year permanent alimony. *Hewit* v. *Hewit.* Court of Peculiars.

---

ESSEX SPRING ASSIZES.

[We commence, in this Number, a series of *nisi prius* cases, on the Home Circuit, which will be the more acceptable from the circumstance that there are, at present, no authentic reports of the cases there decided.]

*Before Mr. Baron Garrow.*

PROMISSORY NOTE. — STATUTE OF LIMITATION.

*Fenton* v. *White and Pryke.*

This was an action to recover the sum of 200*l.* and interest, due upon a promisory note given by the two defendants on the 25th May, 1814. White pleaded the statute of limitations, and Pryke suffered judgment to go by default. In 1814, Mr. Fenton, a tailor at Colchester, entered into partnership with Pryke, and they established another business at Coggeshall. It was agreed that Pryke should bring in 200*l.*; as he was not able to do that, his relation, Mr. White, joined in giving the note in question. The *Common Serjeant* referred to Lord Tenterden's act 9 G. 4. c. ., by which it is enacted, that no verbal promise should be binding to take any case out of the statute of limitations, but there is a proviso that that act shall not affect any party where interest is proved to been paid. In this case payments of interest, and a small part of the principal, were indorsed to have been made in 1823 and 1825, and those indorsements were signed by Pryke, and he contended, that upon the case of *Whitcomb* v. *Whiting*, Doug. 651., if one of two promisers pays interest, it will revive the note as to the other, although he is not aware of the circumstance.

Mr. *Gurney* for the defendant cited *Atkins* v. *Tredgold*, 2 B. & C. 23., and said that the very first payment was in 1823, after the six years had expired, and that the writing then made by Pryke could not affect White, as it was without White's consent, and was not of itself sufficient to prove that any payment was then made.

The learned judge overruled the objection, as it could not be supposed that a man would sign any paper admitting the payment of a sum, and give that paper to another who could turn it so much to his advantage, unless the fact were so.

This point was here immaterial, as the defendant White had on the 19th February, 1830, written to the plaintiff, that he would call and pay the amount.

Mr. *Common Serjeant* and Mr. *Platt* for the plaintiff; Mr. *Gurney* and Mr. *Thesiger* for the defendant.

Verdict for the plaintiff. Damages 247*l.*

See *Burleigh and others* v. *Slott.* 8 B. & C. 56.

---

EVIDENCE. — STAMP. — PRESUMPTION. — WASTE LANDS.

*Doe d. Curtis* v. *Spitty.*

This was an action by ejectment, to prove what is sufficient to establish the right of the lords of the manor of Bures, otherwise Bowers Gifford, to the slips of waste by the side of the road adjoining freehold lands.

The lessors of the plaintiff deduced the title of the manor from the time when Doomsday-book was compiled to the present time. Some short time back the manor and advowson were separated from the manor-farm. The manor *has no copyholds* belonging to it, but it had freeholds sufficient to keep it in existence, and through that circumstance courts were omitted to be held previous to the year 1800, when Mr. Curtis became the owner.

The deeds relative to the manor were in the possession of the defendant, and the plaintiff wished to prove the conveyance of the property from the original purchaser, who had covenanted for the production of the deeds, to the defendant; and in so doing, attempted to give in evidence the draft of a deed, but Mr. Baron Garrow would not admit it; for, as soon as deeds became evidence they must be stamped, and no draft could be permitted to refresh the memory of a witness, thereby enabling him to give parol evidence of its contents. Notice was served upon the defendant's attorney after the opening of the commission, to produce a deed, which he consented to do upon being paid the expenses of sending to London for it. Mr. *Thesiger* for the defendant contended, that he was not bound to produce the deed, inasmuch as sufficient evidence had not been given, and the attorney had not agreed to pay the expenses. This objection the Court overruled, and stated, that although it was now in contemplation to enact that all notices must be given before the commission was opened, yet, until such was the case, he must abide by the present decisions, and there had been sufficient time; as to the expense, the party who is compelled to produce the evidence must bear it. [The commission was opened on Monday, and the trial was on Thursday.] In tracing the title, the court presumed, that a person who devised the premises was the survivor of three persons to whom the estate was limited in 1785.

The facts relied upon by the lessors of the plaintiff were, 1st, When Mr. Andrews, through whom Mr. Spitty derived his title to the land for which he claimed the waste, purchased it, Mr. Curtis objected to the waste being included in the particulars of sale, and the quantity of land was therefore reduced sixpence, being that part unenclosed.

2d, Two letters from the father of the defendant (who had enclosed a part of the land in dispute) admitting that he had made an en-

croachment, and offering either to pay some quitrent or throw down the banks.

3d, Several leases for lives from Mr. Curtis of the waste; the first beginning in 1800.

4th, Quitrents paid by Mr. Spitty (the father) and others, for land so leased or allowed upon sufferance.

5th, (But this was not admitted). The court-book, in which Mr. Spitty is stated to have been one of the homage. The reason of its not being put in evidence was, that the learned judge observed that the minutes signed by him, or a person who saw him act as such, were the only methods of proving the fact.

6th, Enclosures made by persons who had no estate behind, and which might have been made with the consent of the then lady of the manor; and one instance where her consent was given either as such lady or proprietor of the adjacent lands.

Those relied upon by the defendant were, 1st, The presumption of law, that where small slips of land adjoin freehold land they belong to the owners of the adjacent lands, and not to the lord of the manor. *Steel* v. *Prickett*, 2 Stark. 463. *Doe* v. *Pearsey*, 7 B. & C. 304.

2d, No custom enabling Mr. Curtis to grant leases.

3d, No proof by perambulation that the manor was coextensive with the parish.

4th, Repeated instances of the waste being used by the owners of the fields for putting their manure on, and for turning their cattle on.

5th, The cutting of bushes and trees by the owners of the adjacent lands.

The learned judge in summing up stated, that *primâ facie* all slips of waste did belong to the enclosed lands, but that was only a presumption; and it was for the jury to say whether the contrary had not been proved.

They found for the plaintiff. Damages 1*s*.

Mr. *Gurney* and Mr. *Platt* for the plaintiff. Mr. *Thesiger* and Mr. *Sheere* for the defendant.

---

LIABILITY OF SHERIFF.

*Digby* v. *Cure, Esq.*

This was an action against the late sheriffs of this county, for wasting the goods of the plaintiff. On the 8th April last a *fi. fa.*, issued at the suit of James Digby against the plaintiff, and was delivered to the sheriff. He sent his warrant to his officer, Smith, who entered and kept possession until 7th July last. The sheriff was connected with Smith by the evidence of the latter. On the 28th April the sheriff returned that the goods remained in his hands for the want of buyers. After that there was no writ of *venditioni exponas*, but Smith sold the property. The *Common Serjeant* contended, that after the return was made, the sheriff was *functus officii*, and that, as no new authority was given to him, or consequently from him, to Smith, the latter must have acted as agent for the plaintiff, he being an auctioneer as well as a sheriff's officer. Mr. *Gurney* replied, that he had an action in trover against the sheriff; and that the sheriff having once had possession, he could have been turned out.

*Garrow* B.,—after statin g the circumstances of the case—sheriffs, so far as they employ others are answerable; but they cannot be so for every act of their agents. After they have entered, it is their duty to sell the things, in order that they may make a return to the writ. If Smith had entered, and had not given proper notice, or had squandered the property, the sheriff would have been answerable. Here an execution issues, and under which Smith enters, and the plaintiff wishes a person to continue in possession, although the sheriff has made a return to the writ. Another writ should have issued, commanding the sheriff to sell immediately; but from the 28th April to 7th July Smith continues in possession, sells things by retail, and finally by auction. It would be preposterous to charge the sheriff after his officer has changed his character, and become an auctioneer. I shall therefore nonsuit the plaintiff.

---

*Pattisson* v. *Pearce, Esq.*

An action against the sheriff of this county for 1829. The plaintiff demised a farm in St. Lawrence, in 1824, to Richard Hunt, at a corn rent. On August 8, 1829, a *fi. fa.* issued at the suit of —— Wayman against Hunt, under which the sheriff entered, and kept possession till October, 1830. This action was to obtain the rent accruing from Lady Day, 1829, to Lady Day, 1830, being upon the averages 294*l.* 2*s.* 9*d.*, sufficient being left upon the premises to satisfy the plaintiff for that due at Michaelmas last. A copy of the writ and return was produced. The return was made by the succeeding sheriff, and was "for the want of buyers." The town agent of the under sheriff proved that it was the practice to endorse the name of the officer on the writ, and the day when the warrant was delivered. Smith (the officer), had admitted that he had the warrant, and proof was given that he entered, and conducted the farm, and sold the produce. *Gurney*—I propose to read the endorsement as connecting the sheriff with Smith. The *Common Serjeant*—I object. The writ and the warrant are in your power; you have subpœnaed Smith to produce the latter. The copy of a writ is not the best evidence. You have only an examined copy of an endorsement by a sheriff, and a return by a succeeding sheriff, and this is to avoid calling the best evidence. *Gurney*—I have sufficiently connected them. I prove his own admission. In *Fermor* v. *Phillips* and *Francis* v. *Neave*, 5 Br. & Bing. 26., it is decided that the endorsement is evidence, and I prove the endorsement. Serjeant *Stephen*—We only want to connect Smith. This is good evidence of Smith's being employed. We are as well provided as if we produced the writ, it being the practice to put endorsements. We produce an examined copy of a record. It is quite immaterial what sheriff made the return, and it is sufficient if a return is made. The bailiff's name on the writ is sufficient without the warrant. *Knox*—We are not bound to call Smith. In Mr. Phillipps' book on Evidence, it is stated, that it is not proper to call the bailiff, if it can be shown by the sheriff or under sheriff that he was employed; and see *Hill* v. *Lea*, 7 Taunt. 8.

*Garrow* B., after adverting to *Digby* v. *Cure*,

in which he did not recollect the cases now referred to, or he should have admitted the endorsement in that case, said — I have often seen the name of the officer on the stamp. It is more satisfactory that the writ should be produced than a copy; but, according to the copy, the word Smith is on the writ, which means that Smith was the officer who was employed. It seems that the evidence of a copy of a writ is received. Mr. Phillipps, in his very excellent work, refers to several cases in vol. ii. p. 378. There has been much contradiction of authorities as to the evidence of the name being endorsed, but it is clear that if the name is so endorsed by the sheriff or his agents, it is sufficient for the bailiff, and that the warrant is evidence without producing the writ. I shall admit the evidence, but reserve the point, that a nonsuit may be moved for.

The defendant ultimately agreed that a verdict should be entered against him.

## MINOR CORRESPONDENCE.

It was stated in the course of the meeting of creditors of Messrs. Chambers, held on the 2d of March, and which, from the very respectable quarter it came may be relied on, that creditors of the bankrupts whose debts amount to at least 50,000*l.*, have neither proved their debts or taken proceedings respecting them; and that it is much relied on by Mr. Chambers, sen. that in the event of such creditors not proving their debts before November next (which he calculates will be the case with the major part of them), they will be barred by the statute of limitations from enforcing their claims, the commission having issued in November, 1825. Whether this is the case or not, the subject is worthy the attention of solicitors who have clients circumstanced as above noticed.

### ANSWER TO QUERIES.

Sir,

With respect to the answer of C. P. F. to the query inserted in No. xviii. Page 256 of this work. I think he must be mistaken, and that the case he cites does not at all bear on the point referred to, which is, "whether a house rented as a *workshop*, is liable to parochial rates, the person occupying it living in another parish," he says, that in a case recently tried, it was decided that a *granary* is not liable to parochial rates, and for which reason he concludes, a workshop would be exempt. Now, I can bring forward two cases equally as strong, if not stronger, as they are more decided to the point in question, one of which is *King* v. *Hogg*, 1 Durnf. & East, 721. in which it was held, "that a house and engine for carding cotton, which was rented as one entire subject, and described under the general name of *an engine house*, were rateable to the parochial rates;" and the other case is *King* v. *St. Nicholas, Gloucester*, 1 Durnf. & East, 723. *note* in which it was held, that a machine house for weighing waggons was rateable to the parochial rates, there being an emolument derived therefrom.

Even with regard to the case he alludes to, (but the name of which he has not acquainted us with,) * if a man occupies a house as a granary, and from which he derives an *emolument*, then he would, I think, be liable to be rated; but if a *farmer* (*who is not liable to be rated for his stock*,) was to make use of a house for the purpose of a granary, it might then be different.

*C.* and *D.* according to the circumstances stated in No. xix. p. 303., are *not* at liberty to marry again, for it was decided that a marriage lawfully contracted in England, cannot be dissolved in *another country*, by any authority whatever. See *Rex* v. *Lilly*, Burn's Just. 637. and 1 Dow. Rep. 117.

The solution of the second query, in No. xix. p. 303. depends on two points, 1st, Whether the law of divorce in the United States amounts to a complete nullity of the marriage, which if it does B. cannot be entitled to dower in England, as she must be considered the actual wife of the party at the time of his decease; 2dly, If there are two kinds of divorce, as in England, a *mensa et thoro*, and a *vinculo matrimonii*, it would depend entirely from which of these B. is divorced.

T. E.

### QUERIES.

1. A. obtains a verdict against B. for 50*l.*, upon which a *ca. sa.* issues, and B. is locked up in the King's Bench. A. undertakes to discharge B. from custody, upon receiving the security of C. for the amount of the debt and costs. The security (a bond with condition to pay within three months from the date) is given, and B. is discharged. C. before he pays the money becomes bankrupt. Can A. prove upon the bond under the commission against C.

2. S. and P. are partners in trade; P. is an infant. It is intended to strike a docket, should the commission issue against both?

3. A. mortgages to B. his freehold estate for 1000*l.* A covenant is made that B. shall not be at liberty to call in the same without previously giving A. six months' notice in writing of his intention; can B. compel A. to pay off the 1000*l.* before the expiration of twelve months without giving A. notice?

## MISCELLANEA.

### APPEALS IN GERMANY.

The judicial faculty in every German university forms a court of appeal for the whole confederation. In all the states the losing party in a cause had the right of appealing to a university; this right was confirmed by the act of confederation; and even the native forum, if it find difficulties which require the assistance of more profound jurisconsults, may send the case for judgment to an university. In all these appeals the members of the juridical faculty become judges; receive no salary for this part of their duty, but they are entitled to certain fees paid by the litigants, which at Jena I have heard estimated as at least equal to the professional salary. To this

* See Legal Observer, p. 318.

union of the bench with the chair are undoubtedly to be ascribed in some measure the distinguished legal talents which have at all times adorned the German universities, and which in the present day are far from being extinct. The theoretical studies of the academician are thus daily brought to the test of practice, and he sees at every moment how his logical deductions work in the affairs of ordinary life. — *Russell's Tour in Germany.*

AN ADVOCATE'S REHEARSAL.

Sir Henry Martin, Knt. was born in this city (London), where his father left him 40*l.* a year; and he used merrily to say, that if his father had left him fourscore he should never have been a scholar, but lived on his lands: whereas this being though a large encouragement but a scant maintenance, he plied his book for a better livelihood. He was bred a fellow in New College in Oxford, and by the advice of Bishop Andrews addressed himself to the study of the civil law.

By the advice of the said Bishop, Master Martin had weekly transmitted unto him from some proctors at Lambeth the brief heads of the most important causes which were tried in the high commission. Then with some of his familiar friends in that faculty, they privately pleaded those causes among themselves, acting in their chambers what was done in the court. But Mr. Martin making it his work exceeded the rest in amplifying and aggravating any fault, moving of anger and indignation against the guilt thereof, or else in extenuating and excusing it, procure pity and obtain pardon, or at least prevail for a lighter punishment. Some years he spent in this personated pleading to enable himself against he was really called to that profession.

Hence it was that afterwards he became so eminent an advocate in the high commission, that no cause could come amiss to him. For he was not to make new armour, but only to put on and buckle it, not to invent but to apply arguments to his client. He was at last knighted and made Judge of the Prerogative for Probate of Wills; and also of the Admiralty in causes concerning foreign traffic; so that as King James said pleasantly: "He was a mighty monarch in his jurisdiction over *land* and *sea*, the *living*, and the *dead*." — *Fuller's Worthies.*

JUDICIAL AMUSEMENT.

A few day's afterwards I dined with the Lord Chancellor (*Jefferies*), where the Lord Mayor of London was a guest, and some other gentlemen. His Lordship having, according to custom, drank deep at dinner, called for one *Mountfort*, a gentleman of his who been a comedian, an excellent mimic; and to divert the company, as he was pleased to term it, he made him plead before him in a feigned cause, during which he aped all the great lawyers of the age in their tone of voice, and in their action and gesture of body, to the very great ridicule not only of the lawyers, but of the law itself, which to me did not seem altogether so prudent of his lofty station in the law; diverting it certainly was, but prudent in the Lord High Chancellor I shall never think it. — *Memoirs of Sir John Reresby.*

LOCAL COURTS IN HAYTI.

The proceedings in the lower courts are somewhat extraordinary in civil cases. If a creditor institute a suit against a debtor in one district and obtain a verdict, the defendant is permitted to appeal from the sentence to the court of the adjoining district, and so on in succession throughout the whole series of district courts; and if the last confirm the judgment of the first, the defendant can then move it into the Court of Cassation; and in the event of that court confirming the judgments of the courts below he may appeal from it to the president, and apply for a new trial in those courts, so that the contest proceeds *ad infinitum*. — *Franklin's Present State of Hayti.*

QUALIFICATIONS OF A CHIEF JUSTICE IN HAYTI.

The Grand Judge, Mons. Freshnell, is an infirm man of colour, nearly eighty years of age. Until he arrived at middle age, he had been actively and successfully employed in the marauding career of a private. His legal knowledge is just what might have been expected from his previous avocations. He is a modest old man, it is true, for when his present appointment was offered to him he declined it, as he said himself from his incompetency to fill it, and to perform the duties which it required. Boyer, however, insisted on his accepting it, and remarked, "that it did not require talent or legal knowledge to execute the duties of it; that he had only to do as he was directed by such orders as he might receive from the *bureaus* of government." — *Franklin's Present State of Hayti.*

LORD THURLOW AND THE DISSENTERS.

A deputation from the dissenters waited on Lord Thurlow, by appointment, to request that he would give them his vote for the repeal of the test act. They were shown into his library, where a plentiful collation had been prepared. At length Lord Thurlow appeared, and, highly gratified by their reception, they delivered a long harangue, to which he listened with much patience. When it was finished, he rose up and addressed them:—"Gentlemen, you have called on me to request my vote for the repeal of the test act. Gentlemen, I shall not vote for the repeal of the test act. I care not whether your religion has the ascendancy, or mine, or any, or none; but this I know, that when *you* were uppermost, you kept us down, and now that we are uppermost, with God's help, we will keep you down."

# The Legal Observer.

VOL. I. SATURDAY, APRIL 2. 1831. No. XXII.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## POWER OF THE BENCH OVER THE BAR.

WE shall take this opportunity of noticing the principal cases relating to the power of the Bench over the Bar. Fortunately the collisions between them are not very frequent, and have never recently in this country led to very serious results. There are two instances, however, in which a certain power has been lately exercised and has been questioned — the one in Ireland, and the other in one of our colonies in the West Indies; and as we know not how soon it may be attempted to be extended to England, we think this a fitting time to enquire into its extent, and examine its foundation.

We shall, however, rather discuss it as a question of precedent than of principle, as we are willing to admit that any power which was formerly exercised over the bar must still be submitted to. A judge must be armed with some authority over the advocate, if the mere despatch of business alone be considered; but we are desirous of ascertaining whether this power can be carried to the extent which has frequently been threatened, and has been elsewhere exercised, viz. of committing a barrister for alleged contempt, and further, of disbarring him, or otherwise disqualifying him from practice. We shall therefore proceed to consider the authorities.

By statute of Westminster 1. c. 29. attorneys and serjeant-counters who have been guilty of any malpractices, and have acted unbecoming their profession, may be silenced, and not be allowed to be heard any more in the way of their profession.

Lord Coke* is of opinion, that apprentices at law, which is another name for barristers, are included under the head of "serjeant-counters."

The leading modern authority on the subject is *Hughes* v. *Scirace*†, where a person of the name of Mitchell, a justice of the peace and a barrister, was committed to the Fleet for being a principal contriver in marrying Miss Hughes, a ward of court, under aggravated circumstances. Mitchell applied for release from prison, and submitted to make any reparation to the lady which the court should direct, and likewise *to be restrained from acting as a counsel.* The counsel on the other side not very much opposing it, the Lord Chancellor Hardwicke made an order for his discharge, upon his attorney's undertaking to pay the whole expense of the former petition against him. But as to Mr. Mitchell's submission to be restrained from acting as a barrister, he said, he should at present give no other direction, but that, according to his own submission, he should be restrained from acting till further orders — "Because," said his Lordship, "from any enquiries that I have hitherto made, I am not satisfied what is the proper course to remove him from practising as a barrister. If Mr. Mitchell had continued a solicitor, there had been no difficulty, for the ready and proper way would have been to have struck him out of the roll of solicitors; and surely it would be very hard, when he has advanced himself to a degree of greater rank in the law, that there should not be some precedents for degrading a person who, by his malpractices and misbehaviour, has rendered himself highly unworthy of the character he has taken upon him of a barrister at law. But whether this ought to be done by

* 2 Inst. 214.

† 2 Atk. 173.; S. C. Hal. MSS. vol. 6. 8. Line. Inn Library, sometimes referred to by the name of Mitchell's case.

disbarring him, or whether the court by its own power and authority will silence him for the future, I shall not at present determine, but have already referred it to Lord Chief Justice Lee, who will assist me in finding out precedents in such cases." The reporter adds, in a note, "Mitchell was afterwards struck out of the commission of the peace, and prohibited from practising at the bar." As, however, Mitchell offered to abandon the bar, this case cannot be considered a complete authority for the power of disqualifying a barrister. Some additional light is thrown upon this point by the case of *The King* v. *Gray's Inn**, in which case an application was made for a *mandamus* to be directed to the benchers of Gray's Inn, to compel them to call the prosecutor to the degree of a barrister. The court observed;—"The original institution of the inns of court no where precisely appears, but it is certain they are not corporations, and have no constitution by charters from the crown. They are voluntary societies, which for ages have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the bar is delegated to them from the judges, and in many instances their conduct is subject to their controul as visiters (see Dugdale's *Origines Juridicales*). From the first traces of their existence to this day, no example can be found of an interposition by the courts of Westminster Hall, proceeding according to the general law of the land; but the judges have acted as a domestic forum. The only case in which an attempt was made to proceed in this court is reported in March. One Booreman, a barrister of one of the Temples, having been expelled, he applied for his writ of restitution; but it was denied him, 'because there is none in the inn of court to whom the writ can be directed: for it is no body politic, but only a voluntary society, and submitting to government; and the ancient and usual way of redress for any grievance in the inns of court was by appealing to the judges.' In Townsend's case, reported by Sir T. Raymond, it is assumed, *arguendo*, that no *mandamus* will lie to the inns of court. The first reason stated in March is not the true one; the second is the true reason. The true ground is, that they are voluntary societies submitting to government, and the ancient and usual way of redress is by appeal to the judges. There has been a very late instance where this method of appeal had the sanction of the judges. 'The first day of Hilary term an appeal of one Maurice Savage, against an order of the benchers of Lincoln's Inn, which rescinded an order for his call to the bar, made about four or five days before, on the ground of misrepresentation or surprise, was heard by all the judges at Serjeant's Inn Hall. The judges being attended by the treasurers of the two societies of Lincoln's Inn and Middle Temple, and examining the under treasurers of each (not on oath, for they proceeded as visiters), and the circumstances of the charge fully appearing, and after hearing Savage in support of his appeal, who did not examine any one to vary the facts, declared their opinion, that the call to the bar appearing to have been obtained by surprise, and the bench of Lincoln's Inn having proceeded immediately to annul it, the appeal should be dismissed.' The consequence of all this is, that we are all of opinion, that no rule should be made for a *mandamus;* but if there is ground for it, the party must take the ancient course of applying to the twelve judges."

The court of King's Bench adhered to the same rule in a more recent case†, when they refused to issue a *mandamus* against the Society of Lincoln's Inn, to compel them to admit a person as student.‡

There is, however, a recent case decided in this country on the point, by a Judge of considerable authority. We allude to an appeal case before the Privy Council, *In re the Justices of the Court of Common Pleas at Antigua* §, in which the circumstances were as follow:—The petitioner had been disbarred by the justices of the Court of Common Pleas at Antigua, for various acts of professional and general misconduct with which he had been charged by the Attorney General and several other practising advocates there. The advocates at Antigua practise both as barristers and attorneys. They are admitted to practise in both characters by the Court of Common Pleas there, and afterwards practise in all other courts in the island. Previously to the final order for the disbarring the petitioner, the court had, at the desire of the colonial secretary, examined witnesses upon the charges which had been made against him. He petitioned the privy council to restore him to the bar. The

* 1 Dougl. 353.

† Exparte *Wooler*, M. T. K. B. 1823.

‡ See further, *Butler* v. *Freeman*, Ambl. 301., Blunt's edit. n. (2.); *the King* v. *Southerton*, 6 East, 143.; *the King* v. *George Crossley, and another*, 7 T. R. 315.

§ 1 Knapp, 267.

Judges presented a memorial in answer to the allegations contained in his petition, in which they cited *The King* v. *Gray's Inn*, and *Mitchell*'s case, as authorities to prove the right of courts to expel from the bar those of its members who misconduct themselves. The case was argued at great length upon the merits. Lord *Wynford*'s judgment was as follows:—"In England the courts of justice are relieved from the unpleasant duty of disbarring advocates, in consequence of the power of calling to the bar and disbarring having been, in very remote times, delegated to the inns of court. In the colonies there are no inns of court; but it is essential for the due administration of justice, that some person should have authority to determine who are fit persons to practise as advocates and attorneys there. Now, advocates and attorneys have always been admitted in the colonial courts by the judges, and the judges only. The power of suspending from practice must, we think, be incidental to that of admitting to practise, as is the case in England with regard to attorneys. In Antigua the characters of advocates and attorneys are given to one person; the court, therefore, that confers both characters, may, for just cause, take both away. Although, indeed, our own courts do not disbar, for the reason I have mentioned, I have no doubt they may prevent a barrister who had acted dishonestly from practising before them. In a case which came before us a short time ago from Bombay, some of the members of this board doubted that the Supreme Court there had authority to prevent English barristers to practise before them. The question was, whether their authority had been properly exercised. Whilst advocates in the colonies have an appeal to his majesty, the power to remove them from practice can never be abused."

In this case the principles, as to the power of disbarring a barrister are, therefore pretty clearly laid down. We shall now consider the other point to which we alluded; the power which exists in the bench of committing a barrister. This is, in fact, the more important question. Where there has been gross misbehaviour on the part of a barrister, it seems only reasonable that there should be a power of removing him from a profession which he has disgraced: and, as this would hardly ever be attempted in any case where the misconduct was not very notorious and extreme, the power is not likely to be abused. The power of committing a barrister by the court is, however, a much more questionable authority. It must, of course, be left to the discretion of the presiding judge: it may be exercised from pique or in anger: the right not only of the bar but of the suitor may be infringed. A case might easily be put in which an advocate, in the honest and zealous discharge of his duty, might offend a very sensitive judge: a dispute might ensue; and, if the power to commit were clear, the interest of the suitor might then be greatly endangered. We have merely put the case in its mildest light; but the judge might be influenced by worse motives than those to which we have alluded. It might happen that a great political question was at stake—that the personal interest of the judge was concerned — that if the barrister were committed, the success of a particular side might be secured — all this might happen: and the possibility of its occurring makes us view this power in a judge with great dislike and suspicion. We think he should have no such authority. It is better that some little indecorum should occasionally appear, than that the whole purposes of justice should be left at the discretion of one man. This is our opinion, and we shall now give the only authority on the point. We might mention several instances in which this power has been stoutly denied by advocates of eminence; but as they have not been properly authenticated, we refrain from citing them.

The case to which we allude, occurred lately in Ireland, where a barrister was committed by the magistrates presiding at a petit session. We think the case so important, that we shall give a full account of it, which we are enabled to do through the medium of *The Law Recorder*. An action was brought by the barrister committed, against the magistrates for a libel, under the circumstances mentioned in the following portion of the address to the jury of Lord Plunket, then Chief Justice of the Common Pleas in Ireland:—

"Gentlemen of the jury,—This case has occupied a considerable portion of your time and attention, but I cannot say that it occupied more than the circumstances of the case required; it is certainly one of considerable importance, both to the plaintiff and the defendants.

"It is an action brought by the plaintiff, a barrister, to recover damages from the defendants, magistrates of the county of Limerick, for a libel alleged to have been published by them. The subject of this publication was certainly not one which originated with these magistrates. It is not an ordinary case of libel, in which a person voluntarily publishes a libel against another; it had been called for by a complaint made against the defendants to the Chancellor, by the plaintiff, through the medium of the Irish bar, and, therefore, cannot be considered in the nature of a voluntary libel. On the other hand, though

it is to be distinguished from the ordinary cases of libel, where a person inadvertently defames another, yet, if a libel, it was a deliberate libel, and intended to defame the plaintiff, though its object was to defend the writers of it against what they conceived an attack upon their character, and what contained a suggestion of the propriety of their dismissal from the magistracy. We cannot, therefore, be surprised at finding these gentlemen defending themselves with some warmth, but, nevertheless, such defence ought to be completely founded in truth.

"The cause comes before you, gentlemen, in this manner. There was a meeting of the bar of Ireland, where a statement was read, put forward by the plaintiff, Mr. Croke, a barrister, against the defendants, magistrates, presiding at the Petit Sessions of Bruff, in the county of Limerick, in which he stated he had been put into the dock by these magistrates, merely for asserting his right to plead for a client. This complaint was entertained by the bar, and by them forwarded to the Lord Chancellor; and this, I think, is a proper place for me to read his Lordship's letter to these defendants. You will observe, these letters are but copies. The question, whether the originals were properly producible here, is to be considered in another place. I have given no opinion on it. It is a question solely for the Court of Common Pleas, and the parties have each acquiesced, from a due respect to their own characters, in a consent, that copies of these letters should be taken for the present, as the original documents, subject however to this, that any verdict which may be had thereon shall be set aside, in case the court above shall be of opinion that these original documents ought not to have been withheld. I shall now read the letter of the 11th December, 1829, from the Lord Chancellor to the defendants:

"'*Dublin*, 11*th Dec.* 1829.

"'Sir—The memorial I transmit with this letter was sent to me by the directions of the assembled bar of Ireland. The proceedings at the Sessions to which it refers surprised me when I first heard of them.

"'As the head of that body, to whom his majesty confided the dispensation of justice to his subjects in this country, it is my duty to inform you, that it is the privilege of those subjects to be heard by counsel in all his courts for supporting and defending their civil rights; and the rule last laid down in the court wherein you preside, precluding that privilege, is illegal, and must be immediately rescinded.'

"It is quite unnecessary that I should add any thing to this high legal authority, on the point of the illegality of the rule laid down by the magistrates at Bruff. My Lord Chancellor has given a just and dignified rebuke to them on the occasion. It is, surely, the undoubted privilege of the subject to be heard by his counsel in all his majesty's courts, whether high or low, to support and defend their civil rights; and if such a privilege was denied me as a barrister, I own I should have adopted the language attributed to the plaintiff here, and said that the rule was grossly unconstitutional, and could not too soon be departed from.

"It is proper, however, to inform you, gentlemen, that it is not for a violation of the right that this action is brought. It is merely for the publication of this libel; but you cannot consider the one without the other.

"Here, then, ends that part of the letter from the Lord Chancellor, which he writes in his character of Lord Chancellor. The next part admits of a different construction, for he says,

"'On the part of the bar of Ireland (of which I claim the honour of being a member), I further inform you, that the act of committing to prison a barrister who appeared in his place in court, because he insisted on his privilege to be heard on behalf of his client, was unprecedented and indefensible. In the expectation that this admonition will prevent the recurrence of a similar case, I shall not proceed further at present, but leave to your discretion the reparation fit to be offered to Mr. Croke for the indignity he has suffered.'

"This is a representation from the Chancellor, claiming the honour and privilege of being considered a member of the bar, and submits to these gentlemen whether they should not offer reparation for what they had done. The statement of the bar assumes as true every representation made to them by Mr. Croke, and if it is so, the whole weight of the censure of the Lord Chancellor rests on the conduct of these defendants; if it is not, it is diminished in proportion as that statement departs from the truth. But here let me observe, that, no doubt there was a power in these magistrates, as there is in every court, to protect themselves and preserve their own dignity. If there was not such a power vested in every jurisdiction, it would be quite impossible for any court to administer justice. However, an answer was sent to the Chancellor by these magistrates to this charge, and this answer constitutes the alleged foundation of this action. After it had been forwarded to the Chancellor, a letter had been written to these gentlemen by his Lordship, which is dated the 21st December, 1829. Now, this letter has been given in evidence on the part of the defendants, and not for the plaintiff; and in it his Lordship states, that the memorial of the Irish bar was sent for the purpose of making such observations as its subject might require, and that their statement should be sent by him to the adjourned meeting of the bar. Now, the defendants' statement is unaccompanied by any expostulation against his Lordship's laying it before the assembled bar; it is then to be taken as sent to the bar, 'on the same principle that their memorial was communicated' to the defendants, and we are therefore to take it as an issue knit between the two parties, the representation of the assembled bar on the one hand, and that of the plaintiff on the other.

"Now, the counsel for the plaintiff have truly stated, that it was not competent for him to have brought an action for this committal. Where a court has the jurisdiction of committing, it is not competent for another court to enquire into the circumstances of such committal, so that the plaintiff has really taken the only course in which he could have brought a question, on which the Chancellor was unable to

decide, into a proper train of investigation; but he takes this course, and it is not to be wondered at that he has done so. If he had not, it would have been better for him to lie down and die, than be disgraced, as he should have been if he had suffered his character to be stigmatised, and had not taken up the gauntlet thrown down to him. On the other hand, the charges against the magistrates are of such a nature, that if they feel they are false, they are bound to defend themselves in every fair and justifiable manner.

"Before I give to you the particulars of the statement made by Mr. Croke to the bar, you will take into your consideration, whether what has been published by the defendant, supposing it not a voluntary attack, but made under the feeling of its being necessary for their self-defence, was a *bonâ fide* vindication, or whether it was a malicious representation — when I call it malicious, it is not necessary that any express malice shall be proved. According to the circumstances the law will infer malice, and the issue therefore is, on the one hand, has the plaintiff substantially stated his case? — and, on the other whether the defendants have fully and fairly stated the particulars of their defence? In considering this, you will not be attentive to minute circumstances, but merely to discover whether the statement on the one side or the other is substantially correct, or whether it was intended to mislead.

"Now, as to the statement of Mr. Croke, it will be material for you, in applying the evidence to it, to see how far it is substantially true, or whether any thing substantially material has been suppressed. The statement of Mr. Croke to the bar is this —

"'I was employed as counsel before D. O'Grady and M. Bevan, Esqrs., the magistrates presiding at a Petit Sessions at Bruff, on the 26th day of August last, in a civil proceeding, to recover penalties under the act of 57 Geo. 3. c. 108., and having respectfully intimated to the court that I appeared as counsel in the cause, Mr. O'Grady said it was a rule established by the court that counsel should not be heard; to which I replied, that it was a rule which might be departed from. Mr. O'Grady then said, 'We have made the rule, and shall not depart from it.' I replied, that I thought such a rule rather unconstitutional. Mr. O'Grady then said, 'What signifies what you think.' To which I replied, that what I thought was of as much consequence as what he thought, upon which Mr. O'Grady, in the presence of Mr. Bevan (the other magistrate) exclaimed 'Take the counsellor, and commit him to the dock immediately.' Upon which I was rudely seized by the breast by a policeman, and put into the dock, and there remained forty minutes. The bench then proposed to me to make an apology, and that they would thereupon discharge me. I said that no man had a higher respect for the administration of justice than I had, and if I had offended I was sorry. To the truth and accuracy of this statement I pledge myself, as a barrister and a man of honour.

"JAMES CROKE."

"This statement you will have before you, and I will now read to you the statement of the magistrates, on which this issue is knit, in their reply, as conveyed in a letter to the Lord Chancellor: —

"'MY LORD, "Dec. 16. 1825.

"'At a Petit Sessions held at Bruff, on the 26th August last, the undersigned were the presiding magistrates, and the court was unusually crowded. A case against the toll-keeper of the fair of Drumnin was called on. A person addressed the Bench, from the midst of the crowd, under the gallery, and at the back of the court. The magistrates desired him, if he had any thing to say to the case before the court, to come forward and say it. This person, without moving from his place in the crowd, which were pressing on, said he was engaged in this case.'

"So far as we have gone, there are two things shown; one, that *this person*, as they choose to designate him, was in the crowd under the gallery; and secondly, that he said he was engaged in the case.

"'The magistrates told him, they could not listen to him, as there was a rule of the court not to hear professional persons. This person then said the rule ought to be departed from, and was, he thought, unconstitutional. The magistrates replied, that it was the rule of the court, and that what he thought of it could not induce them to depart from it.'

"Now, if this statement, as contained in the letter, is correct, and a proper statement by the magistrates, supposing this to have been a right rule, and that the exact truth is told, all might be correct; but the allegation by Mr. Croke is, that they said, 'What signifies what you think.' No doubt, there are shades of difference in a statement, but such shades are not unimportant if an altercation happens between the bench and the bar, for it might be very important to decide where the altercation commences; if the court so far forgets its dignity, as to use colloquial or querulous observations, it is not surprising, if those bring on altercations, which would not otherwise subsist: such a reply as, 'What I think is of as much consequence as what you think,' would have been, under certain circumstances, a very impertinent observation; but, under others not exactly so, if applied to the expression mentioned in Mr. Croke's statement. We next find, that "He then became silent, and the case before the court was proceeding." And here, what was observed by counsel for the plaintiff is entitled to attention, that the defendants themselves state, that "here the plaintiff was silent, and the cause was going on;" so that there was an end to any thing then, that could have caused the menacing attitude Mr. Croke, they say, then assumed; and it will be here for you, Gentlemen, to consider, whether, on the evidence, Mr. Croke was actually getting half up on the bench, and whether he used the threats and attitudes given in evidence by the defendants' witnesses, or whether the fair and proper conduct, attributed to him by Mr. Gleeson, was completely preserved by him. All this, I say, is exclusively for your judgment; and I must tell you, that before these magistrates had made such a strong and deliberate statement, as the following, that 'Here the business of the court was interrupted by a

very general riot and disturbance, occasioned by the mob forcing its way into the court, and this person at its head, advancing in a riotous, menacing manner, using abusive and insulting expressions to the magistrates, and holding up his clenched fists towards them, in a threatening attitude.' Before, I say, they had stated these as facts, they should have most attentively canvassed all the circumstances which suggested them, and weighed them well, before they should have brought such serious charges against any individual, and if their only grounds for the statement was the assertion of third persons, they should have been perfectly satisfied of the truth of the assertions, and the credit of the persons making them.

"We find, shortly after, that these magistrates make use of the expression, 'His companion in the dock,' alluding to another person of a different grade in life, whom these magistrates had committed that day. Now, gentlemen, it is for you to consider, whether they would have used this expression, if they had been preparing a fair and candid statement of the circumstances that had occurred on the occasion, and whether there is any thing in the tone of this expression, which savours of ill-will towards the plaintiff, and whether, if a magistrate should find it his duty, his painful duty, to commit a barrister to the dock, you think he would designate him as 'this person,' and allude to him in the words 'his companion in the dock.'

"But next comes a direct allegation, that, 'They had no reason to believe he was a barrister, and that it was not until after he had been committed to the dock, that they knew he was a barrister.' You, gentlemen, will see from the evidence, whether that allegation was consistent with the fact, whether it appears on the evidence, that Mr. Croke had declared himself, in the beginning, to be counsel for the plaintiff in the case; or whether it was not disclosed that he was counsel, until after his committal. The magistrates, indeed, add, that 'his rank should not have protected him:' but, gentlemen, it is right that we should recollect, that a barrister stands not, as such, in any peculiar or personal rank, but his claim to the attentive consideration of the court is, from its feeling that he is the shield of the subject. It is true that a magistrate may, in an extreme case, undergo the responsibility of committing a barrister, if his conduct is grossly contemptuous, but it must be an extreme case; and you will see whether this committal was that extreme case. No one recollects a barrister having ever been committed in the exercise of his duty to a client. We have heard of judges having threatened this result, but the oldest man living does not recollect any court having ever exercised this power: and it has been left for the magistrates of the petit sessions at Bruff to be the first to show the example.

"The next thing we find stated by these magistrates is, that, 'from the thronged state of the court, from the noise proceeding from the crowd, and from the post in the centre of it, taken by Mr. Croke, they early apprehended a riot.' Now, gentlemen, if there were facts which portended the appearance of a riot, it certainly was their duty to state them; but when they say, that a barrister was the cause, I think they should have been able to establish it beyond suspicion; but here they put him down as the probable cause of the riot.—'Their suspicion,' they say, 'lighted upon Mr. Croke, as the probable leader.' Of this, too, gentlemen, you are to be judges, whether he was so or not; or whether they lightly, or whether they fairly formed that suspicion.

"Again, they say, that 'his face was partly disguised, as if to prevent his being recognised.' Now, what is the impression thus intended to have been made by this letter? Is it not, that Mr. Croke came, intending to foment a riot, and to protect himself from the consequences that he actually had disguised his face? You will consider the evidence as to that, and what is the case as to this part of the subject. A pedlar has a cause with a toll-gatherer, and it is generally understood that a barrister is to come to Bruff, on the plaintiff's side; the barrister does attend, and he is addressed by the clerk of the court, who offers to get him a suitable seat, and yet, after this, he is charged with wanting to disguise himself, for the purpose of committing a riot, and to disguise himself from those whose attention he has called on to those rights, with which, as a barrister, he was invested. Now, if the magistrates did not believe that he disguised himself for the purpose they suspected, this was not a true statement, and therefore it is, as respects them, an unworthy insinuation; but they go on and say, that from his dress, deportment, and conduct, 'they never suspected he was a gentleman,' and 'they had considerable doubts whether he was sober.' You will consider whether any thing appears to have entered into the mind of any of the witnesses, to justify that suspicion.

"These magistrates then add, that 'these very unfavourable impressions' on their minds 'have received strong confirmation from information which has since reached them.' You will see, presently, the nature of this information. It is left for us to suppose it could only be the very evidence which we have heard given for the defendants here yesterday, but they say there are facts to which they wish to call the attention of the Lord Chancellor. And what were these? —That Mr. Croke, when he first entered the court-house, loudly and distinctly addressed the crowd in the hall, and told them, 'he was come there to humble the magistrates, and that he would be assistant-barrister of the day,' and such like observations. Now, gentlemen, if Mr. Croke used these or similar expressions, and there is evidence that he did so, the words are most important indeed, and if you believe that he so conducted himself in the hall, before going into court, it will go to diminish very much the amount of any damages you might be inclined to find; and it will be also material, if the magistrates had any reason to believe that he had been acting so, for it will go to justify that part of their statement; and if it is an established fact that he did so misconduct himself, and that you should doubt as to what was his conduct in the court, his conduct in the hall will help to throw light on his conduct in the court, and you

will think his conduct, as stated there, to be less improbable; for where there is any doubt in the evidence, you will have to consider probabilities."

We have no room to extract the correspondence between the bar and the Irish Lord Chancellor (Hart) on this subject, which is of considerable interest. It is sufficient, however, to say that this affront was not tamely submitted to, and the case will hardly now be quoted as a precedent.

This is the state of the authorities on the point, from which we deduce the following principles. That, in this country, the Inns of Court have an undoubted authority to disbar a barrister who has grossly misconducted himself: that in the colonies this power may be exercised by the bench; but, that the bench has no power to commit a barrister in the discharge of his duty as an advocate.

## THE NEW BANKRUPTCY BILL.

We shall again shortly allude to the Bankrupt Bill, the details and the principle of which still continue to be agitated both in and out of Parliament. It is said, that all the law-lords, including Lord *Tenterden*, are opposed to it; and considerable fears are entertained as to its passing, at any rate in this session of parliament, even though there be no dissolution. If this be true we most sincerely regret it; its being thrown out will, to use the emphatic words of the Lord Chancellor, "carry dismay and despair into the hearts of the citizens of London." We have elsewhere stated our only objection to the bill, but we shall insert two letters which we have received from persons whose opinions are entitled to attention, which enter into some of the details. We hope, most heartily, that it will pass; and are satisfied that, as a whole, the legal profession is favourably disposed toward it.

We may take this opportunity of adverting to some remarks on our publication in an able contemporary. It is misinformed if it supposes that we profess peculiarly to represent the opinion of any one class of the profession. We are proud of the support which we have met from all its branches. We certainly have laboured, and shall continue to labour, to set the profession right with the public; but we are also anxious to advocate the interests of the community. If our contemporary will therefore favour us by the promised examination of our opinions, he will see, that we in no way support the exclusive sentiments of any one class of the profession; but that, receiving from many sources as well the results of experience and practical knowledge as the speculations and theories of the law reformer, we have endeavoured to benefit by both of them, to stand forth the friend of moderate and practical reform, and to direct growing feeling in its favour into the proper channels. The letters we alluded to are as follow: —

### THE BANKRUPTCY COURT BILL.

*To the Editor of the Legal Observer.*

Sir,

On my return from the country last evening, I found your valuable Supplement for February contained the Lord Chancellor's speech on Chancery Reform, and the new Bankruptcy Court Bill.

A perusal of the new bill raised some doubts in my mind; perhaps I can best convey them and obtain answers by putting them, with your permission, in the shape of questions; thus,

In case no creditor shall think fit to accept the office of assignee, under the official assignee, is the official assignee to act alone?

Is the official assignee to appoint the solicitor to the commission?

Is the official assignee to be subject to liabilities as assignee of the estate, and to actions for things done in the execution of his office?

What sort of security for costs on appeal is expected to be found by a bankrupt (9th sect.) immediately after the adjudication has divested him of his property?

Are attorneys to be permitted to stand in the place of their clients, and examine and cross examine witnesses, and address these new courts, or must barristers be always employed?

Section 12. directs all examinations of the bankrupt to be carried on in private: does this mean to the exclusion of the creditors and their attorneys?

Does it not occur to you, that the machinery of the office of official and chief assignees, also of the accountant general's account keeping, somewhat inconvenient; and that a little alteration in the mode of choosing assignees would effect all the improvement necessary?

I am, Sir,
Your very obedient Servant,
J. N.

21st March, 1831.

*To the Editor of the Legal Observer.*

Sir,

I have read with great care the new Bankruptcy Bill printed in your Supplement for February, and your remarks on it. I wish to call your attention to a part of it, which, as it at present stands, so far from being productive of benefit, will greatly increase both expense and delay. I allude to the sections in the bill which relate to the proof of debts and the power of appeal thereupon. They enact, that the proof of debts shall first be made by one of the junior judges, who, if he thinks fit, may adjourn

such proof into the subdivision court to which he belongs, which shall finally dispose thereof, without any appeal, "excepting upon matters of law or the refusal or admission of evidence;" in which case it is further enacted, that such matter may be brought under review of the court of review, and the proof of the debt shall be superseded until such appeal shall be disposed of; "and in like manner, there may be an appeal on the like matter of law from the court of review to the Lord Chancellor." It is also provided, that an issue may be directed to a court of common law for the trial of disputed debts. Now, sir, here are four distinct courts through which a disputed debt may be carried. 1. That of the Junior Judge. 2. The Subdivision Court. 3. The Court of Review. 4. The Lord Chancellor's, besides an issue which may be directed as to the same debt to a court of common law. There may be no fewer than *three appeals.*

This appears to me worse than the present system, where, as you know, there is but one; and, I am convinced, from some experience in the matter, that if this triple right of appeal be given, there will be much more vexation, delay, and expense, than now exist.

I am, sir, your obedient servant,

A PRACTICAL MAN.

## ANALYSIS OF NEW BILLS IN PARLIAMENT.

### TITLES BY PRESCRIPTION. — OUTSTANDING TERMS AND JUDGMENTS.

LORD TENTERDEN'S bill *for shortening the time of prescription, and lessening the impediments to the transfer of real property created by outstanding terms and judgments,* recites that the expression 'time immemorial' is now by the law of England, in many cases, considered to denote the whole period from the reign of Richard the First, which is productive of injustice; for remedy whereof it is proposed to be enacted,

That no claim which may be lawfully made at the common law, by custom, prescription, or grant, to any right of common, or other profit or benefit to be taken and enjoyed from or upon any land of our sovereign lord the king, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except rent and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by shewing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of *thirty* years; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty* years, the right thereto shall be deemed *absolute and indefeasible, unless* it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by words *or* writing.

In claims of right of way, watercourse, or other easement, the periods to be twenty years and forty years, unless by consent as aforesaid.

That when the light for any dwelling house, workshop, or other building shall have been actually enjoyed for the full period of twenty years without interruption, the right shall be deemed absolute and indefeasible, any local usage to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for the purpose by words *or* writing.

Prescriptions and claims to modus decimandi or exemption or discharge from tithes where tithes in kind demanded by the king or a layman or corporation aggregate, to be deemed valid, on proof of enjoyment for thirty years; unless proof of render or payment prior to thirty years. If the proof of the claim extends to sixty years, the right to be indefeasible; unless proof of consent, &c. Where tithes in kind demanded by any ecclesiastical person or corporation sole, the prescription or claim to be valid and indefeasible, upon evidence during the whole time of two incumbents, and of six or more years after the appointment of a third, not being less than sixty years in the whole; unless proof of consent, &c.

The act not to be available in suits pending or to be commenced within three years.

Proviso in favour of infants, idiots, &c., as to the periods of twenty and thirty years, but not in any case where the right or claim is hereby declared to be absolute and indefeasible.

Proviso for absence beyond sea at the expiration of the period. Six years allowed, except where the right is declared to be absolute and indefeasible; and Scotland, Ireland, the isles of Guernsey, Jersey, Alderney, Sark, or Man, shall not be deemed places beyond the seas.

In actions on the case the claimant may allege his right generally, as at present. In pleas to actions of trespass and other pleadings, where the party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied specially.

Terms of years created for particular purposes to be considered as determined at the end of two years after the purpose is satisfied, unless assigned, &c. for some other purpose, or to attend the inheritance.

Terms attendant on the inheritance may be merged therein by the owner thereof.

Money recovered by bond, covenant, judgment, or term of years, to be deemed satisfied at the end of twenty years, if no principal or interest paid in the meantime.

## SETTLEMENTS BY INFANTS.

IN another page of this Number will be found a short note from our Chancery reporter of a late important case, in which the Master of the Rolls has held that a female infant cannot settle her leasehold property or chattel interests which are limited to her use. We shall briefly notice the state of the law on this point.

Although a contrary opinion formerly

obtained,* yet it now seems decided that a female infant cannot settle her real estate.† It was, however, perfectly clear, that she might settle her personal property, as well vested as contingent, if the settlement were reasonably beneficial to the infant,‡ and also her choses in action.§

Leaseholds being personal estate it has always been considered that they might also be settled by an infant; which does not seem to have been disputed by the Master of the Rolls as he grounded his decision on the circumstances of their being limited to the separate use of the infant. This, then, is the present state of the question, and as the decision of the learned judge has been appealed from we may soon hope to see it finally settled.

---

## MEDICAL JURISPRUDENCE, No. I.

ON THE LAWS RELATING TO THE BIRTH OF CHILDREN.—TENANCY BY THE CURTESY, AS AFFECTED BY THE CÆSARIAN OPERATION, AND BY MONSTERS, &c.—ORDER OF BIRTHS.

MR. AMOS, in a recent Lecture on Medical Jurisprudence, delivered at the London University, made the following observations:—

"It is frequently of great importance in legal affairs to ascertain whether a child has been born alive, though it live but for a *few seconds*. I might put a number of instances of this, but one will suffice. A man marries a woman who is possessed of a landed estate; he has a still-born child, and his wife dies shortly after the delivery. The landed estate will go over to the remotest relation the wife has, nay, to the king, in preference to the husband. But if the child was *born alive*, and lived only a *second*, the estate would go to the husband for his life, who would be called a 'tenant by the curtesy.'

"I put this instance of a tenancy by the curtesy only by way of illustration; for I could put many other instances, where the living but for *an instant* is important with a view to legal consequences; but my only object is to impress on the mind of the medical practitioner the necessity of paying particular attention to cases *where children die soon after birth*. As I have selected the instance of a tenant by the curtesy, I will follow it up by mentioning one or two medico-legal points connected with this particular legal estate.

"For a considerable time it was the opinion of the profession, that, to create a tenancy by the curtesy, the child must be heard to *cry*. Our great oracle of law, Lord Coke, dissented from that opinion; but upon a ground of which I do not know whether medical men will approve, viz. that the child may be *deaf and dumb*. It is probable, however, that the *crying* of the child would be regarded by a jury as conclusive evidence of the child being born alive. Again, it is the law, that a tenancy by the curtesy will not be created, where the child is 'ripped from the womb' by the *Cæsarian operation*, after the death of the mother, because it is not born *during* the marriage. Here is a strong inducement as far as interest, not feeling, is concerned, on the part of the husband, to have the operation performed before the death of the mother. And in case the mother expire under the operation, or if it be performed with great haste after the supposed death of the mother, here is a question of fact, attended with important legal consequences, as to whether the mother survived the birth of the child but for an instant. This is a legal point which may stimulate your medical enquiries with respect to the history of the Cæsarian operation.

"Again, the birth of a *monster* does not create a tenancy by the curtesy. Some writers on medical jurisprudence pass over the subject of 'monsters' by saying, it is unimportant to make particular enquiries concerning monsters, *because they seldom live long;* whereas, from what has been just said, you see the importance, as regards a tenancy by the curtesy, of the point, where a child has lived a *minute*, of ascertaining whether it were, or were not, a monstrous birth.

"I have been taking the tenancy by the curtesy only as one example out of many to which to attach my observations; we will take another example, for variety:—Suppose a man had a daughter by one wife, and a daughter by a second wife, and died; and there happens a posthumous birth. If the posthumous child is a son, and it lives for a second, the consequence would be to disinherit the eldest sister entirely, and give all the estate to the youngest; for the eldest sister is not heir to the brother, being of half-blood. But if the posthumous birth was of a *monster*, then the two sisters would inherit equally. This is what the law calls a '*possessio fratris;*' and many other examples of the importance of these enquiries, in a medico-legal point of view, might be stated.

"A word or two more on the subject of *monsters:* our law is, in a great measure, the creature of emergencies. We are a practical people, and have dealt very little in prospective legislation. The subject of monsters affords an example of this. I will read you the legal definition of a monster:—

"'A monster, *which hath not the shape of mankind*, cannot be heire, or inherit any land, albeit it be brought forth within marriage; but although he hath *deformity* in any part of his body, yet if he hath *human shape* he may be heire. *Hi qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa, inter liberos non computentur. Partus tamen cui natura aliquantulum ampliaverit vel diminuerit, non tamen superabundanter* (*ut si sex*

---

* *Cannle* v. *Buckle*, 2 P. Wms. 243. *Harvey* v. *Ashley*, 2 Atk. 612. *Warburton* v. *Lytton*, B. C. C. 440. *Drury* v. *Drury*, 5 B. P. C. 590.

† *Pierson* v. *Pierson*, cit. 1 B. C. C. 115. *Chitty* v. *Chitty*, 545. *Milner* v. *Lord Harewood*, 18 Ves. 275. *Trollope* v. *Linton*, 1 Sim. & Stu. 774.

‡ *Harvey* v. *Ashley*, 2 Atk. 612. *Williams* v. *Williams*, 1 B. C. C. 152.

§ *Price* v. *Seys*, 3 Barnard. *Trollope* v. *Linton*, 1 Sim. & Stu. 477.

*digitos vel nisi quatuor habuerit) bene debet inter liberos connumerari. Si inutilia natura reddidit, ut si membra tortuosa habuerit, non tamen is partus monstrosus.* Another saith, *ampliatio seu diminutio membrorum non nocet.*'*

"You will ask, how does the law provide for the case of the Siamese youths, their rights in regard to third parties and to each other?—and how for a person whose face may be inhuman, but may possess reason—say the case, real or supposed, of the pig-faced lady? and, probably, medical men may put a number of other instances;—I answer, that the law says nothing more than what I have just read; and that, therefore, if a case of monstrous birth should be brought before the courts, the courts will seek for all the medical information that can be obtained, and will legislate for the particular occasion; only they will not call it legislation, but will pretend to found their decision upon Lord Coke's definition; which definition, by the way, is borrowed from Bracton, who borrowed it from the civil law.

"There is another species of birth, of which the law speaks in terms as vague and rude as upon the subject of monsters—I mean *hermaphrodites.*

"'An hermaphrodite (which is also called androgynus) shall be heire, either as male or female, according to that kind of the sexe which doth prevaile. *Hermaphrodita tam masculo quam feminæ comparatur, secundum prevalescentiam sexus incalescentis.* And accordingly it ought to be baptized.†'

"A committee of medical men and lawyers would give us some more distinct and scientific rules upon the subject of hermaphrodites, as well as upon monsters; but, in the present infantine state of our jurisprudence as to these matters, it is the more incumbent on the medical practitioner to note every minute fact, with regard to births of doubtful sex, particularly when you reflect on the misrepresentations which ignorant or interested persons may make on such a subject; and to which such malformations, as are every now and then occurring, may give a colour.

"We have been considering the *nature* of particular births; I should mention that the *order* of births is also a most material circumstance to attend to, when two or three children are born at a time. The following case has occurred in our courts:—There was a family of eight children, of which the three youngest were born at one time, and the five eldest died—the priority of birth of the three youngest was questioned in a suit brought for the inheritance. The names of the children were Stephanus, Fortunatus, and Achaicus, three names which are to be found in this order at the conclusion of St. Paul's Epistle to the Corinthians; and evidence was given of the declarations of the dead father, that this was the order of their births; but this evidence was outweighed, in the opinion of the jury, by the evidence of the declaration of a deceased aunt, who was present at the birth, and who used to say, that she tied a string round the arm of Stephanus immediately after he was born, in order to denote that he was the second son."

* Co. Lit. 7 b., 8 a., and 20 b.

† Co. Lit. ibid.

## EXPENSE OF LEGAL PROCEEDINGS.

*To the Editor of the Legal Observer.*

SIR,

As so much has been said about the necessity of legal reform, permit me to say a few words on the subject. In one of your numbers a very excellent letter appeared on the subject of the charge made on searching for judgments, and which ought certainly to be immediately abolished; but this, sir, is trifling compared with the charges made for entering pleadings and passing records. The only duty performed is that of entering the *title of the cause.* Still worse are the court fees demanded after the trial of every cause.‡ I tried a cause a short time since, and had two thirds of the amount of the verdict to pay *in court fees alone.* These, sir, are the real and true causes that attorneys' bills amount to such large sums as the public constantly complain of, and they are productive of the greatest injury to the fair practitioner. By noticing this in your next number you will confer a benefit on the profession at large, and oblige

A CONSTANT READER.

## SUPERIOR COURTS.

### LORD CHANCELLOR'S COURT.

#### RIGHT TO BESPEAK A COMMISSION OF BANKRUPT.

THE petitioners, who were solicitors, had received instructions to sue out a commission of bankruptcy against a Mr. Cooper, and the docket was struck on the 14th of the last month; and before ten o'clock on the morning of the 19th, they applied at the bankrupt office to bespeak the commission. The fees thereon were taken by a junior clerk, in the absence of the principal clerk, who, however, arrived at ten o'clock, which is the proper time for opening the office, and at that time a clerk of Messrs. Allen and Co., solicitors, came to the office to bespeak a commission against Cooper, on behalf of another creditor. The order requires the applicant for the commission to bespeak it four days from the striking of the docket, and the 19th being the fifth day afterwards, Messrs. Allen's clerk demanded the commission. The principal clerk thereupon directed the fees to be returned to the petitioners, and caused the commission to be prepared for Messrs. Allen.

Mr. *Walker* now applied on behalf of the petitioners to have the commission given to them, and cited *In re Graham*, Buck. B. C. p. 529. The *Solicitor-General* opposed the question.

The Lord *Chancellor* thought that the preference had been rightly given to the last applicant, as the commission had not been bespoken within the appointed time. What was done before the

‡ It can hardly be said that the claim for court fees stands on the same footing as the entries of pleadings. The officers engaged in trying causes have a laborious duty to perform.—ED.

office hour amounted to nothing. The case cited was not applicable. The motion was refused with costs. *In re Cooper*, L. C. Mar. 21. 1831.

## ROLLS COURT.

### SETTLEMENT BY INFANTS.

The facts of this case have been given in former numbers (*ante*, p. 285. 303.), but the Master of the Rolls having been requested to reconsider his judgment, he this day further adverted to his reasons for his former decision, to which he adhered. The question, he said, was, whether the chattel interest of a female infant, limited to her separate use, could be bound by a settlement made on her marriage; and he had decided that it could not, for the following reasons:—In the case of personal property belonging to a female, the husband would upon marriage acquire an absolute interest in it; a settlement might therefore be made of it, extricating the absolute interest, and it would be considered only as the settlement of the husband and not of the female infant. With respect to the real estate of a female infant, no settlement could be made of it to bind her, because the husband did not acquire an absolute interest, but a qualified or partial interest in it during his life. With respect to a chattel interest settled on the female infant to her separate use, the husband could obtain no interest in it by marriage. It would be singular, therefore, if he could bind her by a settlement of it. The simple question was, in fact, whether she had power to make a settlement of it during her minority; for it would of course be different if she were of age. It appeared to him that the case of a chattel interest settled to the female infant's separate use was even stronger than that of real estate, for in it the husband did not obtain any interest whatever. It was true the Master had approved of the settlement, but he thought the Court had no power to confirm any such settlement. He had examined the books on the point, and could find no instance of the Court making a settlement of a chattel interest of this nature, and he considered that it came under the same principle which was applicable to real estate.—*Simpson* v. *Jones*, M. R. Mar. 22. 1831.

## COURT OF KING'S BENCH.

### SETTLEMENT BY RENTING A TENEMENT.

A man who had a settlement in one parish, removed to another, and rented a tenement at ten pounds a-year. He was unable to pay the whole of this rent, and applied to the overseers of his former parish for assistance out of the poor rates, to enable him to pay it. They advanced him five pounds for that *particular* purpose, and not as assistance generally. The sessions held this a fraud to enable the pauper to gain a settlement in the second parish, and made an order accordingly.

The Court confirmed the order of sessions. *Rex* v. *Ink.* of ——— H. T. 1831. K. B.

### COPYHOLD.—SEIZURE QUOUSQUE.

Ejectment to remove a tenant from lands which the lord had seized *quousque* for the refusal of the tenant to get himself admitted in the lord's court and pay his fine. Defence, that the lord had not taken the proper preliminary steps to warrant the seizure. Proclamations were made at three different courts for the tenant to come in, but not at three consecutive courts.

*Scriven* Serjt. contended, that although three proclamations at three consecutive courts were necessary to warrant a seizure for a forfeiture, it was otherwise with reference to a *quousque* — which was only a seizure until the tenant came in.

The Court was of opinion, that as to the proclamations there was no distinction between a seizure *quousque* and a seizure for a forfeiture. — Judgment for the defendant. *Doe* v. *Trueman*, H. T. 1831. K. B.

### PAROCHIAL RATE.

In an appeal against a parochial rate imposed on the Blackwater Navigation Company, the question was, whether under the terms of the 33 Geo. 3., by which the company was established, the lands occupied by the company were to be rated according to their actual value in their hands, including tolls, &c., or only according to the value of the adjoining lands. The sessions rated the lands on the former principle, and made the rate between 100*l.* and 200*l.* subject to opinion of the Court, whether the latter principle ought not to be adopted;—if so, the rate should be 35*l.*

The Court decided that the latter principle was the proper one, and remitted the case to the sessions, with an order to reduce the rate to 35*l.*

### MANDAMUS. — PAWNBROKERS.

*Adolphus* obtained a rule to show cause why a *mandamus* should not issue to Mr. Roe, a magistrate at Marlborough-street, commanding him to hear an information preferred by Byers the common informer, against Filmer, a pawnbroker, in South Audley-street.

*Andrews* Serjt. showed cause. The magistrate had partly heard the information. A witness of the name of Rawlins, stated that he had pawned a piece of linen at the pawnbroker's shop, and that no questions were asked as to his place of residence. By the act of parliament* the pawnbroker was bound to ask the question, and not having done so, the informer contended that he was liable in the penalty. But Rawlins stated, that he had pawned the article not in his own name, but in the name of Robinson; and then, the magistrate understanding that this was the only witness, said that he would not convict the pawnbroker on the testimony of one who had acted in this fraudulent and tricking manner by giving a false name. The magistrate was therefore justified in refusing to proceed with the hearing, particularly as the witness was a man, whose only means of gaining a living was by giving evidence for common informers.

*Richards*, on the same side, observed, that the

* 39 & 40 Geo. 3. c. 99. § 6.

act of parliament forbad the pawner to give * a false name, and, if he did, directed the pawnbroker to hand him over "into the custody of a constable, or other peace-officer."

Lord *Tenterden* C. J. Then the pawnbroker ought to have asked him where he resided, that he might be able to deliver him over to a constable, in case he gave a false name. It was proper that the information should be heard, and the *mandamus* must go. Rule absolute. *Exparte Byers*, H. T. 1831. K. B.

---

ARCHDEACONRY OF ROCHESTER.

Lord *Tenterden* C. J. delivered the judgment of the Court. This was a case for the opinion of the Court on three questions; first, whether the prebendary in question was duly annexed to the archdeaconry; secondly, whether the archdeacon was by his office or person capable of holding a prebendary; and, thirdly, whether the defendant was duly instituted and inducted into the prebend. It was admitted, that in case the Court should be of opinion with the plaintiff, on the first two points, judgment should be entered for the plaintiff; if not, that it should be entered for the defendant. The first question was, whether, in the time of Car. 1., the crown had the power to alienate the prebendary? and the Court was of opinion, that at that time the crown had the power, unless there were special circumstances to the contrary, which here did not exist. The next question was, whether the crown had the power to annex the prebendary to the archdeaconry? and the court was of opinion that it had. The Pope had the power before the time of Henry VIII., and afterwards that power was in the crown. Then came the question, whether the archdeaconry was competent to receive the prebendary? At first, a prebendary could only be holden by a corporation sole, but afterwards they had been granted to corporations aggregate, provided they were of a spiritual character; and the Court was of opinion, that it was competent to hold the prebendary; and, when once annexed to the archdeaconry, it could not be severed. But it had been said, that the plaintiff had not been duly instituted and inducted. If, however, the prebendary was annexed, institution into the archdeaconry gave the right to the prebendary.

Postea to the plaintiff. *King* v. *Day*, H. T. 1831. K. B.

---

COPYRIGHT—ENGRAVING.

*Gurney* obtained a rule to show cause why the general verdict for the plaintiff in this case should not be set aside, as against the assignees of Heath, and why the verdict, as against Heath, should not be entered on the first count only.

Trover brought by Mr. Murray, the bookseller of Albemarle Street, to recover the value of one hundred prints taken by Mr. Heath the engraver, from plates engraved by him for the plaintiff for the illustrations of an edition of Lord Byron's Don Juan. Heath had become bankrupt, and the prints came into the hands of his assignees, who put them into the hands of Mr. Southgate the auctioneer, and they were advertised for sale in his printed catalogue. The plaintiff brought his action, and the defence was, that the engraver was entitled by custom to take some prints from the plates which he himself engraved. Various witnesses were called who proved that it was the custom for the engravers to take some prints from the plates which they engraved for others; some said ten, some twelve, and some twenty; but there was no precise number fixed. Under these circumstances, Lord *Tenterden* C. J., who tried the case, was of opinion, that the engraver had no right to take prints without the consent of the owner of the plate, and the jury found generally for the plaintiff against all the defendants. *Gurney* obtained a rule, calling on the plaintiff to show cause why the general verdict for the plaintiff should not be set aside, as against the assignees of Heath, and why the verdict as against Heath should not be entered on the first count only. The eighth count in the declaration was founded on the statute of the 17 Geo. 3., which gave the proprietor of the plates a special action on the case against those who pirated his plates or prints, for damages with double costs; and the object of the rule in regard to Heath was, to relieve him from the payment of double costs; and as to the assignees, it was contended that they were not liable to the plaintiff in *trover*, as the prints, whether lawfully taken or not, were not the property of the plaintiff, who could only recover damages from Heath.

*Sir James Scarlett*, *Campbell*, and *Hill*, showed cause, and contended that the present case came under the provisions of the 17 Geo. 3. c. 57. By the true construction of the words of that statute, it applied both to the pirating of the plates, by engraving new ones from the original plates, or from the prints struck from the original plates, and also to the unlawful taking of prints from plates lawfully engraven, which was the case in question. The statutes of the 8 Geo. 2. c. 13., and 7 Geo. 3. c. 38., relative to the same subject, were penal, and applied to the pirating the engravings or plates, but the 17 Geo. 3. was a remedial statute, and ought to be construed so as to advance the remedy; and if so, then the unlawful taking of prints from plates lawfully engraven must be considered as coming under the provisions of that act. This practice of taking prints from the plates without the consent of the proprietors, and publishing them, or selling them, or exposing them to sale, was extremely injurious to the proprietors; for it diminished the value of their property in the market; more particularly, as the impressions so taken were the first and best impressions, and it was the object of the act to protect proprietors from the consequences of the practice. Then, as to the assignees, they knew perfectly well how these prints had been obtained, and yet they published and exposed them to sale; and thus they made themselves liable under the act, whether any of the prints were sold or not.

Lord *Tenterden* C. J., said, if the act of the 17 Geo. 3. c. 57. had stood alone, he admitted that there would have been strong grounds for contending that this case came under the pro-

---

* § 10.

visions of that statute. But looking at the 8 Geo. 2. c. 13., and the 7 Geo. 3. c. 38. *in pari materiâ*, with the present, he was satisfied that the remedy was confined to the pirating of the original plates, and selling prints taken from plates so pirated from the originals. The words of the statute of the 8 Geo. 2. c. 13. were, "that every person who shall invent and design, engrave, etch, or work in *mezzotinto* or *chiaro oscuro*, or from his own works and inventions shall cause to be designed and engraved, etched or worked in *mezzotinto* or *chiaro oscuro*, any historical or other print or prints, shall have the sole right and liberty of printing and reprinting the same for the term of fourteen years, which shall be truly engraved with the name of the proprietor on each plate, and printed in every such print or prints, and that if any printseller or other person whatsoever within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any other manner copy and sell, or cause to be engraved, etched, or copied and sold, without the consent of the proprietor or proprietors thereof, such persons shall forfeit the plates and prints to the proprietors, and be subject to a penalty of five shillings for every print so engraved, copied, or sold or exposed for sale. The act of the 7 Geo. 3. merely extended the provisions of the former to different descriptions of prints. Then came the act of the 17 Geo. 3. c. 57., and by that statute it was enacted that "if any engraver, etcher or printseller, or other person, shall engrave, etch, or work, or cause or procure to be engraved, etched, or worked in *mezzotinto* or *chiaro oscuro*, or otherwise, or in any other manner copy, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, reprint, or import for sale, or cause or procure to be printed or reprinted or imported for sale, or shall publish, sell, or otherwise dispose of, or cause or procure to be published, &c. any copy or copies of any historical print or prints, or any print or prints of any portrait, conversation, landscape, or architecture, map, chart, or plan, or any other print or prints whatsoever which hath or have been or shall be engraved, etched, drawn, or designed in any part of Great Britain, without the express consent of the proprietor or proprietors thereof in writing, then every such proprietor shall or may, in a special action on the case, recover damages and may have double costs." Now, looking at the whole of these acts together, he was of opinion that the act of the 17 Geo. 3. applied only in cases which came under the two previous acts, and that its object was to give the proprietors of engraved plates an additional remedy against those who pirated them, by this special action on the case with double costs. In the present instance the prints were taken from plates engraved for the plaintiff himself, and therefore there was no unlawful engraving nor pirating of plates without the owner's consent, and that being the case, the statute did not apply. The taking of prints in that way, and publishing or selling, was no doubt very injurious to the proprietors, since the impressions so taken were the best, and must diminish the value of the owner's property, and it was a fraud at common law, and no act was wanted to repress the practice. As to the assignees, they were no parties to the taking these impressions from the plate, and *trover* could not be maintained against them, unless the property in the prints had been in the plaintiff. Here the only remedy he had was to recover damages against Heath.

*Littledale* J. said the statute appeared to apply only to impressions taken from pirated plates, which these were not. If it were otherwise, printsellers, who purchased prints for sale, could not carry on their trade with safety.

*Taunton* J. and *Patteson* J. were of the same opinion.

Rule absolute for setting aside the verdict as to the assignees, and for entering it against Heath on the first count only.—*Murray* v. *Heath and others*, H. T. 1831. K. B.

---

MANDAMUS.—INSPECTION OF CORPORATION BOOKS.

A rule nisi had been obtained why a mandamus should not issue directed to the Master and Wardens of the Merchant Taylors' Company of London, commanding them to allow the applicants for the rule, as liverymen of the company, to inspect all books and papers, records and muniments, of the corporation.

After cause had been shown,

Lord *Tenterden* said, that ever since he had a seat in the court, he had always understood that his jurisdiction was limited by the practice; and he had always been anxious not to assume a power for which he had not precedent or authority. It was for that reason, that when he found that an application had been made on speculative grounds for a rule for a mandamus to inspect all books, papers, records and muniments, of a corporation, he had enquired whether there was any instance where such an application had been successful, in order that he might be assured as to the extent of his power. His impression had always been, that a mandamus could not be granted, except for some specific object and purpose. Some cases had been cited, but it had been admitted that there was no authority precisely in point, or which went to the full length of the present case. Observations, it was said, had also been made on general words imputed to the judges in these cases; but such observations must always be understood with reference to the subject matter under consideration at the time. The first was the case in Strange; and there the Court was reported to have said, that a mandamus might be granted to an individual to inspect the books of a company as to a particular matter which concerned himself; but it was confined to that particular matter, which in that instance was the admissions of members; and, in reality, there was a dispute on the point, and a proceeding depending. The rule then was, to limit the exercise of the power to cases where there was a particular specific object in view; such as, for instance, where a proceeding was depending respecting a particular office; but it was always limited to a particular subject. In the case of the King v. Tower,*

* 4 M. & S. 162. *Rex* v. *Lucas*, 10 East, 235.

there was no proceeding depending in a court of justice, but there was a dispute between the lord of a manor and his tenant on a specific subject, viz., the right to the underwood. There, a mandamus was granted to inspect the roll, not generally, but in as far as the tenant's right to the underwood was concerned. There were cases in which copyholders had been held entitled to an inspection of the rolls, where no suit was depending that was in question relating to customs, and the line of descent; and mandamuses had been granted for inspection of the rolls so far as the applicants were concerned: But no case of authority had gone further. Applications for general inspection on speculative grounds had always been refused, and there was no instance in which the court had interposed by mandamus in such a case as this, where the application was generally to inspect *all* books and papers. But it was said, that the Master and Wardens held considerable funds as trustees for the corporation. Be it so: but this was not the court to compel a trustee to account to his *cestui que trust*. It was said that improper and exorbitant fees were charged on the admissions of liverymen. If so, an application might be made for admission on the payment of reasonable fees, and if that application should be rejected, then a case of particular grievance would arise, on which there might be an application for a mandamus. He did not say what would be done upon it, but at least a ground would be laid for a rule to show cause, and the mandamus might issue, unless good cause was shown to the contrary. Then it had been said, that the liverymen took an oath to observe the rules and ordinances of the corporation, and that in order to be able to obey them, it was necessary that they should see them. But there, again, if a person found himself particularly aggrieved, he might apply for a mandamus, and it might be granted, unless good cause was shown to the contrary. No ground had been laid for a mandamus to allow a member to inspect generally all the books and papers of a corporation. It had never been the practice to listen to such applications; and if a contrary practice was to prevail, it would be attended with great and unnecessary inconvenience and expense to the parties. He was, therefore, of opinion that the rule should be discharged.—Rule discharged. *Exparte Norman, Franks, and others.* H. T. 1831. K. B.

---

## PREROGATIVE COURT.

### ADMINISTRATION.

Sir *J. Nichol* took occasion to make some observations upon the practice of granting administrations in common form, and upon the regulations which had been made by this court for preventing fraud in such cases. He observed, that it had been a matter of complaint by the Bank, the South Sea House, and other public bodies, as well as by individuals, that so far from any impediments being offered to the grant of such administrations too great facilities were afforded; and in another place, where witnesses had been examined on oath, one of them a professional person of experience had stated, that if any difficulties arose in the granting of administrations in common form, it was from the facility with which they were obtained, which afforded opportunity for fraud. The witness recommended more caution; the administration should not be granted upon mere allegation; that some proof should be required of the death of the party, a certificate of burial, and proof that the applicant was next of kin. Considering, however, that there was not one case of fraud out of perhaps five thousand, it was not expedient to subject parties to such inconvenience; yet the court was always ready to adopt any course, which, at the same time that it did not produce too great inconvenience, might add to the security of the probate. He should direct, that in future the date of the party's death should be inserted in the margin, and on the back of the probate or administration; and he impressed upon the registrars, the clerk of seats, and practitioners, the duty of exercising vigilance where applications of this nature were made. Cases had recently arisen, which had more particularly called for these remarks. An application had been made on behalf of William Darling, representing himself as one of the children of Elizabeth Darling, widow, who died at Bankshead in Durham, in March, 1819, intestate. The property was sworn to be between 450*l.* and 600*l.* This seemed to be the sort of case in which some explanation should be given why administration had been so long delayed, and the registrar had accordingly very properly called for it. There was no reason to doubt that this was a fair case; yet when it was pretty well known that letters were circulated all over the kingdom in consequence of the publication of the unclaimed dividends, this might have been a case of a different description. When the solicitor (a respectable house) was applied to, however, he had sent a letter to the proctor, which if he had been acquainted with the rules of practice in this court, and the reasons for them, he would not have sent, but would have been the first to approve of the regulations. The letter stated that the client of the writer had been prejudiced by the unwarrantable delay (though the application had been made the same day) in this court; that the writer could not take upon himself to assign motives for the delay, or to examine his client upon the subject; that the statute of administrations required the Ecclesiastical Court to grant administration without such enquiry; that his client had come up three hundred miles for the purpose of obtaining this administration, and the writer required that application should be made to this court, and if it refused an administration he (the writer) declared he should apply to the Court of King's Bench for a mandamus. Now he (Sir *J. Nicholl*) should not shrink from doing what he conceived to be his duty by the threat of a mandamus; and he was convinced, that the Court of King's Bench would not only refuse a mandamus, but highly approve of the course which this court had taken to prevent improper grants of administration. The reason now assigned for the delay was, that the deceased had no property but a reversion of a sum in the funds, and that the party in possession of that sum had but just died. This reason was satis-

factory; but as the person who alleged it was not known some enquiry must be made to authenticate it.

*In the goods of Elizabeth Darling, deceased.*

## ESSEX SPRING ASSIZES.

### ATTORNEY.—CLIENT'S PRIVILEGED COMMUNICATION.

In an action of ejectment, the attorney for the plaintiff being called by the plaintiff, was on cross examination asked by

*Platt*, whether a certain deed of conveyance belonging to the lessor of the plaintiff was in his possession?

The witness refused to answer the question, on the ground that he was not obliged to state any thing affecting his client, which he knew merely from his client.

*Platt* submitted, that the witness must answer the question, as this case was different from one in which an attorney was called upon to state some fact, which he had learned from his client by means of a confidential communication with him, or to produce the title deeds of his client. It was merely enquired here, whether a certain deed of the client was in possession of the attorney.

*Dowling*, for the plaintiff, contended that the witness was not bound to answer the question. The answer in the negative or the affirmative might be exceedingly important to the lessor of the plaintiff. This might be a mere fishing question, to learn with certainty whether a particular deed was or was not in the possession of the witness, in order to carry on further proceedings at law or in equity. The capability which the witness might possess of answering the question, was derived from his connection with his client, and therefore must be viewed as privileged.

*Garrow B.* thought that the question came within the rule as to privileged communications between attorney and client, and therefore, if the witness declined answering, he could not say that he was obliged so to do. *Doe* d. *Cook* v. *Barrett.*

### EJECTMENT.

In an action of ejectment where a verdict had been given for the plaintiff,

*Dowling* applied to *Garrow* B., who tried the cause, for his certificate under the 11 Geo. 4. and 1 Wil. 4. c. 70. § 38., to enable the plaintiff to obtain a writ of possession immediately. The words of the statute are, "when a verdict shall be given for the plaintiff, or the plaintiff shall be nonsuited for want of the defendant's appearance to confess lease, entry, or ouster, it shall be lawful for the Judge, before whom the cause shall be tried, to certify his opinion on the back of the record, that a writ of possession may be issued forthwith."

*Platt* told the court that he should move in the next term for a new trial, on the ground of certain evidence having been admitted, which was not receivable in point of law.

*Garrow* B. said, that under these circumstances he should refuse to certify.—*Doe* d. *Cook* v. *Barrett.*

## MINOR CORRESPONDENCE.

### TERMS AND RETURNS OF WRITS.

One of your correspondents, signing himself "T.," in a letter inserted in your journal on the 5th of February, remarks (and as I think very correctly), that the note in p. 172., on "Terms and Returns of Writs," is in error in stating that the prolongation of Easter term, in the event of Easter falling during the term, is repealed. And you, Mr. Editor, subjoin a note to "T.'s" letter, stating, that "as the days beginning on Good Friday and ending with Easter Tuesday, are to be deemed part of the term. 1 W. 4. c. 3. § 3.; and *as term is limited to a certain number of days*, it must surely follow that the contingent prolongation is at an end."

Now, I should be glad to know where you find that the term is limited to a certain number of days. Surely, in neither of the acts 1 W. 4. c. 70. § 3.

While on the subject of these acts, let me ask your correspondents what, under the new acts, is to be done when (as must frequently occur), any one of the terms shall *commence* on a Sunday? Their ending on a Sunday is provided against by § 3. of 1 W. 4. c. 3.

S. W.

### ANSWERS TO QUERIES.

1st. A. can prove upon the bond under the commission against C., as a *voluntary bond* given for no valuable consideration (as this may be considered) may be proved, so that payment of it be postponed till all the other debts are satisfied, and then it may be paid out of the surplus. See Eden's Bankrupt Law, 121.; and *Gardner's assignees* v. *Skinner*, 2 Sch. & Lef. 228. The reason why payment is postponed is, there being the want of a *valuable consideration.*

2d. It has been decided, that an infant who is a partner in trade, and holds himself out to the world as an adult, and *sui juris*, is liable to the bankrupt laws. 16 Ves. 265.

3d. I should think B. cannot compel A. to pay off the mortgage before he has given six months' notice, and which must expire at the end of the twelve months. T. E.

In answer to the second query in Number XXI. p. 335., I beg to refer to *Exparte Sydebotham*, 1 Atkins, 146., where it was held, that an infant could not be made a bankrupt; but it would seem, that if an infant has traded for some considerable time, and held himself forth as an adult, a commission of bankrupt against him would be sustainable. See *Exparte Watson*, 16 Ves. 265. A. F. C.

### QUERY.

Under the 9th section of 7 & 8 Geo. 4. cap. 71. is an attorney exempt from the whole act; that is to say, can he hold to bail for 10*l.* and upwards, as he could under the 12 Geo. 1. cap. 29.

## POOR LAWS.

### BARRISTERS AND ATTORNEYS.

A Bill, "for the better management of the Poor in the several parishes and hamlets of the city of Norwich, and county of the same city," was lately presented to the House of Commons and has been printed. The principal object appears to be, to get rid of the corporation guardians. * * * * * The disfranchising principles of the bill however, do not stop there: amongst the persons who are *not* to be eligible to the office of Guardian are the mayor, recorder, steward, justices of the peace, sheriffs, aldermen, the several officers of the corporation, *and practising barristers, attorneys, and solicitors!!* Now the gentlemen of the legal profession generally live in good houses and are large payers to the rates; and what in the name of wonder has the whole body done that they may not be trusted to act in the guardianship of the poor?—*Norfolk Chronicle, March* 26.

## MISCELLANEA.

### SERJEANTS AT LAW IN THE 15TH CENTURY.

Sir John Fortescue has declared that the degree of serjeant at law is as honourable as that of doctor in the universities. And, in truth, the degree of serjeant at law was considered in a very respectable light: none could be a judge in the King's Bench or Common Pleas, but one who had been first a serjeant; nor was a person to be called to the degree of serjeant, till he had been in the general study of the law above mentioned at least for sixteen years, which probably meant from his first entrance at an inn of chancery. But, then, it so happened that the expense attending a call of serjeants, was, at this time, very great — in general about seven or eight were called at a time; and, on that occasion, there were revels and feastings for seven days together, *as at a coronation.* The expense each serjeant was at seldom fell short of two hundred and sixty pounds, out of which one-sixth was actually expended on rings. It cost Sir John Fortescue, himself, 50*l.* in rings.

In consequence of this great expense, learned apprentices, as rising lawyers were then termed, were not always ambitious of the state and degree of a serjeant; but, on the contrary, when called thereto, tried all ways to avoid it. Instances of this sort occurred, in which the office was shunned and endeavoured to be escaped by all the means in the power of the persons who had been called to this honour by the king's writ. Having in vain tried to evade the direction of the writ, the persons named in it, upon the return thereof in chancery, made an absolute refusal. Upon this they were called before the parliament, that was then sitting, and there charged to take upon them the state and degree of serjeant, to which, per force, they consented.

### STUDENTS IN THE FIFTEENTH CENTURY.

Fortescue mentions it as a peculiar honour to the legal profession, the number of students who frequented the inns of court and chancery; and also, speaks of the high character of the students themselves. A famous statute, however, of the 33 Henry 6., gives a better notion of the effect of this numerous assemblage of legal aspirants. This act restricts the number of attorneys, who, for the most part, were derived from far other than "noble stocks," and could claim little credit for having "a special regard to their nobility, and the preservation of their honour and fame." Indeed, as stated by Sir Matthew Hale, the practice of the common law had declined in excellence since the reign of Edward I.

### THE RACK IN ENGLAND.

Though the legality of the torture at any time in England is strictly denied by Fortescue; yet only a few years before his time the celebrated rack, still to be seen in the Tower, called the Duke of Exeter's daughter, had been introduced by that nobleman when high constable. These torments, whether legal or illegal, were inflicted upon the sufferer with perfect impunity; and nearly for two centuries after this period we meet with occasional examples of torture in various modes of application. During the whole reign of James I., an officer existed called the master of the rack.

### EXCELLENCE OF CAPITAL PUNISHMENT.

Fortescue boasts that more men were hanged in a year for robbery and manslaughter than in seven years in France for the same crimes. In Scotland, also, says the same juridical authority, "there was hardly a man hanged for robbery once in seven years;" but in England, "if a man be very poor, and see another very rich, whom he may despoil by force, he will not fail to do so."

### LORD CLONMEL.

The late Lord Clonmel, who never thought of demanding more than a shilling for an affidavit, used to be well satisfied provided it was a good one. In his time the Birmingham shillings were current, and he used the following extraordinary precaution to avoid being imposed upon by taking a bad one:—"You shall true answer make to such questions as shall be demanded of you touching this affidavit, so help you God. Is this a good shilling? Are the contents of this affidavit true? Is this your name and handwriting?"

# The Legal Observer.

VOL. I. SATURDAY, APRIL 9. 1831. No. XXIII.

"Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## LAW REFORM IN AMERICA.

REAL PROPERTY. — ESTATES-TAIL. — MORTGAGES. — JOINT-TENANTS. — TRUSTEES. — DESCENT. — DEBTS. — SLAVERY.

WE have been long desirous of laying before our readers some account of the progress of law reform in America, and had endeavoured to collect some materials for that purpose, when our attention was called to an able article in the last Number of the Foreign Quarterly Review, on the United States. The portion relating to the title of this article we shall gladly extract, as it appears to us highly interesting. We beg to say, however, that we do not admit all the "grievances" of which the writer complains as existing in our laws; and that he is better acquainted with the reforms effected in America, than with the actual state of the law in this country.

"In conformity with that apathetic spirit with which Englishmen, we know not why, have regarded every thing relating to the United States, little is known among us of the numerous ameliorations of our law which have been carried into effect by the Americans. Perhaps it may be little flattering to our pride to see our ancient colonists so much in advance of ourselves in the application of the principles of jurisprudence to practice. Some there are, doubtless, among us, who imagine that little is to be gained in any point of view by an acquaintance with the legal system of America; but whether pride or ignorance is the cause of this difference, we admit that, considering the source from whence it has sprung, a system cannot be undeserving of our attention to which M. Comté, one of the most celebrated French political writers of the day, and who at least may be taken as an impartial witness, has applied the following brilliant eulogy: —

"'Nos théories les plus brillants sont, sous le rapport des institutions, de beaucoup en arrière des pratiques Américaines; les legislateurs de l'Amerique out exécuté sans violence et presque sans efforts, ce que les philosophes anciens ou modernes n'auraient pas osé concevoir.'

"Though in the charters which were granted to the original colonists, the feudal rights of the sovereign in the soil were formally recognised, yet even then for all purposes of enjoyment and alienation, the lands were really allodial. By a statute passed by the legislatures of New York, Massachusetts, since the establishment of their independence, this allodial title of the proprietor in his lands has been placed beyond all doubt, and thus those numerous sources of litigation which proceed from our absurd adherence to the forms required by the obligation of military fealty, are amongst our ancient colonists entirely removed; for though laws distinctly recognising this principle have not (as far as we are aware) been passed in all other states, yet for all practical purposes the allodial right of the landed proprietor is formally established. The grievances resulting from our system of copyholds and manorial services, from uses and trusts, from the incapacity of married women to convey, from the necessity which exists with us of naming the heirs of the alienee in all alienations in perpetuity, and from the cumbrous machinery of fines and recoveries, are in America either considerably ameliorated or entirely removed. The state of the law respecting estates tail may be seen from the following extract from Mr. Duponceau's 'Dissertation on the Jurisdiction of the Courts of the United States' quoted by Mr. Parke.

"'*Of estates tail in the several states of the union.* In four states these estates were never known to have been in existence, viz.: Vermont, Illinois, Indiana, and Louisiana. In one, viz. South Carolina, the statute *de donis* never was in force, but fees conditional at common law prevail. In twelve they have been abolished, or converted by statutes into fee simple absolute, viz. New York, Ohio, Virginia, North Carolina, Georgia, Missouri, Tenessee, Kentucky, Connecticut, Alabama, Mississippi, and New Jersey; but in the last four a species of estate tail still exists, being for the life of one donee, or a succession of donees there living. In six they may be barred by deed, acknowledged before a court or some magistrates, viz. Rhode Island, Maine, Pennsylvania, Massachusetts, Maryland, and Delaware; but in the last four they may also be barred by fine and common recovery. And in one only do they exist as in England, viz. New Hampshire.'

"All the improvements that Mr. Brougham

desired respecting the conveyances of estates held by married women in their own right, or in which they would be dowable have been effected.* The absurd doctrine of tacking, by which a second mortgagee, if he was ignorant of the prior charge when he advanced his money, may, with us, by getting an assignment of any legal interest anterior to the first mortgage, take precedence of the first mortgagee, has been utterly exploded, and the simple rule of 'qui prior est tempore, fortior est jure,' is every where observed.

"The absurd rule of our law, by which, if an estate is given to a plurality of persons, without adding any explanatory words they become joint tenants of the lands, has been remedied in the United States by the obvious plan of reversing the rule; as in nearly every case the interest of the parties requires that they should have a tenancy in common, and not a joint tenancy.

"In New York and Delaware estates conveyed to executors and trustees are exempted from the rule of construction introduced by statute. The propriety of this exception is obvious. The actual law of New York and Delaware, both with regard to the general principle, and the exceptions, coincides exactly with the provision proposed by Mr. Humphreys, who says, 'where land is alienated to two or more jointly, whether with or without distinction of shares and interests, or in whatever terms, the share of each of them, upon his death, shall pass to his real representatives, and not to any surviving proprietor unless an express right of survivorship be given, or in the case of active trustees.'†

"The custom of primogeniture so firmly rooted in the English system, would, of course cause the American law of descent to be in a great measure inapplicable to England; still, however, the Americans have introduced several improvements in the law of descent not touching upon this point, which might be advantageously transplanted to this side the Atlantic. The English law by which a parent cannot succeed to a son's estate, and which requires a collateral heir to be of the whole blood of the ancestor dying seised, a law which Mr. Humphreys justly stigmatises as 'repugnant to every principle of property, and to the moral feelings of mankind,' has been abrogated in all the states. Blackstone's seventh causes of descent, by which kindred derived from the blood of the male ancestors however remote, are admitted before those from the blood of the female, however near, which Mr. Parke properly characterises as violating the feelings of nature, is observed in very few districts of the Union. There is no uniformity, however, in the several states in the laws relating to this subject. In Georgia, a preference is given to the brothers and sisters of the half blood in the paternal line, while in Pennsylvania the inheritance is divided among the next of kin of equal degree to the intestate.

"The very obvious improvement in the English law, recommended by Mr. Humphreys, which should render the real as well as personal estat of the deceased liable for his simple contract debts has been carried into effect in most of the States. Also during the life of the debtor, his real estate is liable for the payment of his debts, except in the State of Virginia, which all travellers concur in describing as the most aristocratic part of the Union, and of which it appears the large landed proprietors have felt that reluctance, which Mr. Humphreys anticipates would be felt by ours, at a proposal of subjecting their real estates to the payment of their debts of every description.

"M. Levasseur was much struck, and well he might be, at the absurd law in the state of New York, which incapacitates a person from sitting on the bench, when he has attained the age of sixty years: an absurdity which could not be more glaringly exposed, than by the fact of the appointment of Mr. Kent as a commissioner to revise the law of the state, after he was superannuated as a judge. This gentleman, whose learning and abilities justly entitle him to the appellation of the Blackstone of America is, the author of "Commentaries on the American Law," which, like the commentaries of our celebrated English judge, were originally delivered in the form of lectures at Colombia College. They contain a full and luminous account of the legal institutions of the republic, and though not quite completed, are considered, we believe, throughout the states, as the standard work on American jurisprudence.

"It is an anomalous circumstance, that in the land which we are accustomed to consider as the model of simplicity and uprightness, the practice of gambling in lotteries, and places devoted to this purpose, which has been some time forbidden in England, and now appears on the point of meeting a similar fate in France, should be sanctioned by legislative authority in the United States. In New York several lottery offices exist with the connivance of the government: the legislature, it is true, has forbidden the establishment of new ones, but, with what we cannot consider as a culpable weakness, it has refused to withdraw its protection from the old ones, on the plea that they exist in virtue of privileges anterior to the constitution; the city is consequently exposed, in the words of M. Levasseur, "to a scourge more terrible than drunkenness or prostitution, which extends its ravages through the city of New York, and daily taints the public morals."‡ New Orleans also contains numerous gambling establishments, to which licences are granted by the government in the same way as at Paris.

"Slavery, and the laws relating to the free persons of colour, form a foul spot in the picture of the American Union. On this subject we are persuaded there is little accurate knowledge in England. The travellers of our nation who have visited the slave-holding states, have, as far as our observation goes, been either persons whose morbid horror of slavery has prevented them from taking a sufficiently close view of its state, or whose unfounded prejudices against the

* Parke's Introduction, p. 77.

† Parke's Introduction, p. 72.

‡ La Fayette in America, vol. i. p. 124.

whole of the American nation, have utterly disqualified them from judging impartially on any subject relating to that great republic. For this reason we shall abstain, in the following observations, from quoting the work of any Englishman, and should have done so even though we had not been warned of its danger by the sweeping denunciation of M. Murat, who declares that on the subject of slavery, there is not a single page in any English traveller, that has been dictated by common sense.* M. Murat himself, however, is chargeable with entertaining prejudices against the English government on the subject of slavery, not less unfounded than those which he ascribes to our countrymen, when he accuses it of employing writers to exaggerate the evils of American slavery, with the view of discouraging emigration to the United States. This is a mistake into which, to say nothing of its intrinsic improbability, he could hardly have fallen, had he been aware of the evils which the excess of population is now inflicting on England.

"In thirteen out of twenty-four states slavery has been abolished by law; in the eleven others it exists with full vigour, though variously modified according to the genius and character of the several governments. Much more inquietude is felt with respect to the free blacks than the slaves; for there, as every where else, the whites have an unconquerable aversion to any connection or intercourse with persons of colour: and this puts a complete check to an amalgamation of the two races. Discontent is not unfrequently excited amongst the slaves by the sight of their free brethren, who usually live in a state of complete idleness. By a law lately passed in the state of South Carolina, every traveller who enters that province with a black servant, is deprived of him on the frontiers, where he is imprisoned, and only returned to his master when he is about to leave the state. The reason given for the enactment of this law, is the fear that tumults may be excited amongst the slaves by free black strangers, who never fail to talk to them of liberty.† A negro when free or enslaved, cannot travel without a passport, and every white has a right to detain him in prison‡, if he is not able to prove his freedom. The desire of some states to rid themselves of the free blacks, has induced them to impose a heavy capitation tax on these unfortunate persons, and even to authorise their sale if they cannot pay it.§ This appears to be a most impolitic measure, as without diminishing their numbers in the union, it may only serve to increase the dislike between the two races; and in case of an insurrection the contest between them would be maintained with a more determined hate and ferocity. In most of the states they may be sold to pay the debts of their masters, contracted before emancipation, and even the expenses of their imprisonment, if they should be detained while travelling, for not having certificates of their liberty.‖ In thirteen of the states the constitution expressly forbids them to vote; and in all others, except Pennsylvania and New York, they are deprived of this privilege by special laws. Some of the southern states have forbidden free negroes to enter their dominions under severe penalties, a law which, equally with those above mentioned, has given rise to long discussions as to its constitutional character. The constitution of the United States declares, that 'the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' But a free negro of New York is a citizen of that state: now we have just seen that so far from enjoying the privilege of a citizen in some of the southern states, he is even forbidden to enter them — a plain violation of the constitution. In some parts slaves are only allowed to be emancipated, on the understanding that they shall quit the state immediately on obtaining their freedom.

"On the admission of Missouri into the union in 1821, an article of its constitution, which forbids the entry of free persons of colour into the legislature, gave rise to long and violent discussions. The article was, however, at length admitted, on the understanding that it should not apply to any citizen of another state — a result which only serves to perplex the question in a greater degree than before. The debate on the admission of this state, commonly called the 'Missouri question,' violently agitated the union, and gives reason to fear that at some future period it may be the cause of its dissolution." ¶

* Lettres sur les Etats Unis, p. 114.
† La Fayette in America, vol. i. p. 206.
‡ Lettres sur les Etats Unis, p. 143.
§ Ibid. p. 147. ‖ Ibid. p. 144.
¶ Lettres sur les Etats Unis, p. 147.

## THE UNIVERSITY OF LONDON — LAW CLASS.

### LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

No. III.

### *Of the Extent and the Construction of the Contract of Surety.*

THE same rules of interpretation and construction which apply to other kinds of contracts apply to the contract of surety. In cases of doubtful construction, the meaning may sometimes be ascertained from a consideration of the nature of the contract. Suppose, for example, a person to become a surety for the fidelity of a public officer, whose appointment at first is for a limited period only; at the end of which period a new appointment is necessary, if the employment continues. The officer is newly appointed, and again and again re-appointed; and during the period of one of these subsequent appointments, he commits a breach of duty, for which indemnity is claimed of his surety. The surety's engagement, entered into upon the first appointment, is expressed in terms which

are sufficiently general to import an obligation for an indefinite period; but the surety contests the demand, and the interpretation being doubtful, "Would it be consistent, with the nature of the contract to hold the surety obliged for an unlimited period? It has been deduced from the definition or nature of the contract of surety, that the surety cannot be obliged to a greater extent than the principal; and, therefore, as the officer, at the time the surety's engagement was made, was obliged for only a limited period, that is, for the period of his appointment, the surety also was obliged only for the same period, and the demand in dispute having accrued at a subsequent period cannot be supported."

The lecturer adverted to the subject of technical rules of interpretation; the application of which, he observed, would be uncertain, unless the person using them have on all occasions a clear perception of their reason; and he proceeded to prove, that the rule so often referred to, that the generality of a condition or covenant is restrained by the recital, derives its force from the supposition of the recital being a precise and adequate expression of the intention of the parties; where, therefore, the recital is manifestly defective in that point of view, the rule stated is either wholly or partially inoperative. For instance, where, as in *Sansom* v. *Bell*[a], the recital mentions some only of the subjects mentioned in the condition, the recital may be assumed to be defective as a statement of the intention of the parties, and it will restrain the generality of the condition only in respect of the subjects mentioned in it.

From the above preliminary topics, Mr. Theobald proceeded to a review of cases; observing, that until the decisions of the courts are codified, or the general rules and principles fairly deducible from them are collected, and made authoritative by the legislature, tuition in cases is the only mode in which instruction in the law can be given.

From the cases of *Arlington* v. *Merricke*,[b] and *The Liverpool Waterworks Company* v. *Harpley*,[c] and others which are similar, Mr. Theobald inferred the rule, That where the engagement of a surety related to a particular office to which his principal is appointed, the surety's obligation does not extend in point of time beyond the duration of the appointment. In the first case the bond in suit recited, that the plaintiff had appointed one Jenkins to be his deputy postmaster for a certain stage *for the term of six months*, and that the defendant was his surety; and the condition was that Jenkins should *during all the time he continued* deputy faithfully execute his duties. Jenkins continued deputy after the expiration of the six months; but the court held that the defendant's obligation extended to that period only.

Where also a bond was taken with a surety for the fidelity of a person as collector of a church rate, and the collectorship was not recited to be an annual office, the surety's obligation was held to extend to one year only, because it appeared on the pleadings that the appointment was for that period only.[d]

Where also it was neither recited, nor admitted on the record, that the office for the due execution of which the defendant was surety was an annual one, but it appeared to be such in the act of parliament which constituted it, the court held that the surety's obligation applied only to the current year of his principal's appointment.[e]

Where, also, churchwardens appointed a deputy, and took a bond, with a surety for his fidelity, conditioned for his accounting from time to time, and at all times when required, to the churchwardens or *their successors*, the surety's obligation was held to extend to the first year of the deputy's appointment only, because as the office of churchwarden is annual, so must be that of the deputy.[f]

Where, on the contrary, a bond was taken under an act of parliament, with a surety for the fidelity of A. B., and it appeared that A. B.'s office was not made annual by the act, the court held the surety's obligation was not confined to the period of a year.[g]

If, also, said Mr. Theobald, a surety's engagement relates to a particular office, it will not extend to things which are out of the ordinary scope and business of the office. For example, the surety for an overseer is not responsible for money borrowed by the overseer, even under the direction of the parishioners, for parochial purposes, because it is not the duty of an overseer to borrow money.[h]

The surety's engagement also, which relates to a particular office, will extend only

[a] 2 Camp. N. P. C. [b] 2 Saund. R. 405. [c] 6 East, 507.

[d] *Wardens of St. Saviour's Southwark* v. *Bostock*, 2 New R. 175.
[e] *Peppin* v. *Cooper*, 2 Barn. & Ald. 451.
[f] *Leadby* v. *Evans*, 2 Bing. 32.
[g] *Curling* v. *Chalker*, 3 Maule & Sel. 502.
[h] *Legh* v. *Taylor*, 7 Barn. & Cres. 491.

to such things as were under the jurisdiction of the office at the time the surety's engagement was made, and not to things brought under its jurisdiction afterwards. Thus a surety for a collector of customs, on his appointment in 1691, was held not liable for the duties on coals, of which his principal had the collection, but which was first imposed in 1698.[a]

The lecturer censured the decision in the *Irish Society* v. *Needham*,[b] where a bond with a condition that the principal party should pay over to the plaintiffs all *rents* which he should receive, and the *increase* and *improvement thereof*, upon the renewals of the then leases, was held to extend to *fines* received by the principal; according to which decision a *fine* was considered as an increase of a rent, whereas more probably improved rents only were intended.

Where an engagement of surety is expressed to be on behalf of a particular individual as principal debtor, it is understood as being on his behalf alone, and therefore it will not continue if he takes in a partner.[c]

In like manner, if an engagement of surety is expressed to be on behalf of more individuals than one as principal debtors, who are all specified by name, it is understood to be on their behalf jointly, and therefore will not continue on behalf of the survivors, in case of the death of any of them, unless it expressly appears, and that very clearly, that the continuance of the engagement on behalf of survivors was intended.[d]

But where the persons, on whose behalf an engagement of surety is made, are described by a particular character, the same rule does not hold, and the engagement may or may not extend to survivors, according to the preponderance of evidence as to the intention of parties.[e]

The obligation of a surety contracted with a particular person as the obligee, extends to that person only, and therefore ceases if he takes in a partner. Thus in *Wright* v. *Russell*,[f] the bond in suit was conditioned for A. B.'s fidelity as long as he should continue in the plaintiff's service as a broad clerk. The plaintiff took in a partner, A. B. continued in the same employment, and during the partnership committed the breach of his fidelity for which the action was brought; but the court held, that the obligation of the defendant, the surety, was at an end when the plaintiff took in a partner.

On the principle that a trade is not transmissible, but is put an end to by the death of the trader, Lord *Mansfield* C. J. adjudged that a surety for the fidelity of a clerk was not responsible for a breach of trust upon an employment of the clerk after the death of the trader by his executors.[g]

The engagement of a surety made with several individuals who are specified by name, is understood to be made with them jointly, and therefore it ceases upon the death of any of them, and will not be available against the surety, in respect of the transactions of the survivors.[h]

But a surety bond, or other engagement of surety, may be so framed as to continue for the benefit of future partners. Thus, in *Barclay* v. *Lucas*,[i] the court having construed the defendant's engagement as intended to enure to the benefit of the plaintiff's *banking house*, without reference to the particular persons composing it when the engagement was entered into, held, that a change in the firm did not dissolve the liability of the defendant, the surety. And in *Pease* v. *Hirst*,[k] where a joint and several promissory note, payable on demand to order, was given as a security for advances made by the payees to one of the makers for whom the defendant had become a party, it was held, that the note continued as a security for advances made after a change in the firm of the payees, because from its being payable to order, the court inferred, that the parties intended the note to continue as a security to the house of the payees, of whatever persons it might be constituted.

If an obligation is entered into with the obligees with reference to a particular character sustained by them, the obligation ceases when they lose that character.[l]

It is an important question in a large number of cases, whether the security given applies to an existing or past account, or to a future account only; and, if to a future, whether it applies to the first transactions after the commencement of the account, or to any portion of it within the amount to which the surety has confined his liability. With reference to this question, the chief cases reviewed were, *Kirby* v. *Marlborough*,[m]

---

[a] *Bartlett* v. *Attorney General*, Parker, 277. *Bowdage* v. *Attorney General*, Parker, 278. n. a.
[b] 1 Term R. 482.
[c] *Bellairs* v. *Ebsworth*, 3 Camp. N. P. C. 52.
[d] *Simson* v. *Cooke*, 1 Bing. 452.
[e] *Kipling* v. *Turner*, 5 Barn. & Ald. 261.
[f] 3 Wils. 550. 2 Black. 954.

[g] *Barker* v. *Parker*, 1 Term R. 287.
[h] *Weston* v. *Barton*, 4 Taunt. 673.
[i] 1 Term R. 291. n. a.
[k] 10 Barn. & Cres. 125.
[l] *Dance* v. *Girdler*, 1 New R. 54.
[m] 2 Maule. & Sel. 18.

*Williams* v. *Rawlinson*,[a] *Mason* v. *Pritchard*,[b] *Hargreave* v. *Smee*,[c] *Melville* v. *Hayden*,[d] and *Kay* v. *Groves*.[e]

The liability of the surety in general extends to things which are accessary to the principal debt or obligation, unless he has protected himself by an express contrary stipulation; therefore, interest being accessional, he is liable to pay interest whenever his principal is so. Thus receivers being liable to pay interest, their sureties are entitled to relief only upon payment of the debt and interest: although to this rule there may be exceptions; as for example, *Dawson* v. *Rayner*,[f] where the parties interested, knowing that their receiver had become bankrupt, neglected to take steps to pass his accounts for a considerable time afterwards, the Lord Chancellor relieved the sureties without interest.

Costs also being accessional to the debt, the surety is in general liable to pay the costs recovered against his principal.[g]

In the case of a bond, be the cause of the obligation what it may, or the condition ever so general, the obligor, whether a surety or principal, is not liable beyond the penalty.[h] *Francis* v. *Wilson*,[i] seems an exception to this rule, because the plaintiff obtained an allowance of interest beyond the penalty; but in that case the penal sum was the exact amount of the debt, and therefore was penal only in respect of the form of the obligation, and there was a stipulation for interest upon it.

The subject announced by Mr. Theobald for his next lecture was, "The mode in which the obligation of surety may be extinguished."

---

## LORD KENYON ON THE STUDY OF THE LAW.

THE following letter contains some important questions which every young man about to enter on the profession of the law, would most gladly propose to such an exalted character as Lord Kenyon. This is a task which has been already accomplished; and in Lord Kenyon's reply, the young student will not make any great mistake, if he should imagine the letter addressed to himself.

"MY LORD,

"I am a young man about to enter into the profession at the head of which you preside with such distinguished eminence, and am desirous of moving in the sphere I am placed in, with as much credit as it will admit of. To gain a competent knowledge of the spirit and principles of the law, must be most essentially necessary to the pure practice of it; and I am now induced by the accounts I have always heard of your lordship's goodness, humbly to request that you will be pleased to honour me so much as to communicate to me the course of reading necessary to be perused in order to attain so desirable an end.

"The mind without a guide to direct its exertions, is like a traveller on a pathless desert, bewildered and confused; it proceeds without knowing whither, and perhaps sinks in the pursuit of that which, by timely assistance, it might have attained with pleasure.

"Your lordship will certainly be astonished at my presumption, yet I trust you will not wonder at the reason of it. It is natural for a man eager after knowledge, to wish to take it from the purest source. Common sense pointed out your lordship.

"If your lordship should not consider it beneath your dignity to take notice of this letter, I should have reason to consider it the happiest circumstance of my life, to have experienced your condescending goodness. If, on the contrary, you should smile at my folly, or be offended at my presumption, I shall be sufficiently punished by silence and neglect.

"Humbly entreating your lordship's forgiveness for having thus long obtruded on your valuable time I beg leave to subscribe myself

"Your lordship's
Most devoted and
Obedient humble Servant,
ROBERT CRABTREE."

"Halesworth, Suffolk."

---

The following is Lord Kenyon's answer.

"SIR,

"I am afraid you have concluded before this time I decline to answer your letter. To say the truth, I had some suspicion that the letter did not come from a real person; but being convinced of that, I do not delay to write to you. I wish it was in my power to propose any plan that you could rely on. The truth is, that, in the study of the law,

---

[a] 1 Ry. & Moody, N. P. C. 233. 1 Bing. 71.
[b] 12 East, 227. [c] 6 Bing. 244.
[d] 3 Barn. & Ald. 593. [e] 6 Bing. 276.
[f] 2 Russell, 466.
[g] *Walker* v. *Wild*, 1 Madd. 528. *Rex* v. *Lyon*, 3 Burr. 1461.
[h] *White* v. *Scaly*, 2 Black. 1190. *Wild* v. *Clarkson*, 6 Term R. 303. overruling *Lonsdale* v. *Church*, 2 Term R. 388.
[i] Ry. & Mood. N. P. C. 105.

a mass lies before the student enough to deter young minds, and they are left to hazard in which road to proceed.

"I would advise you to read very carefully Blackstone's Commentaries, and if you have the perseverance to go through it two or three times, I believe it would be of great use. After this, you may, perhaps, with some advantage, read Serjeant Hawkins' Abridgment of Coke's Littleton, and then proceed to Coke's Littleton, accompanying that arduous task with reference to the Abridgment I have mentioned, which will point out to you those points of that vast work which are now rather obsolete. When you have done this, you will read the more modern reports; Sir James Burrows', Mr. Douglas', Mr. Cowpers', and the Term Reports; and in Equity the 1st vol. of Equity Cases Abridged, Mr. Cox's edition of Peer Williams, Hawkin's Reports in the time of Lord Talbot, and Precedents in Chancery. By the time this is done, you will be as good a judge as I am how to go on. If you mean to come to the bar, I would advise you to go to some *able* special pleader; but you will inform yourself who answers that description, as much ignorance now mixes in that profession. Conveyancing will be learned in the office you are placed in, and by referring to Horsman's or other books of precedents; and the poor law and sessions business from Mr. Const's late book and Burn's Justice.

"I heartily wish you success, and that you may deserve it by acting honourably in the prosecution of your profession.

"Your humble Servant,

"KENYON."

"May 13th, 1793."

## MAINTENANCE OF SUITS. — ANCIENT DISSEISIN.

ALTHOUGH, from the time of Edward I., the feudal system, and all the feelings connected with it, declined very rapidly; yet, what the nobility lost in the number of their military tenants, was in some degree compensated by the state of manners. The higher class of them, who took the chief share in public affairs, were exceedingly opulent; and their mode of life gave wealth an incredibly greater efficacy than it possessed in later times. Gentlemen of large estates and good families, who had attached themselves to these great peers, who bore menial offices in their households, and sent their children thither for education, were of course ready to follow their banner in a rising, without much enquiry into the cause. Still less would the vast body of tenants, and their retainers, who were fed at the castle in time of peace, refuse to carry their pikes and staves into the field of battle. Many devices were used to preserve this aristocratic influence, which riches and ancestry of themselves rendered so formidable. Such was the maintenance of suits or confederacies for the purpose of supporting each other's claims in litigation, which was the subject of frequent complaints in parliament, and gave rise to several prohibitory statutes. By help of such confederacies, parties were enabled to make violent entries upon the lands they claimed, which the law itself could hardly be said to discourage. Even proceedings in courts of justice were often liable to intimidation and influence. A practice much allied to confederacies of maintenance, though ostensibly more harmless, was that of giving liveries to all retainers of a noble family; but it had an obvious tendency to preserve that spirit of factious attachments and animosities, which it is the general policy of a wise government to dissipate. This custom had continued from the first year of Richard II., and was unrepealed, though many legal provisions had been made against it, until the reign of Henry VII., when it was shortly after ultimately abolished.

These associations, under powerful chiefs, were only incidentally beneficial, as they tended to withstand the abuse of prerogative. In their more usual course, they were designed to thwart the legitimate exercise of the king's government in the administration of the laws. Habits of rapine and tumult were prevalent. This was the common tenour of manners; sometimes so much aggravated as to find a place in general history, more often attested by records. During the three centuries that the house of Plantagenet sat on the throne, disseisin, or forcible dispossession of freeholds, makes one of the most considerable articles in the law-books. Highway robbery was from the earliest times a sort of national crime. Capital punishment, though very frequent, made little impression on bold and licentious men, who had, at least, on their side the sympathy of those who had nothing to lose.

These robbers had flattering prospects of impunity. Besides the general want of communication, which made one who had fled from his own neighbourhood tolerably secure, they had the advantage of extensive forests to facilitate their depredations and prevent detection. When outlawed, or brought to trial, the worst offenders could frequently purchase charters of pardon; which defeated justice in the moment of her blow. Nor were the nobility ashamed to patronise men of every crime.

## REMEDY OF ATTORNEYS IN PARTNERSHIP.

*To the Editor of the Legal Observer.*

Van Sandau and Tindale v. Brown.

SIR,

A SENSIBLE letter, entitled as above, appeared in the Legal Observer of the 26th of March, inst. That letter is, in general, accurate in its details; but, no doubt without intending it, the writer has made me appear to have acted harshly to-

wards my *quondam* friend and client: the contrary, however, was the case, for Van Sandau and Tindale's bill of fees was delivered, signed, so long since as May, 1827; payment of the balance sought to be recovered was promised by the defendant, by letters, over and over again, so long since as 1828, and no action was brought until October, 1830, when I was goaded to assert my rights by the gross written insults of the defendant, who (under circumstances which, if detailed, would demonstrate on my part, I will say, more than ordinary zeal for, and attention to, his interest,) thought fit to visit his disappointment on me. I must add, however, that the defendant, Captain Brown, was never my personal friend, but, on the contrary, our acquaintance and connection commenced with the business for which this action was brought, and has been confined to the same business. The second action was not brought until the defendant had every opportunity given him to avoid it.

As, without this explanation, I may appear to have been wanting in good feeling towards a former friend and client, I trust you will give insertion in your next Journal to this letter.

I am, Sir,

17. Old Jewry, March 28. 1831. Your obedient servant, ANDREW VAN SANDAU.

## LANDLORD AND TENANT. — DILAPIDATION.

*To the Editor of the Legal Observer.*

SIR,

I BEG to call your attention to a very serious defect in our present law as regards *Landlord* and *Tenant*. I mean that branch of it which relates to the subject of *Dilapidation*, no relief being afforded to a tenant to stop an action by paying money into court, and I see no good reason why a tenant should not be permitted to tender amends, or pay money into court in this case, as a defendant may in many others, which found in damages only. It has fallen within my experience several times to witness the disposition of a tenant to pay a sum of money to prevent or stop an action for dilapidations, but from the defective state of the law, he had no opportunity to do so, and in the end a smaller sum was recovered than was offered to purchase peace, and the defendant had of course to pay the costs. I trust this matter is of sufficient importance to call forth an amendment.

I remain Sir,

Yours very obediently,

15. March, 1831. W. H. M.

## ON THE LAW OF KEEPING DOGS.

*To the Editor of the Legal Observer.*

SIR,

I HOPE you will continue the practice of giving the public information from time to time on such legal topics as may interest, and which will not have any tendency to perplex them. It is with pleasure that I have noticed several articles of this nature in your pages, and being willing to further so good a design, I beg to call your attention to a case just reported in Moody and Malkin's Reports, in which my Lord Chief Justice *Tindal* has perspicuously stated the exact terms on which the law permits a man to keep a dog for the defence of his property. I allude to the case of *Sarch* v. *Blackburn*, 1 Moo. & Mal. 505. S. C. 4 Car. & P. 297., in which an action was brought by a person who, having endeavoured to enter by a back way to a house, had been bitten by a dog belonging to the defendant. The direction of *Tindal* C. J. to the jury was as follows:—"There is no case which will exactly apply to this; such cases necessarily depend on their own circumstances, and the question that arises is a very nice one. The plaintiff certainly is not entitled to recover in this action if he was injured by his own fault. On this you will have to consider, whether he had a justifiable and reasonable cause for being where he was bit, such as would naturally induce him to go there, and would be a justification in an action of trespass brought against him for being there (as it would be as a license in law, if it was a way by which persons used to pass to the house); and whether he was there without notice of his danger. There is no evidence to show why the plaintiff was on the spot in question, whether with a lawful or unlawful object. The law, however, would rather presume a lawful object; and there is no improbability in his having one, for he was on one of the ways to the house itself at mid-day, although certainly it was not the most public and usual way. If he was lawfully there, I do not think the mere fact of the defendant having put up the notice relied on would deprive him of his remedy. The mere putting up of the notice is not sufficient for this, unless the party injured is at least in such a condition as to be able to become cognisant of its contents. The plaintiff could not read, the notice therefore furnished no information to him; and there were no circumstances in the way in which the dog was kept to apprise him of his danger. If, therefore, he had a right to be where he was, I see no fault or negligence to deprive him of his remedy. Still the defendant will not be liable unless he is in fault, unless he knows the character of his dog, which he certainly did in this instance, and unless he keeps it improperly with that knowledge. The mere putting up the notice does not in this case, I think, excuse him. But it is said he has a right to keep a fierce dog for the protection of his property. He certainly has so, but not, in my opinion, to place it in the approaches to his house, so as to injure persons exercising a lawful purpose in going along those paths to the house. If the dog was placed in such a situation that he could injure the plaintiff, ignorant of the notice, and going to the house for a lawful purpose, by a way which he was entitled to use, I think that the defendant would not be protected from this action. On the whole, the only question which I can leave to the jury is, on which side was there negligence? If the plaintiff was negligent, if he was where he ought not to have been, or if he neglected means of notice, he cannot recover; if the defendant was negligent, if he placed the

dog where he might injure persons not themselves in fault, he is responsible."

Your's obediently,

A SPECIAL PLEADER.

## STAMP DUTIES.

### LAWYERS' CERTIFICATES.

*To the Editor of the Legal Observer.*

Durum! sed levius fit patientiâ,
Quicquid corrigere est nefas.
*Hor. Od.* xxiv. l. 1. ver. 19.

SIR,

In all trades and professions there are many grievances which require remedy, are complained of, grumbled about, and submitted to without resistance. Those who suffer from them, instead of endeavouring to procure their removal by employing the requisite means, content themselves with indulging their dislike and impatience in vain and idle exclamations of condemnation, and are prompt to fix blame any where rather than on their own backwardness to seek redress. I am firmly persuaded that it requires no very diligent search to discover many acts of oppression and injustice, and many instances of gross abuse, which have continued and gained strength, principally because the attention of the public has not been called, in a public manner, to their existence, and because those who have the power to rectify them have been the last to hear that there was aught required amendment.

This conclusion (to which my own observation and experience have led me) may possibly be erroneous, but it is one I have acted upon, and intend (with your permission) to act upon in the present instance. The subject I wish to recommend to your notice is the tax paid by lawyers for their certificates; and I shall attempt to show, first, its unequal pressure, and, secondly, to offer some hints for its alteration and melioration.

As the law now stands, the young gentleman who has just completed his articles must, if he commence practice immediately, pay, if in London, 6*l.*, if in the country, 4*l.* The same payment must be made for two following years, but, afterwards, the amount must be doubled. Should he, however, from motives of prudence or some other cause, refrain from entering into business for three years, directly on his commencement after that period he will be saddled with the highest duty. No respect is had to the extent of business, or the opportunities of obtaining and improving connection. As a condition precedent, the imposition must be paid; and the hardship it may occasion is never taken into account.

Now, if we consider the reason, propriety, and end of taxes, it will instantly appear that this tax is particularly objectionable, because those whose business is in its infancy pay as much as those who are engaged in the most extensive and lucrative transactions. This is in direct opposition to one of the grand maxims with respect to taxes in general laid down by Dr. Adam Smith in his "Inquiry into the Nature and Causes of the Wealth of Nations," viz., that "the subjects of every state ought to contribute towards the support of government in proportion to their respective abilities, that is, in proportion to the revenue which they respectively enjoy under the protection of the state."* A maxim founded in good sense. Pauper ought not to be expected to hand into the treasury so much as Dives, for the very best of all reasons, viz., that he has not the same portion of good things.

You, sir, as a professional man, must be aware that connection and business are plants of slow growth—that the youthful aspirant after independence by means of professional exertions is often doomed to a severe exercise of patience, and to taste the bitterness of disappointed hope. Many a one who had reason to expect that, at his outset, the word of promise which had previously been liberally dealt out would literally be fulfilled, and that business, various in its nature and sufficient in its extent, with its cares, its pleasures, emoluments and honours, would realise his utmost wishes,—many a one has found himself compelled (with anguish of soul) to acknowledge the vast difference between professions and performance. Generally speaking, some years must elapse before a good business can be obtained—but all this time the attorney must pay the same as if he were completely successful.

This cannot be right: what then is the remedy. I would submit one of the two following courses. Either let the tax be proportioned to the extent of profit of the attorney, as, for instance, two per cent. upon its amount†; or, let the lower duty continue to be paid for a much longer period than three years, say ten. The first of these plans would be by far the most equitable. I am, however, very sensible many objections would be raised against it, though I flatter myself I could satisfactorily answer them all. The other course would, in some measure, afford relief, and, rather than have no alteration, I would say, Grant us that.

I could expatiate largely on this subject, and the circumstances connected with it, but shall refrain, because I well know that those for whose consideration this article is intended will anticipate me in every respect. As an attorney, I feel anxious for the welfare of the department to which I belong, and with which my interest is identified. If I can in any way serve my brethren it will be my pride and pleasure to do it; and I have only to add, the gratification I experience in finding my endeavours so well seconded by your powerful and unremitting aid.

I remain, Sir,

Your most obedient Servant,

G.

### MONEY ORDERS.

*To the Editor of the Legal Observer.*

SIR,

The stamp act being now before the Chancellor of the Exchequer it appears to be the proper time

* 6th ed. vol. 3. p. 255.

† This suggestion cannot be entertained for a moment. It would be an income tax, which it is clear ought not to be levied on lawyers unless the whole of the community were also taxed in the same way.—ED.

to apply for an alteration of the law regarding the exemption of bankers' checks from stamp duty. The act should explain what is meant by the term banker, and define it to mean, as I submit, army and navy agents, solicitors, and in fact all persons in the habit of receiving other men's moneys. The utility of such an alteration must be, I think, very obvious to all persons in the habit of receiving rents or recovering money, and who have felt the difficulty of asking a client to give a stamped receipt for his own money. The revenue would lose nothing by this, for I do not know any one at present in the situation I have described, who does not prefer running the little risk which is incurred in paying by check, with the banker's name of the client crossed, to asking for a stamped receipt.

A FRIEND AND CONSTANT READER.

---

## ON THE RIGHT OF AN ATTORNEY TO WITHDRAW FROM A SUIT.

*To the Editor of the Legal Observer.*

SIR,

MUCH misunderstanding apparently exists in the profession, as to the circumstances under which an attorney may decline further conducting an action or suit wherein he has once engaged.

The reading to be met with in the books on the subject certainly must be open to some qualification. It cannot be taken literally; otherwise the law is, that an attorney cannot withdraw himself until the proceedings are determined; that he *must* proceed, though his client will not furnish him with money! That if he quit his client before trial, an attorney cannot bring an action for his bill: and, in chancery, that a solicitor proceeding to a certain length in a cause, shall not leave it there, but *shall* go on. (*Vide* Tidd's Prac. vol. i. p. 86., 9th ed.)

Why this feverish anxiety of the law to *lash* attorneys to their post? Are they notoriously apt to desert professional business? Do the interests of clients require this extraordinary protection? What? it must be asked with surprise, cannot an attorney quit all, or any, of the several suits or actions in which he may have engaged, if his clients will not furnish him with the *necessary* money wherewith to proceed? Must an attorney, who, on an implied, if not an actual, promise by his clients, to supply him with the needful cash, becomes concerned in their suits, proceed with them until they are determined, at his own expense, and consequently, in very many cases, at his personal risk? for he is not permitted to indemnify himself by taking security for *future* costs. *Jones* v. *Tripp*, 1 Jac. 322. Let it for a moment be considered how long an action or suit, notwithstanding all possible expedition is used, may be pending; how many contemporary actions or suits an attorney in moderate practice may be concerned in; the necessary disbursements in their various stages; and who can conjecture the amount of capital such an individual must embark, and place very much at hazard? What scale of fees would remunerate an attorney under such circumstances? Would it be politic in the law; is it favourable to honourable practice, thus in effect to make his own all the proceedings in which an attorney may be concerned, by transferring all risk, from the very moment he commences them, from the clients to himself? What is there unreasonable in the supposition that an attorney being called upon to proceed with various suits, may not have the necessary cash immediately required to be disbursed? How MUST he "*go on*" in such a case?

If an attorney cannot withdraw from an action or suit, but must proceed till it is determined, what becomes of his undoubted right, at any time, on his mere request, to withdraw his name from the roll? The affidavit necessary for such purpose only states that "no proceeding or application is then pending against him, and that he does not expect that any application will be made against him as an attorney." And why does not the court require information as to whether all his actions and suits are determined?

The client it is well known, may, by leave of court, or by a judge's order, which is never refused, repudiate his attorney *ad libitum*, on payment of his bill. Surely then, the rule that an attorney cannot quit a suit must be susceptible of a qualified interpretation, that he cannot vexatiously, or merely to harass his client, *who has been guilty of no defection*, abandon him and his proceedings. But certainly, under any circumstances, a court or judge would, on his application, permit an attorney to withdraw himself, without imposing any such condition as that he shall not bring an action for his costs then incurred, or depriving him of any lien, or other mode by which, had he concluded the proceedings, the law would authorise him to pay himself.

I would pursue this enquiry with reference to his liability in an action for negligence, when an attorney will not proceed with a cause because his client withholds his assistance in the article of cash.

Blackstone (quoting Finch L. 188.) says, an advocate who betrays the cause of his client, or, *being retained*, neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case, for a reparation to the injured client. By "being retained" is doubtless meant *paid his fees*. *Then* the advocate's absence from the trial would certainly be actionable negligence.

When an attorney *neglected* to fee counsel, whereby his client was nonsuited, the court ordered an attachment against him, Say, 50. To have been guilty of *negligence*, must not the attorney be supposed to have been supplied by his client with the money to pay the fees? Have we any right to presume the attorney possessed sufficient of his own moneys for that purpose? And certainly an attorney, no more than any other person, cannot be said to *neglect* to do that which he has no means to do. Correct language will not express such an idea.

Supposing a client is assured by his attorney, that he really has not sufficient money to pay the fees; a situation not necessarily suppositious, as the most respectable practitioner may have ex-

perienced, particularly on such an emergency as the preparation for a heavy assize; and the client, exulting on the reading in Tidd replies, "You *must go on*, if you don't I'll bring an action against you for negligence!" Would the law so militate against the plain principles of common honesty and fair dealing as to sanction so palpable a hardship?

These observations were more immediately induced by Mr. Justice Bosanquet's decision in the case of *Hoby* v. *Built*, gent. one, &c. tried at Hereford last assizes. It was an action for alleged negligence on the part of the defendant, by reason of his not having delivered briefs with fees to counsel, in a case in which he was concerned for Hoby, whereby Hoby was nonsuited. On the present trial, for the defendant Built, Mr. Serjt. Russell* almost ridiculed the idea that an attorney is bound to deliver briefs with counsel's fees, or go on with a suit when his client will not provide him with money for the purpose, which the serjeant stated, and it was not denied, was the defendant's situation when he was concerned for the plaintiff. On the other hand Serjt. Ludlow contended, that an attorney under such circumstances is bound to proceed. The learned judge observed, that without saying which of those propositions was correct, *he thought* that if an attorney went on with a cause, and brought the record to an assize town, he was not at liberty, immediately before the trial, to say, "I won't deliver the brief unless I receive some money," and the verdict was for the plaintiff.

Now, it was admitted that the defendant had applied to the plaintiff for money wherewith to deliver his briefs, and that the plaintiff did not furnish that money, or pretend that the defendant had previously been supplied with sufficient. On that case then, I humbly submit the reasonableness of the request, or in other words, the immediate necessity for "some money," and *not* the particular moment at which the request was made, was the material consideration, and that such was the question his Lordship should have left to the jury. Who can doubt the reasonableness of the request for "some money," if it were, as appears to have been the case, immediately required to be disbursed for witnesses, counsel, and court fees? Could it be expected that the defendant should, under these circumstances, at his own immediate expense, hazard the result of a trial? Could the plaintiff reasonably complain of neglect, or that he was betrayed, or deceived, when he was told by the defendant that without some money the cause could not be tried? Was not the plaintiff bound to know that the disbursements immediately preparatory to the trial must be considerable? And did he not also know that he had not contributed a mite towards those expenses? Then what possible right, either legal, equitable, or *in foro conscientiæ*, could the plaintiff have to compel the continuance of the defendant's services and command his cash?

The general principles which regulate all engagements between principal and agent, not particularly specific, must apply to the relation of attorney and client; and in all such engagements if the principal will not do that which is clearly reasonable on his part, the agent is absolved, the consideration on which he engaged having failed by the default of the principal.

It it a fact reputable to the profession, that there are very few actions for negligence against attorneys, recorded in the books. But it is therefore important that a decision which may become a precedent, should be strictly investigated, and have an indisputable principle for its basis.

Let this very reasonable rule be remembered: It is not every neglect which will subject an attorney to an action for negligence. He is only bound to use reasonable care and skill in managing the business of his client. He is only liable for *crassa negligentia*, (Selwyn, N. P. vol. i. p. 169., 6th ed.)

Quære then whether the defendant Built, was, under the circumstances, guilty of "gross negligence."

I am, Sir,
Your most obedient Servant,
T. P.

* The learned Serjeant said he believed it had been decided that an attorney may *give notice* to his client that he will not proceed.

## RETURNS OF WRITS.

### EASTER TERM.

*Begins April 15., ends May 9., and contains Twenty-five days.*

| | Essoign. | Appce. |
|---|---|---|
| The 4th day *before* Term, | April 12. | 15. |
| The 5th day of the Term, | — 19. | 22. |
| The 15th day, - - - | — 29. | May 2. |
| The 19th day, - - - | May 3. | — 6. |

It was doubtful, according to the construction of the *Act for the better Administration of Justice*, whether this Term would end on the 8th or 9th May; but it seems now settled, that the 9th will be the last day of Term. The Sittings after Term in Middlesex will be held on the 10th of May, as usual, the day after Term.

## COURT OF CHANCERY.

### LORD CHANCELLOR'S SITTINGS.

*Lincoln's Inn.*

Thursday, April 14. Seal before Term.

*Westminster.*

Friday, April 15. Petition-day and Motions.
16. to 20. } Appeals and Rehearings.
Thursday, April 21. Motions.
22. to 27. } Appeals and Rehearings.
Thursday, April 28. Motions.
29. to May 4. } Appeals and Rehearings.
Thursday, May 5. Motions.
6. & 7. } Appeals and Rehearings.
Monday, May 9. Motions.

VICE CHANCELLOR'S SITTINGS.

*Lincoln's Inn.*

Thursday, April 14. Seal before Term.

*Westminster.*

| | | |
|---|---|---|
| Friday, April | 15. | Petition-day and Motions. |
| | 16. to 20. | Pleas, Demurrers, Exceptions, and Further Directions to be taken before Causes. |
| Thursday, April | 21. | Motions. |
| | 22. to 27. | Pleas, Demurrers, Exceptions, and Further Directions and Causes. |
| Thursday, April | 28. | Motions. |
| | 29 to May 4. | Pleas, Demurrers, Exceptions, Further Directions and Causes. |
| Thursday, May | 5. | Motions. |
| | 6. | Pleas, Demurrers, Exceptions, Further Directions and Causes. |
| | 7. | Short Causes and ditto. |
| Monday, May | 9. | Motions. |

Between the end of Term and the First Seal the Vice Chancellor will hear Bankrupt Petitions.

## SUPERIOR COURTS.

### LORD CHANCELLOR'S COURT.

COPYRIGHT—INJUNCTION.

In this cause, Kalkbrenner the composer had, in the year 1820, sold a piece of music to the plaintiff, who had published it. Some time afterwards, the defendant had published a piece of music, called "The Charms of Berlin," consisting of eleven pages, four of which were composed of the piece of music so sold to the plaintiff. The plaintiff accordingly filed his bill against the defendant, and the Vice Chancellor granted an injunction, *ex parte*, to restrain the publication of "The Charms of Berlin." The defendant then put in his answer, stating that the piece of music composed by Kalkbrenner was composed by him for seven instruments and published in Paris in 1814, and submitted, that having been so published there was no copyright at all in the work, and supported the facts in his answer by affidavits to the same effect. The injunction was therefore dissolved by the Vice Chancellor.

The *Solicitor-General* now moved to discharge the order made by the Vice Chancellor, and Mr. Pepys opposed the motion.

The *Lord Chancellor* thought that the Vice Chancellor's order was right. It was the policy of the law, recognised by express statutes, that the importation of foreign inventions should be as much encouraged as the actual inventions of this country. Now in this case the piece of music had been published in France six years before its publication by the plaintiff. This, therefore, gave a clear right to any one in this country to publish it. He therefore refused to discharge the order made by the Vi c Chancellor, but ordered each party to pay his own costs.—*Guichard* v. *Mori*, Mar. 22. 1831

COSTS IN LUNACY.

This was a petition presented by the solicitor engaged in opposing a commission of lunacy, and prayed for a reference to the Master to enquire whether a sum sufficient to defray his costs could be raised out of the lunatic's estate, or whether the allowance made to the lunatic and his family ought to be reduced in order to meet this payment. The amount of these costs was stated to be about 2000*l.*

Mr. *Spence* appeared for the petitioner.

Mr. *Wakefield* opposed the application. The costs of the parties by whom the commission had been sued out, and whom the event proved to be in the right, were entitled to the priority.

The *Lord Chancellor* asked what these latter costs amounted to.

Mr. *Wakefield*.—About 5000*l.*

His Lordship could not understand why the costs of making a man a lunatic should be preferred to those incurred in protecting him against the commission. And he was surprised that the costs on one side were so much greater than on the other, the number of witnesses on both sides being equal.

Mr. *Wakefield* said, in his client's bill the tavern expenses were included, which amounted to 600*l.*

His Lordship reprobated the squandering of so much money on dinners, but said that he was aware that the charges for the hire of rooms for these purposes were very high.

Mr. *Wakefield* said that such expenses would not be incurred in future, as Lord Lyndhurst had altered the practice. The learned counsel then consented to the reference prayed for.

His Lordship enquired how much had been taxed off the bill of 5000*l.*, and having been informed between 200*l.* and 300*l.*, his Lordship said that the taxation appeared to have done very little good. At common law much more would have been taken off: he would be bound the costs of the taxation were as much as the deductions, so that the people would see there was not much use in taxation.—*In re Franks*, Mar. 26. 1831.

### VICE CHANCELLOR'S COURT.

PATENT LABEL.—INJUNCTION.

Mr. *Wilbraham* applied for an injunction under the following circumstances. Thomas Henry, the plaintiff's father, had in 1771 discovered the properties of magnesia in its calcined state, and had continued to sell it up to the time of his death in 1816, since which time the plaintiff had continued the same business down to the present period. The magnesia prepared by him was sealed up in bottles of a particular shape, and labelled "Henry's Calcined Magnesia, Manchester." The defendants had lately prepared and sold magnesia in similar bottles, and with similar labels, which were not purchased of the plaintiff.

The *Vice Chancellor* granted the injunction, observing, that the relief sought was the same as that granted the other morning in the case of *Day* v. *Binning* (reported *ante* 205.) *Henry* v. *Price and another*, Mar. 29. 1831.

## COURT OF KING'S BENCH.

### PRINCIPAL AND AGENT.

An action was brought on several bills of exchange drawn in South America, on Messrs. Spooner, Attwood and Co., Bankers, in London, by their agents. They were duly presented, but were not accepted. The defendant had been director of a company, called the Chilian and Peruvian Mining Company, and was sued in that character. The bills had been drawn by two persons, of the names of Bagnold and Andrews, the former of whom had been sent, under a resolution of the directors, (made at a board at which four were present,) to South America, to manage the concerns of the company there. Bagnold and Andrews not being supplied with money by the company to pay the miners and other workmen employed by them, applied for an advance of 1175*l.* to an agent of the plaintiff in South America, and the bills in question were given in return. They were drawn by Bagnold and Andrews upon the company. They acted in this matter under a power of attorney executed by three of the directors, authorising them to draw bills upon the company. On the part of the defendant it was contended, that as the money had been borrowed under the authority of the power of attorney, and that instrument was not executed by four of the directors, as it ought, but by three only, acting as trustees, the defendant, as a director, was not liable upon the counts on the bills, or the money counts.

*Lord Tenterden* C. J., who tried the cause, thought that the plaintiff could not recover on the counts on the bill, but as the company appeared to have formed a resolution to pay the bills drawn by their agents, and as the money had been borrowed for the use of the company, the plaintiff was entitled to recover on the counts for money lent. On showing cause against a rule for entering a nonsuit,

The *Court* confirmed the opinion of his Lordship. Rule discharged. *Ducarrey* v. *Gill*, H. T. 1831.

### MISNOMER.

*Cresswell* showed cause against a rule for cancelling the bailbond, on the ground that the defendant had been arrested by the name of James Pottinger, his real name being Charles Pottinger. His affidavit stated, that he had been christened by the name of Charles, and that he had never been known by any other name, "save by the plaintiff in the cause." Now this was sufficient to discharge the rule on his own showing; but the plaintiff's affidavit in answer to the rule stated, that he had always dealt with the defendant by the name of "James," and that he never knew him by any other name.

*Parke* J. that is an answer. You must be as strict in this case as in a plea in abatement. *Anonymous.* H. T. 1831.

### AFFIDAVIT TO HOLD TO BAIL.

*Saunders* showed cause, against a rule obtained by *Telford*, requiring the plaintiff to show cause, why, on filing common bail, the bail-bond should not be delivered up to be cancelled, on the ground of the affidavit to hold to bail not being sufficiently certain. The affidavit stated, "that Barnard Gregory is justly and truly indebted to this deponent in the sum of 75*l.* upon and by virtue of certain articles of agreement, bearing date the 8th day of September, 1830; and made between the said Barnard Gregory on the one part, and this deponent on the other part, whereby the said Barnard Gregory did, for the consideration mentioned in the said articles of agreement, agree to pay to this deponent, the said sum of 75*l.* at the time therein mentioned, and which is now past." He contended that this affidavit was sufficient, as it was positive and certain, and disclosed a good cause of action with the requisite degree of particularity. It stated that a debt was due upon articles of agreement, particularly described: that the agreement was for the payment of a sum of money, fixed and certain, at a time stated, which time was alleged to be now past.

*Parke* J. said the affidavit did not state what the consideration was. It might be executory, and therefore, consistently with the affidavit, there might be no cause of action. The consideration might be goods, which were afterwards to be delivered. Now, supposing they were not delivered, it would be too much to say that the plaintiff had been guilty of perjury; but still, the defendant ought not to be holden to bail for it. Rule absolute. *Walker* v. *Gregory.* H. T. 1831.

## KING'S BENCH.

*Nisi Prius Sittings after Hilary Term.*

### FRAUD.

Case by the holder of a bill of exchange, drawn at Pernambuco, on a person named Hancorn, of London, under the following circumstances:—When the bill arrived in England, in July 1829, it was presented for acceptance at the counting house of Mr. Hancorn in Skinner Street, Snowhill. The defendant, Mr. Walter, who had been formerly in partnership with Mr. Hancorn, at that time occupied the counting house jointly with him. When the banker's clerk called for the bill, the defendant informed him, that Mr. Hancorn was out of town, and it was therefore not accepted. He returned it to the clerk, telling him he had better present it again in a week or ten days, when Mr. Hancorn would be in town. Shortly afterwards Mr. Armfield, a partner in the house of Taylor, Braid, and Co., the payees of the bill, called on the defendant, and represented to him that if the bill was not accepted, it would be protested, and returned. On this statement the defendant accepted it for Mr. Hancorn, on an assurance that it was "all correct." The defendant then wrote an acceptance "per procuration of Hancorn," and on the return to town of Mr. Hancorn, he told him what he had done. Mr. Hancorn expressed his regret that he had accepted the bill, as he knew nothing of the amount. On being afterwards presented for payment, it was dishonoured. The plaintiff, Mr. Polhill, sued Mr. Hancorn as the acceptor. Mr. Hancorn defended the action; and on the trial the defendant, Mr. Walter, was called as a witness to prove the acceptance. He denied, of

course, that he had had any authority from Mr. Hancorn to accept the bill, and the plaintiff was consequently nonsuited. The present action was brought to recover the amount of the bill, with the costs (amounting to 57*l.*) which the plaintiff had incurred in the action against Mr. Hancorn, which had been defeated by the defendant's evidence.

Sir *James Scarlett*, in his opening, mentioned the recent case of *Marzetti* v. *Williams and others**, in which it was decided that an action in *tort* was maintainable against a banker for breach of duty in not paying the check of his customer in due time, and that the defendant here had committed a breach of duty in not paying the bill. He referred also to a case which was tried some years ago before Mr. Baron Wood, in which it was holden, that a person entering into a contract as the agent of another, without authority, was bound by the contract as principal.

The plaintiff's case being closed,

*Campbell*, for the defendant, submitted that there was no case to go to the jury.

Lord *Tenterden* C. J. was of the same opinion. There was no fraud that he could see.

Sir *James Scarlett* submitted, that there was fraud upon the face of the bill. At all events the defendant was liable as acceptor.

Lord *Tenterden* C. J. said, he would let the case go to the jury if the counsel for the plaintiff wished. His Lordship then left it for the jury to say, whether the defendant in accepting the bill, in the manner and under the circumstances stated, had been guilty of any fraud or deceit. If they thought he had, the plaintiff would be entitled to recover; if not, and if they thought that in writing the acceptance he had acted honestly, urged as he was by the representation of Mr. Armfield, one of the payees of the bill, then they would find for the defendant.

The jury immediately found for the defendant.

Lord *Tenterden* C. J. gave the plaintiff leave to move to set aside the verdict, and enter one for himself, if the court should be of opinion that he was entitled to recover, notwithstanding the jury had negatived fraud. *Polhill* v. *Walter*.

CONTRACT — SAILORS' WAGES.

In an action for wages by a sailor on board the ship *Dungannon*, which, in the year 1827, sailed on a voyage from Liverpool to Odessa, it appeared that the plaintiff, John Mahony, joined the crew, in November 1827, at Zante, having previously entered into an agreement with Mr. H. Cameron, the then owner of the vessel, for wages at the rate of 2*l.* 5*s.* *per* month, and signed the ship's articles. The *Dungannon* was to take in a cargo of tallow at Odessa, and thence proceed to England. On the arrival at Odessa, in August 1828, Russia being at that time at war with Turkey, it was found impossible to obtain the cargo, and the captain having in consequence abandoned the intention of returning to England, employed the ship in the service of the Russian government, and made several voyages in that service from Odessa to Varna and back. The plaintiff not choosing to continue in this foreign service, announced his intention of returning to England; and on the 26th of May 1829 he quitted the ship at Odessa. He now claimed 28*l.* 9*s.* 6*d.* as the balance of his wages, having already received 10*l.* 13*s.* 6*d.* on account. The objection to payment on the part of the defendant, Mr. Gilbert Henderson, was, that the plaintiff had no right to quit the ship, or if he had, the defendant was not liable to the whole of the present demand; for it appeared that Cameron, the former owner of the *Dungannon*, had, after the ship sailed on her voyage, assigned his interest in it to the defendant, in satisfaction of a debt which he owed him: and it was now contended on the part of the defendant, that he was not liable to any of the contracts entered into by Cameron on the ship's account, before he became interested in the ship.

Lord *Tenterden* C. J. was of opinion, that the plaintiff was entitled to recover. The ship's articles had been signed originally in blank — that is, no place of destination had been mentioned; and his Lordship observed, that it was most irregular to send a ship out with articles signed in blank. The plaintiff having engaged to go to Odessa, and thence to return to England, was not bound against his will to continue in a foreign service. With respect to his wages, the defendant having become the owner of the vessel was clearly liable to the balance now claimed.

Verdict for the plaintiff — Damages, 28*l.* *Mahony* v. *Henderson*.

PREROGATIVE COURT.

ADMINISTRATION. — TROVER.

Dr. *Adams* applied to the court under the following circumstances: — A testator had, about fifty years ago, devised real property to two trustees, for the purpose of its being mortgaged or sold, in order to raise a fund for the provision of minors. One of the co-trustees died; the other carried the intentions of the testator into effect. The mortgagee became bankrupt, and a dispute arose between the parties interested and the assignees of the bankrupt's estate. An application was made to the Master of the Rolls, and he decided that the property should be sold. The deeds, which had been in the custody of Mr. Wm. Andrews, the solicitor of the parties, had by his death come into the possession of his son, who refused to give them up, except to the legal representatives of his father. The present application therefore, was for an administration of the effects of Mr. Wm. Andrews, limited to these deeds.

Sir *John Nicholl* declined granting the administration, as there was another mode of obtaining the deeds, *viz.* by an action of *trover*. In the goods of *William Andrews*.

## MINOR CORRESPONDENCE.

QUERIES.

1st. By referring to "the Legal Observer," page 20, it will be seen it was conceived that the words of § 13. of the 1 Wm. 4. c. 70. would have the effect of taking all the inhabitants of

* 1 L. O. page 61.

Chester and Wales out of the protection of § 7. of 7 & 8 Geo. 4. c. 71., and rendering them liable to arrest for 20*l.* according to § 1. of that statute. In the Carmarthen Journal of the 4th of March instant (citing the Salopian Journal), it is stated, "In the Court of King's Bench last week it was decided, that no person in *Cheshire* or in *Wales* can be arrested by process out of the Courts of Westminster, for a debt under 50*l.*" * * * * *

After the above decision, it may be a question whether any debts in Wales can be recovered under *fifty pounds*, as by the Welsh judicature bill the defendant would be entitled to a judgment as in case of nonsuit, if the plaintiff proceeded against him in any of the Courts of Westminster for any sum less than 50*l.*"

Has there been a decision to that effect? what is the name of the case? and where reported?

Can a debtor be arrested in Wales for a debt under 50*l.*?

W.

---

2d. What can be advanced in defence of a vendor's solicitor introducing into his conditions of sale that the conveyance is to be prepared by himself at the purchaser's expense?

P.

---

3d. Is a writ of enquiry necessary after a judgment by default in an action of debt upon a simple contract?

I understand that a case was decided in the Common Pleas about a year ago, establishing the affirmative of the question, in contradiction to the old authorities, but I have not been able to find the case.

H. H.

---

4th. A. is articled to B., an attorney who is clerk to a civic company, and also a freeman of the city of London. At the expiration of A.'s articles, will he be entitled to his freedom of the city by servitude?

---

5th. A clerk's articles expire before he is twenty-one, must he wait till he is twenty-one before he can be admitted an attorney?

A. F. C.

---

6th. The London Grand Jury find a true bill against A. for libel. A. removes the indictment from the Old Bailey to the Court of King's Bench. Not being in custody, he does not surrender to take his trial on the day fixed for the trial of the indictment. Can the trial proceed, and can judgment follow a verdict of guilty in A.'s absence?

---

7th. Suppose an articled clerk enter the yeomanry with his master's consent, need the most scrupulous master hesitate to make affidavit, or give a certificate, at the expiration of the articles, of his having passed his five years in his service?

S. H. W.

8th. Is a defendant, upon issuing a writ of false judgment on a judgment obtained in an *English* county court, and not in a county palatine, compellable to give security for costs to prosecute his suit?

A case has lately occurred, in which the plaintiff says he is entitled to such security. The damages laid in the plaint were 19*l.* 19*s.* 11*d.*, for which sum the plaintiff recovered a verdict. Tidd's Practice, and other similar works, are totally silent upon the necessity of finding security, merely stating that neither party is entitled to costs upon this writ. By the 7 & 8 Geo. 4. c. 71., "all and every" the provisions of this act are extended to the 19 Geo. 3. c. 70.; and by this last statute it is enacted in § 5., "that no execution shall be stayed or delayed upon or by any writ of error or supersedeas, thereon to be sued for the reversing of any judgment given or to be given in any inferior *court of record*, where the damages are under 10*l.* (this sum will be 20*l.* under the first named act), unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties such as the court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or supersedeas to be awarded, be bound unto the party," &c.: the remainder of the section describes the nature of the security to be given. Now, I apprehend that this act was not intended to authorize, nor does it authorize, the plaintiff to call for security in a case of this kind, inasmuch as the writ of false judgment is not named therein, and cannot, it is conceived, be included under the term "writ of error," to which there is attached a certain and known meaning; and the enactment is also confined to *inferior courts of record*, which the county court is not. This I think sufficient to show, that any reliance that may be placed on this statute is not well founded. But notwithstanding these circumstances in favour of the defendant below, the plaintiff, in the case above alluded to, has issued execution, and actually levied, on the ground that the writ of false judgment is a mere nullity, unless security for costs be entered into. The writ is returnable in the King's Bench on the 12th April, wheresoever, &c. As this is a question of some interest, and more particularly to those who may have frequent occasion to consider the point, I shall be glad to have the opinion of some of your able correspondents upon the legality of the plaintiff's proceedings, and if illegal, what is the defendant's remedy.

H. C.

---

ANSWER TO QUERY, *page* 351.

The 10th section of the act, 7 & 8 Geo. 4., which is, a clause reciting that the act shall not extend to Scotland or Ireland, is worded in exactly the same manner as the preceding one, and I think it can be reasonably concluded, that those words which form the exception in the 10th section, should likewise bear the same signification in the 9th, and there is not any proviso or clause in the act for its extending only to certain parts, but to the act *in toto*.

T. E.

## MISCELLANEA.

### STATE OF THE LAW IN THE TIME OF HENRY VII.

When Richard terminated the sway of the Plantagenets, which had endured from the accession of Henry II., three hundred and thirty-one years, Henry VII. assumed the regal power by a sort of military election; a mode of acquiring power probably not very consonant with legitimate notions; yet the conqueror's marriage with the princess Elizabeth, eldest daughter of Edward IV., and legitimate heiress to the throne gave him, at least, an intelligible title. And if it had not the principle of hereditary right, it had been so very occasionally realised in practice, that from the Conquest to Richard III., precisely one half the kings of England acquired the throne by usurpation. Augustin's definition of a political society is — "As the head of a body natural cannot change its nerves and sinews, cannot deny to the several parts their proper energy, their due proportion and aliment of blood; neither can a king, who is the head of the body politic, change the laws thereof; nor take from the people what is theirs by right, against their consent. For he is appointed to protect his subjects in their lives, properties, and laws; for this very end and purpose he has the delegation of the power from the people, and he has no just claim to any other power but this."

Henry VII., though chaste and temperate, was not a monarch whose personal conduct realised all that must have been expected of him. His avarice, of which Empson and Dudley, two lawyers, were the detestable instruments, rendered him odious to his subjects, from the disgrace which, in the persons of the two lawyers before mentioned, it cast on the profession. The laws, indeed, were more reverenced than in former times, but yet we do not find in the history of their application, that security for the lives, property, and liberty of the subject which was desirable. In addition to the feudal burdens imposed by the Norman conquest, the personal despotism of the conqueror and his immediate successors was never surpassed in any part of modern Europe; and when the power of the monarch became subsequently relaxed, it seems to have been assumed by the nobility, the virtual and real power of the government residing for several centuries in the aristocracy, who, under a weak monarch, never failed to exhibit their own pretensions, with small regard to the interests of the people, over whom they tyrannised with a reckless authority more grievous, because more inveterate and incessant, than any exercise of the sovereign power. Better things were promised at the beginning of Henry VII.'s reign, and proper constitutional forms were observed in the acts of government, but the right spirit had not yet supervened. More wary than Edward IV., the exactions of Henry VII., in the way of *benevolences*, were done by consent of parliament; but they were exactions nevertheless, and the abuse of the constitutional means by which they were effected, in reality only made them more grievous, as they deprived the people of what was meant to be for their own peculiar security. But, above all, the mind revolts and kindles into indignation, when we observe that all penal statutes were enforced which would contribute any thing to the exchequer of the monarch; and when, with the same view, the king caused prosecutions to be instituted on laws old and forgotten; a species of tyranny, to a generous mind, and to an honest lawyer, of of all the most odious and galling.

### SINGULAR DISTRESS.

Archibald Carmuel, town-officer, hanged at the cross, and hung on the gallows twenty-four hours; and the cause wherefore he was hanged, he, being an unmerciful, greedy creature, poinded (*i. e.* attached by distress) an honest man's house; and among the rest, he poinded the king and queen's picture; and when he came to the cross to comprise (appraise and expose to auction) the same, he hung them up on two nails on the same gallows to be comprised; and they being seen, word went to the king and queen, whereupon he was apprehended and hanged. — *Pitcairn's Ancient Trials.* April 27. 1601.

### LAW OF LEGITIMACY.

Children have been adjudged in England legitimate when born forty weeks and eleven days after the death of the husband. There appears to be no definite period fixed by our law. The code Napoleon withholds the presumption in favour of legitimacy, when the child is born three hundred days after the dissolution of a "marriage."

The Frederician code of Prussia, without expressly declaring children born in the 11th month illegitimate, attaches many additional conditions to the proof of legitimacy in such a case. By the Scotch law and the civil law, it seems to be treated as a conclusive proof of illegitimacy, where a child is born after the tenth month — three hundred days.

### JUDICIAL CORRUPTION.

Philip de Comines says (vol. ii. p. 7.) in his memoirs, that Lewis XI. distributed for corrupt purpose sixteen thousand crowns among the King of England's officers, who were about his person, particularly to the lord chancellor, the master of the rolls, &c.

### DECORUM OF THE JUDICIAL OFFICE.

Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal. It is no grace to a judge, first to find that which he might have heard in due time from the bar, or to show quickness of conceit in cutting off evidence or counsel too short; or to prevent information by questions, though pertinent. — *Bacon's Essays. Judicature.*

# The Legal Observer.

VOL. I. SATURDAY, APRIL 16. 1831. No. XXIV.

——— "Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## PRACTICE OF THE ECCLESIASTICAL COURTS.

IT is somewhat singular that there is no publication in which the practice of the Ecclesiastical Courts can be ascertained by the general practitioners of the law. The modes of procedure in the several courts of law and equity are described in numerous works, from the most concise to the most elaborate. At Doctors' Commons no doubt these matters are well known; and probably the want of such a book is not much felt by proctors; but it is an inconvenience of no small magnitude to solicitors in general, that they are not put in possession of the rules of practice, and the regulations of these courts, in which, although they cannot personally conduct any proceedings, it is frequently of the greatest importance that they should be enabled correctly to inform and advise their clients, whose affairs may render an application to such tribunals indispensably necessary; and accurate information in this respect is often essential in conducting collateral proceedings in other courts.

By the favour of the King's Proctor we are enabled to present our readers with the principal orders of court made in the years 1827 and 1830, the *first* series of which prescribes the time of proceeding after plea, the allegation, answers, examination of witnesses, &c. The *second* set of orders relates to additional court days for expediting and regulating the proceedings in the Courts of Arches and Peculiars, and the Prerogative Court. The *third* contains the last regulation regarding probates and administrations, with a view to the prevention of fraud in obtaining them. The whole seem well adapted to accelerate the several stages of a cause, and the conditions relating to costs are no doubt calculated to benefit the suitor, and relieve the court from improper proceedings.

### No. I.

#### ORDERS OF COURT, TO SERVE AS GENERAL RULES OF PRACTICE.

**Made on the first Session of Easter Term, 1827.**

1st. That on the first Session of every Hilary, Easter and Michaelmas term, publication shall pass on all pleas given in and admitted on or before the by-day of the term preceding, unless upon such first session cause be shown to the satisfaction of the court for extending the term probatory; provided that nothing herein contained shall preclude the court from assigning a shorter term probatory, or prevent the party giving the plea from sooner praying publication.

2d. That a party intending to counterplead, shall assert his allegation the court day on which the term probatory expires, and shall bring it in on the following court day, unless on that day cause be shown to the satisfaction of the court for allowing further time for bringing in such allegation.

3d. That upon answers being prayed, the proctor praying the answers shall forthwith take out a decree, and shall cause the same to be duly served without delay on the adverse party in the cause; so as to put such party in contempt in case the decree shall not be obeyed within a reasonable time; provided that the examination of witnesses shall not be delayed, nor the publication be postponed, in order to wait for the answers; but publication shall pass as aforesaid; unless upon application being made to postpone the publication, it shall appear to the satisfaction of the court, that due diligence had been used in taking out and enforcing the decree for answers.

4th. That when application is intended to be made for extending the time in any case, notice thereof in writing, and of the grounds on which the application is to be made, shall be given to the adverse proctor,

and delivered into the registry three days before the making of such application.

5th. That any neglect or delay in bringing in answers, or in other proceedings, shall be matter of consideration in respect to costs either immediate, or at the end of the cause.

J. NICHOLL,
Dean.

---

No. II.

ORDERS OF THE COURT.

Made the 4th Session of Hilary Term, 13th February, 1830.

The *Official Principal* of the COURT OF ARCHES having taken into consideration the expediency of appointing additional court days for the transaction of business and of making orders of court for expediting and regulating the proceedings in that court, has ordered, and does hereby order as follows.

1st. That all court days appointed at sessions, and by-days in each Term, for the Courts of Arches and Peculiars, and for the Prerogative Court, shall each of them be reciprocally considered and taken to be regular court days for the despatch of all business in each and every of the said courts, and that so many additional court days in and after each and every term shall be from time to time appointed as may be deemed and considered necessary for the despatch of business; and such additional court days shall be, to all intents and purposes, regular court days.

2d. That all days which shall be appointed as caveat days in the *Prerogative Court* shall be regular court days for expediting all proceedings in that court, and likewise in the *Courts of Arches and Peculiars.*

3d. That when a party shall have been duly cited, and shall not appear on the day assigned for his appearance, such party shall be pronounced in contempt, and the proceedings shall on the following court day, and afterwards, be carried on in pain of his contempt—"in pœnam contumaciæ."

4th. That when proceedings are carried on "in pœnam contumaciæ," witnesses may be produced and sworn before a surrogate in his chambers, as well as in open court, and such production shall be immediately entered and recorded in the register book; but the witness so produced shall not be repeated to his deposition until forty eight hours at least shall have expired from the time of his production.

5th. That the proctor of a party taking out a citation, or other process, shall on the day of its return be prepared to exhibit his proxy, and to proceed in the cause by taking the first step therein according to the nature of the proceedings.

6th. That any party who shall have been served with a citation, or other process to appear, and who shall appear on the day assigned therein, shall be dismissed with his costs, unless the party taking out such citation or process shall return the same, and be prepared to proceed in the suit, for which costs the proctor taking out such citation or other process shall be liable.

7th. That a proctor appearing for a party cited shall be prepared with his proxy, and shall exhibit the same on entering such appearance.

8th. That the proctor of a defendant in a *matrimonial cause* shall admit, or deny, the fact of marriage, under pain of suspension, on the same day that the plea alleging the marriage is admitted.

9th. That if the party giving in any allegation, shall require the answers of the adverse party, he shall on the day on which his plea is admitted apply to the court to assign a time for bringing in such answers; and unless the answers shall be brought in at or before the time assigned, the facts pleaded shall be taken *pro confesso*, as against the party so neglecting to give in his answers.

10th. That the expense of taking depositions to prove facts confessed in answers or admitted in acts of court, if taken after such confessions or admissions, shall be paid by the party producing the witness, unless the court shall think fit to direct otherwise.

11th. That in all cases the court may extend the time upon reasonable cause shown.

12th. That when any exhibits are pleaded in supply of proof, the proctor of the adverse party shall, on the day on which the plea is admitted, declare, whether he confesses or denies the hand-writing as pleaded of such exhibits; and if the hand-writing be denied, and afterwards proved, the costs occasioned by the proof shall be paid by the party who denied the hand-writing, unless the court shall think fit to direct otherwise.

13th. That in all cases the court may, upon application made to it, direct security for costs to be given by either or all of the parties.

(Signed) J. NICHOLL,
Official Principal of the Court of Arches.

No. III.

DIRECTIONS TO THE DEPUTY REGISTRARS OF THE PREROGATIVE COURT.

Understanding that some few instances have recently occurred in which *probates* or *administrations* are supposed to have been obtained by fraudulent means, I desire the deputy registrars will call to the attention of the practitioners and officers of the court the extreme importance of the greatest vigilance and caution in the passing of all grants.

The practitioners must perceive the propriety of obtaining reasonable satisfaction that the person applying for the grant is entitled to it; and if, from the mode in which the party applies, or from the time that has elapsed since the death of the deceased, or from any other circumstances, there is the least reason to suspect that the person applying is not entitled, it is the manifest duty of the proctor to make further enquiry into the matter, and consequently, if any proctor proceeds in forwarding such business without reasonable satisfaction that the grant is not fraudulent he will be held responsible to the court.

In like manner the clerk of the seat or his assistant, and every other officer of the court whose duty it may be to examine the grant before it passes, observing any reason whatever to doubt its correctness, is directed and required in every such case carefully and diligently to make further enquiry, and not to suffer the grant to pass until he has received reasonable satisfaction respecting it.

It is further directed that in the oath to be taken by an executor or administrator the *time of the death of the party deceased* shall be set forth, by stating that the deceased died on or about the of in the year , and that the time of the death so stated in the oath shall be inserted in the jurat, and also *noted in the margin of the probate* or administration in legible characters, so as visibly to appear to any person to whom such probate or administration shall be presented for the purpose being acted upon.

Dated this 8th day of May, 1830.

(Signed) JOHN NICHOLL,
Judge of the Prerogative Court of Canterbury.

## ON RECEIVING THE EVIDENCE OF PARTIES.

WE insert the following communication from a correspondent, on the subject to which one of the bills of Lord Wynford relates. We have subjected the paper to some alterations, and think it well entitled to attention; but we wish it to be understood, that we do not pledge ourselves to the recommendation of all the conclusions of the writer.]

Amongst the alterations that appear necessary in the English common law is one regarding the rules and principles of evidence. There are two respects in which evidence may be viewed; the one, in which it is considered as information entitled to a greater or less degree of credit, according to the character of the person giving the same, or the circumstances that may exist to bias his testimony; the other, in which it is regarded as proof, or tantamount to manifestation. If we take the former view, the principle adopted by the English law, of receiving some and rejecting other evidence, appears absurd. We must conclude, therefore, that the law takes the latter view, and regards evidence as proof or manifestation. It may be desirable to enquire into the reason of this.

In the Saxon period of our history there existed so great a subordination in the people, and so general a juridical superintendence, as are altogether unknown in our times. The country was divided into counties, hundreds, and tithings, and every stranger or foreigner who came to reside in the kingdom, was compelled, within a limited time, to enrol himself in some one tithing; a law not inconvenient at a time when commerce had no existence, and the necessity of travelling was rare. The result of this general subordinate and juridical superintendence was the sifting out from the community every unworthy character. Every man having an intimate knowledge of his neighbours, criminals were soon detected, and removed from the community. For, upon any one being adjudged a felon, banishment, if not death, cut him off from the tithing to which he had previously belonged; and not being a member of a tithing he ceased to be a member of a hundred, of the greater divisions of a county, and of the kingdom at large. Outlawry, in these days, was indeed a punishment, as the person outlawed was driven forth from the habitations of his fellows to the woods and forests, deprived of all rights and privileges which he had before possessed, and his return into society rendered impossible without a reversal of his sentence. But another result of this system was, that the testimony of every individual not attainted was considered as equivalent to complete proof, there being no ground for considering it otherwise; and as in civil suits, brought by

one member of the community against another, there was necessarily an affirmation on the one side and a denial on the other, and as each of the parties was deemed equally worthy of credit, it followed that the evidence of neither was received. The testimony of both was rejected, because, being contradictory, both could not be true, and consequently they proved nothing. We thus see the reasons that led to the adoption of the two leading maxims of the English law with respect to evidence, that no person who was infamous, *i. e.* who had done an act by which he had forfeited the character of an honest and true man, and no person who was *interested*, could be a competent witness.

While the country retained its ancient juridical government, and before it became a commercial one, the establishment of such rules of evidence was not perhaps attended with any ill effects, considering the publicity that was then given to all bargains and contracts. Land could not be conveyed without the attendance of the parties on the very spot, and there, in the presence of witnesses, the one delivering possession to the other; and the same, or as great publicity was given to all other contracts, which being generally made in a fair or market, evidence could very easily be procured respecting them. But so soon as such juridical government ceased to be strictly kept up, and commerce began to be cultivated, the rule not to receive the evidence of an interested party became inapplicable to the state of society, as did the principle upon which it was founded, of regarding evidence as proof; for when men had no longer that intimate knowledge of their neighbours which they possessed before, criminals could not so readily be sifted from out the community; and as commerce caused contracts to become mere matters of course, and divested them of the solemnity and notoriety which previously distinguished them, great inconvenience arose from rejecting generally the best, sometimes the only evidence which could be had.

Now the civil law took a different view of the nature of evidence, and adopted a different rule. In criminal matters it requires the testimony of two witnesses to convict any one of a crime punishable with death; thereby showing that it was cautious in giving credit to testimony: and in suits of a civil nature, the evidence of a party interested was equally receivable with that of any other person.

Let us now enquire what reasons exist, in our own time and country, against regarding evidence as mere information, entitled to more or less credit according to the character and circumstances of the witness.

Laws should always bear an analogy to the manners of the period in which they prevail. They should change as the people change; for the laws of a rude period can never be applicable to a more civilised state of society. We have seen the different views which the Roman and the English law took of evidence, and their opposite practice with respect to it. What was the reason? The English law was instituted for a period comparatively rude, while the Roman law was embodied in and for a state of society highly refined. In a rude period the rules of law require to be strongly marked out, and do not admit of any very nice distinctions, which an uncultivated people would not be able to perceive. This observation more especially applies to the Saxons, where the body of the people, unlettered and ignorant as they were, were the judges. At that time, therefore, it might appear that the receiving the evidence of parties interested, or any evidence that did not carry with it a strong presumption of its truth, was improper, because a jury in those days was incapable of distinguishing the different shades of credibility attending various kinds of evidence. This reason, however, no longer exists, and the practice of rejecting the testimony of interested parties ought therefore to cease.

At the present time a jury never does receive evidence without weighing its value, a task which, from the degree of knowledge possessed by the nation at large, a jury is now competent to perform. This being the case, how absurd is it to refuse to receive any evidence that can be given, any information that can be obtained—which can by possibility throw light upon a transaction. But the matter rests not here: while excluding the evidence of interested parties generally, our law has felt the necessity of permitting it to be received in some cases, and has therefore made a distinction as to what parties shall be adjudged interested, so as to become incapacitated for witnesses; and what parties shall be held good evidence, notwithstanding their being interested. Now, in drawing a distinction like this, it will be seen there must be great difficulty; that it can be no easy task to fix the kind or quantum of interest which shall incapacitate a man from being a legal witness; and most strange are the determinations of the English law upon this point.

From the commercial character of our

country at the present day, the rejection of the testimony of an interested party must be most unwise. In many instances, as before remarked, the parties to a transaction, if not the only, are the most important witnesses that can be had, and a denial of justice must frequently occur through the rejection of such evidence. In such case it may be said, relief can be obtained in equity; but it may be answered, that while the admission of the evidence of parties interested in courts of equity, shows the impropriety of the rule adopted by the common law, the mode of receiving evidence in those courts is not the mode best adapted to elicit the truth. For if in any instance the examination of a witness *viva voce*, in open court, is important, it is in the case where a witness is an interested party. The mode of examining persons in our equity courts does not afford facility for sifting out the truth which is afforded by the examination of witnesses in the presence of judge, jury, and the public; and in the case of interested parties, gives to them, what they should, as much as possible, be prevented from having, — a previous knowledge of the interrogatories to which they are to give answers.

The state of the argument then stands thus: The rule of rejecting the evidence of parties interested, being applicable to the rude and peculiar state of society in which it was first established, is a strong argument of its inapplicability to our more refined one. That a jury does always exercise its judgment as to the value of the evidence, and is quite capable of so doing; and that therefore the admission of the evidence of parties interested, could not be attended with ill effects. That the evidence of parties interested, being made serviceable in some cases, but not in all, has produced doubt, confusion, and inconvenience. That the admission of the evidence of parties interested in the courts of equity, does not remedy the defect of the common law; the mode of receiving evidence, and examining persons in such courts, being the mode least adapted to answer its proposed end. L. W. W.

## REVIEW.

*The Law, Practice, and Styles, peculiar to the Consistorial Actions transferred to the Court of Session, by Act* 1 G. 4. c. 69. *Compiled by* Maurice Lothian, Solicitor in the Consistorial Court of Session, Edinburgh. Adam Black, 1830.

THIS is a work much wanted; more particularly on this side of the Tweed. There are few subjects on which so much doubt and confusion have existed as on the law of marriage in Scotland; and, as the necessity for its being clear and precise was of considerable importance as well in England as in Scotland, we have frequently had the more reason to regret that there was no work to which we might refer which was at once correct and concise. We think that Mr. Lothian's book will lessen, if not entirely remove, this difficulty; and in order to enable our readers to judge of this for themselves, we shall make some extracts from the work.

We shall pass over the account of the Commissary Court, and shall proceed at once to the subject most interesting to Southron readers — the precise ceremonies necessary to constitute a marriage in Scotland.

"By the civil law this relationship was considered to be purely a consensual contract, though in general, all nations have employed certain solemnities to mark its constitution. The Council of Trent made the sacerdotal benediction necessary to its validity. This, though it extended to the Western Empire, and prevailed over Europe, was not acknowledged in Scotland, in consequence of the Reformation; and since that time the ceremonies of a regular marriage, consist only of the proclamation of banns, of which a register is kept, and the acceptance of the parties before a clergyman, who pronounces the nuptial benediction, and who may be either of the Scotch or English church. Tol. Act. 2 Anne, 10. c. 7.

Banns should be proclaimed on three Sundays in the parish church or churches of the parties, while the people are assembled for divine service. The names and designations of the parties, and their purpose of marriage are thereby announced, and all concerned are required to state any objection which they may have to the union. The only specific regulations on this subject are ecclesiastical. See B. I. of Discipline, Gen. Assem. 1638. ar. 21. Direc. of Worship, 1644. Act of Assembly, 1690. c. 5.; 1711. c. 5.; 1748. c. 8. They have, however, been recognised by repeated enactments of the legislature against clandestine and disorderly marriages. After proclamation of banns the woman cannot do any gratuitous deed to the injury of her future husband. The certificate of the session clerk is received as evidence of the due proclamation, not to be redargued by positive proof that the three different proclamations were made on the same day, though he may be prosecuted at common law if he returns a false certificate.

"It makes no difference, however, as to the legal effects on the parties, though this relationship be contracted in the most irregular form. The only individuals affected by the form are the celebrator and witnesses. In the latter case, the clergyman by stat. 1661. c. 34. is exposed to banishment, and the witnesses by 1698. c. 6. to fine and imprisonment; but, for a long time

back there have been few such prosecutions; nor will there likely be any, unless other circumstances occur to call for the interference of the criminal prosecutor.

"Marriage in this country, according to all our institutional writers, and a long unbroken chain of solemn decisions, is constituted simply by the consent of parties expressed *de præsenti*, without regard to form, and without consummation; and may be proved by such parol or other testimony as is admissible to establish any other personal contract of importance. Lord Stair, B. 1. t. 1. § 6. says, 'Marriage consists in the present consent, whereby they accept each other as husband and wife, whether that be by words, expressly, or tacitly by marital cohabition or acknowledgment, or by natural connection, where there has been a promise or espousal preceding, for therein is presumed a conjugal consent *de præsenti*.' In like manner, Mr. Erskine, B. 1. t. 6. § 2., describes it as a civil contract, constituted by consent alone.

"Such consent may be declared in writing or before a magistrate, or kirk-session, or mutual friends, without the intervention of a clergyman, and it may be inferred from the conduct of the parties.

"1. It must be shown, however, that the consent was deliberate, serious, and voluntary. In the case of *Cameron*, Dict. p. 12680, the court, owing to the youth of the female, and the precipitation employed, considered that her consent had not been given with that seriousness which such a contract requires, and therefore annulled a marriage celebrated before a clergyman, proof having been led that she went to the place with her mother without any intention of marriage, that it was celebrated in her mother's absence, was instantly succeeded by repentance, and that some altercation ensued on bedding being proposed; on which the mother and daughter, a girl of only twelve years and four months old, returned home, refusing to acknowledge the marriage ceremony.

"2. Idiots, being incapable of consent, cannot marry. The procreation of children by idiots who may have gone through the most formal ceremony, and who may not have been previously cognosced, will not supply the want of the requisite consent; such were the circumstances of the case of *Blair* v. *Blair*, 28th June, 1748, Dict. p. 6293, in which the interlocutor of the commissaries, adhered to by the Court of Session, bore, 'that the said Hugh Blair was, and from his youth had been, a natural fool, and void of that degree of reason and understanding which were necessary to entering into the marriage contract, and therefore found and declared the pretended marriage to have been from the beginning, and to be in all time coming void and null.' In the English case, *Turner* v. *Meyers*, 6th May, 1808, a ceremony of marriage was set aside as void, on the ground of the husband's insanity, he himself being the pursuer of the action of nullity after his recovery. Lord Stowel said, 'it is perfectly clear in law, that a party may come forward to maintain his own *past* incapacity, and also that a defect of capacity invalidates the contract of marriage as well as any other contract.'

"3. Pupils, that is, a boy under fourteen and a girl under twelve years of age, being presumed incapable of giving consent, as well as being physically immature, cannot marry. If, however, their cohabitation is continued after puberty, the requisite consent will be held as irretrievably supplied. *Johnston* v. *Ferrier*, 17th Nov. 1770, Dict. 8931. In this case the female was twenty, and the male twelve years of age.

"4. From the same inability to give a rational consent, a person cannot be bound by any words uttered or solemnity gone through when intoxicated, and disclaimed when sober. The circumstance of a woman's being in a state of inebriety when declaring a marriage before a justice of the peace, and for three days thereafter, during which she cohabited with the defender, was found to entitle her to a decree of nullity, and putting to silence, in *Johnston* v. *Brown*, 15th Nov. 1823, she having left him, and intimated that she would hold no communication with him, so soon as she became capable of acting rationally. A man's acknowledgment was disregarded, having been made in liquor and in jest, in *Grey* v. *Lennie*, 12th March 1801, and because it was made in jest, in *M'Gregor* v. *Campbell*, 28th Nov. 1801.

"5. If either party be compelled to express consent there can be no marriage, even though consummation follows, unless it be unequivocally proved that the parties voluntarily cohabited afterwards.

"6. A person within the forbidden degrees of relationship, or impotent, or who is bound by a previous existing marriage, is not at liberty to give a lawful consent. By stat. 1600. c. 20. a party who is divorced for adultery is not permitted to marry with the guilty paramour.

"Neither the *bonâ fides* of one of the parties to a second marriage, nor the plea of personal exception against the conduct of the parties to a first, will protect the second against the effects of a challenge by any individual having an interest to object to it. In regard to the offspring of such second marriage, see Chap. IX.

"The consent of parents or guardians is unnecessary. In *Muir* v. *Nisbet*, 14th Jan. 1727, where the requisite consent *was* deliberately given, it was found not to be invalidated by the circumstances, that the gentleman was a minor; that he had not got the consent of his friends; that no banns were proclaimed; that the lady's father officiated at the ceremony; and that there had been no consummation. *Consensus non concubitus facit matrimonium.*"

The author then proceeds to show how this consent may be proved. It will be seen by what slight evidence this solemn relationship may be constituted.

"By witnesses swearing to the formal acceptance by the parties of each other. If this took place before a clergyman, and was preceded by proclamation of banns, according to the rules of the church of Scotland, it is called a regular marriage, and affords sufficient evidence *per se* of a valid consent, to the effect of throwing the burden of proof upon the party by whom it is challenged. *M'Turk*, 15th Nov. 1792.

"2. By witnesses swearing to the verbal de-

claration or acknowledgment of the parties, that they *are* married to each other, or by writing to that effect.

"3. By a reference to oath, that even in the most secret manner, and though without the knowledge, advice, or concurrence of any other human being, and verbally, parties accepted of each other to be husband and wife, provided there be nothing to throw discredit on the oath.

"The first of these modes may be established just like any other matter of fact.

"As to the others, Erskine, B. 1. t. 6. § 5. mentions an unreported case, where marriage was sustained chiefly on the evidence that the husband owned it to the midwife, whom he called to assist at the birth of his child, and to the minister who baptized it. *Arrol*, Feb. 1739.

"In *Currie* v. *Campbell*, 2d June, 1807, it was found sufficient that a man, previous to consummation, had taken a woman to a public house, and acknowledged her as his wife before the mistress and servants of the house.

"It is not unusual in some of the Scotch burghs for a petition to be presented to the magistrates, setting forth that the parties *were* irregularly married, and praying for fine, or imprisonment on account of the irregularity. On this the parties emit a declaration, confess the charge, and receive sentence to pay a small fine. These irregular proceedings establish the marriage. *Hamilton* v. *Wylie*, 27th May, 1827. In this respect, statutes which were designed to repress the evil, have been converted into means for extending it.

"The circumstances of a person mentioning his marriage in a letter to a third party, and designing the lady as his spouse in his testament, were found sufficient. *Anderson* v. *Wishart*, 23d February, 1724. Dict. 12676. A written acknowledgment was also found sufficient in *Edmiston* v. *Cochran*, 15th May, 1804."

This, of course, is direct evidence of the contract; but it may also be proved "inferentially" by a promise to marry, followed by sexual intercourse, and by the cohabitation of the parties, and their being reputed man and wife.

"Marriage may be constituted by a promise *carnali copula subsecuta* (as the canonists express it) from a presumption that the promise was then fulfilled, and that the consent which was previously *prospective*, was then rendered *present*. *Pennycuick* v. *Grinton and Graite*, 15th Dec. 1752. *Reid* v. *Laing*, 14th May, 1823, affirmed on appeal. Mr. Erskine says, that in the case of a 'promise of marriage followed by a copula, the subsequent copula must doubtless be considered as the perfection or consummation of the prior contract, after which there can be no room for resiling.' This is an equitable doctrine; for since marriage may be contracted in this country by consent merely, and without regard to form, it is most reasonable to infer that the intercourse consequent on the promise, was the matrimonial acceptance and recognition on both sides.

"The woman is more frequently the pursuer of a declarator of marriage so constituted. There is nothing, however, to hinder the man from founding on his own promise, followed by *copula*, provided he will prove her acceptance of it by her writ or oath. A female may indulge a licencentious passion with a man below her in rank, without any intention of gratifying his ambition by marrying him, and therefore, in such a case, her express acceptance must be proved, and will not be implied merely from her admitting that he promised or expressed his willingness to marry her prior to the connection. *Forbes* v. *Dowager Countess of Strathmore*, 27th Feb. 1750."

Mr. Lothian then enquires minutely into the proof of the promise and *copula*, and of the reputation of parties being man and wife. It seems quite clear, that the circumstance of the parties being Scotch, if they be resident in another country, will not enable them to contract a marriage after the Scotch fashion; they must then conform in all particulars to the peculiar customs of the country in which they are resident.

"No proof of any facts or circumstances occurring in a foreign country will be permitted, unless they constitute a marriage in such foreign country.

"On this ground the commissaries found that cohabitation, habit, and repute, and repeated and deliberate acknowledgments in the Isle of Man, were insufficient, and assoilzied the defender; and though the Court of Session remitted with instructions to alter, yet the House of Lords sustained the judgment of the Commissaries. *M'Culloch* v. *M'Culloch*, 10th Feb. 1759.

"The principle on which this rule rests is, that the conduct of parties must be judged of by the laws of the place where it occurred, which is an established maxim of international law. If, therefore, cohabitation in any foreign country could constitute a marriage in that particular country, a proof will be allowed. *Forbes* v. *The Countess of Strathmore*, 27th Feb. 1750. In this case cohabitation as man and wife in Holland, which constitutes a marriage there as well as in Scotland, was libelled, and though the Commissaries superseded the foreign proof till the proof in this country was reported, the Court of Session remitted with instructions to allow a proof of both at the same time.

"In England the public ceremony is indispensably necessary. Accordingly, an offer to prove a promise and *copula* in that country will be unavailing. It was so decided in *Dalrymple* v. *Dalrymple*, 16th July, 1811, where Lord Stowel said that a public ceremony there being 'indispensably required, no young woman acting with a regard to virtue and character, and common prudence, would surrender her person in a way which would not only not constitute a marriage, but would in all probability defeat all expectation of such an event.'

"In the case *Gainer* v. *Captain Dalrymple*, where the pursuer libelled on a celebration of marriage before a popish priest in Ireland, and cohabitation in that country, it was pleaded that no such marriage could be recognised there.

A proof of the pursuer's averments was allowed *before answer*, but the Commissaries pronounced an interlocutor, finding 'the facts and circumstances proved in behalf of the said Mary Gainer and her children *not relevant* to infer marriage, and therefore assoilzied,' &c.

"It is no answer to say that both parties were *Scotch* by birth, and that such a ceremony was gone through abroad, or that such circumstances occurred abroad as would, if they had happened in this country, have constituted marriage, unless they had the same effect by the laws of the place where they happened. This rule is simple and just. It rests on the principle, that as a man must always be governed by the laws of the country where he happens to be, his conduct at the time should only be tried by these laws."

We shall now shortly notice the part of the work relating to the law of divorce. In Scotland there are strictly only two grounds of divorce, viz. wilful desertion or adultery. The actions founded on the defender's impotency, prior to marriage, not being actions of divorce but of declarator, that the ceremony was null and void *ab initio*.

The rules as to wilful desertion are more novel to us than the other portion of the work.

"By the Scotch statute, 1573. c. 55. it is enacted, 'That where any of the spouses shall divert frae the other without sufficient grounds, and shall remain in his or her malicious obstinacy for four years,' the party injured may sue the defender for adherence before the judge-ordinary; and if the defender disregard the sentence, the pursuer may apply to the Court of Session for letters of horning, in room of the ancient letters of *four forms* mentioned in the statute, to enforce it. After this, the church is directed to admonish the defender to adhere; and if he shall still continue obstinate, the church-court is to proceed to excommunication. Which previous steps are declared by the statute to afford sufficient foundation for a divorce.

"Although, by the enactments of the statute, it would seem the offending party must have deserted four years before the action of adherence can be raised, yet, in practice, such action has always been admitted, and decree pronounced in it, after one year's desertion. Four years, however, must intervene between the desertion and the raising of the action of divorce."

The defences to the action are then mentioned, and among others,

"It is not a good defence against the action of adherence that the parties *agreed* to live separately. Nor that a decree of aliment went out against a husband during separation. Nor yet that an agreement was gone into, by which the wife was to be entitled to live separately, with a specific annuity, *if* it were found by *two arbiters that she could not* live in family with her husband on account of maltreatment, and that they had, on proof adduced, pronounced a deliverance, finding the maltreatment proved, on which her husband had given to her a discharge of her person. All such agreements are revocable, as being inconsistent with the first duties of the marriage; and the only effectual separation is a judicial one on cause shown. *Vailange* v. *Lady Touch*, 3d May, 1707.

"Maltreatment, and other improper conduct, so that the wife cannot safely cohabit, is a good defence. *Reid* v. *his Wife*, 9th August, 1696.

"The Court of Session also found that the following circumstances afforded a relevant defence in an action of adherence at the instance of a person of quality against his lady, viz. that he refused to allow her money for necessary uses; debarred her from the oversight of her young children's education; shut his doors against her at night; turned off a servant for opening them; conversed indecently with her woman; and protected the woman after his lady had dismissed her. *Duchess* v. *Duke of Gordon*, 8th June, 1697.

"In *Letham* v. *Proven*, 8th March, 1823, where the husband was also the pursuer, the Court of Session sustained the defence for the wife that she was justified in withdrawing from his society in consequence of his having committed adultery with a domestic servant. It may be here noticed generally, that whatever will justify an action of separation, which will be noticed afterwards, will afford, without any counter action, a successful defence against an action of adherence."

Divorce on account of adultery, and the various defences thereto, are then fully considered; but we have already extracted sufficient to enable the reader to judge of the value of the work. He will find the other portions equally judicious and interesting.

---

## REMARKABLE TRIALS, NO. II.*

THOMAS Harris kept the Rising Sun, a public house, about eighteen miles from York on the road to Newcastle. Harris had a man and maid servant: the man, whose name was Morgan, he kept in the threefold capacity of waiter, ostler, and gardener. James Gray, a blacksmith, travelling on foot to Edinburgh, stopped at Harris's, supped, and lay there. Early in the morning Morgan went secretly to a neighbouring magistrate, and gave information that his master, Harris, had just then murdered the traveller James Gray in his bed. A warrant was issued, and Harris was apprehended. Harris positively denied the charge, and Morgan as positively affirmed it; deposing, that he saw Harris on the stranger's bed strangling him, but that he came too late to save him, and that Harris's plea was the deceased was in a fit, and he was only as-

* The first number of this series was inserted in the Supplement for March, and we shall, in that portion of the work, continue to preserve correct reports of interesting and important trials which occur at the present time, but shall continue the series of ancient trials in our weekly publication.

sisting him; Morgan further deposed, that he instantly retired and made a feint as if going down stairs, but creeping up very softly to an adjoining room, he there, through a key-hole, saw his master rifling the breeches of the deceased.

Harris peremptorily denied every part of this story from the beginning to the end; and the body having, by order of the magistrate, been inspected, and no mark of violence appearing thereon, Harris was nearly on the point of being discharged, when the maid servant desired also to be sworn. She deposed, that almost directly upon her master coming down in the morning, as she must conceive, from the traveller's room, she saw him go into the garden, (being unknown to her master in a back wash-house which overlooked it,) saw him take some gold out of his pocket, wrap it up in something, and bury it at the foot of a tree in a private corner of the place. Harris turned pale at the information. He would give no direct answer as to the circumstance of the money. A constable was despatched with the girl, and the cash to the amount of upwards of thirty pounds was found. The accused acknowledged the deposit of money, but he acknowledged it with so many hesitations, and answered every question with such an unwillingness, such an apparent want of openness, that all doubts of his guilt were now done away, and the magistrate committed him for trial.

Harris was brought to the bar, at the York summer assizes, which happened about a week after his commitment in 1642. Morgan deposed the same as when before the justice. The maid servant and the constable deposed to the circumstance of the money: the first as to the prisoner's hiding, and both as to the finding of it; and the magistrate gave testimony to the confusion and hesitation of Harris on the discovery of, and being questioned about, the hiding of the money.

Harris, in his defence, endeavoured to invalidate the charge by assertions, that the whole of Morgan's evidence was false; that the money which he buried was his own, honestly come by, and buried there for his better security; and that his behaviour before the magistrate on this particular arose from the shame of acknowledging his own natural covetousness, not from any consciousness of guilt. The judge then summed up the evidence, remarking strongly on the circumstance of the hiding of the money, and the weakness of the prisoner's reasons for his so hiding it; and the jury consulting for two minutes brought in their verdict guilty.

Harris was executed pursuant to his sentence, persevering in his declarations of innocence, but desiring all persons to guard against the effects of an avaricious disposition: for, it was that sordidness of temper which led him, he said, to general distrustfulness, and that into the expedient of hiding his money; which circumstance had alone furnished the means to his enemies, (for what reason they were so he said he knew not, but whom he forgave,) for bringing him to an ignominious death. The truth of the fact at last came out: Harris was entirely innocent.

Morgan and the maid were not only fellow-servants but sweethearts. Harris's suspecting, covetous temper was well known to both; and the girl once, by accident, perceived her master burying something, discovered the circumstances to Morgan, he, acting as gardener, took an opportunity when at work to dig for it; it proved be five guineas; he left it, and informed the girl of it. They settled not to touch the money, but to keep watching their master as they had no doubt he would add to it; and when it arose to a good sum, they agreed to plunder the hiding-place together, — marry, and, with the spoil, set up in some way of business. As they imagined, so it happened, they got several occasions to see the stock increasing, but (equally covetous with their master) the golden harvest was not yet ripe.

One day in a quarrel Harris strikes his man Morgan several times, Morgan determines on revenge: at this fatal period arrives James Gray. Morgan finds him the next morning dead in his bed. The diabolical thought strikes Morgan of first charging Harris with the murdering and robbing of Gray, and then of plundering his master's hiding-place whilst he (the master) shall be in prison. Morgan communicates this intention to the maid; she approves of it; they consult and fix on the plan, and Morgan gives the information to the magistrate as before related. The girl unexpectedly finds the accusation not sufficiently supported, and fears her sweetheart, of whom she is fond, will be confined if her master is released, who indeed unfortunately had just hinted as much before the justice. The expedient in a moment strikes her to sacrifice the hidden money, and with it her master, to the safety of her paramour; and the idea, as the reader already knows, fatally succeeds. The whole of this piece of wickedness came to light in the beginning of the year 1643, on a quarrel between Morgan and the girl, who after the death of Harris had lived together as man and wife.

They were taken up in consequence, and committed to prison, but escaped the public punishment due to their crime, by both dying of a gaol disease. Harris's innocence became afterwards further illustrated, by its being found out that James Gray, the supposed murdered person, had had two attacks of an apoplexy some time previous to his death, and that he was never master of five pounds at one time in his life.

## STAMP DUTY ON BILLS AND AGREEMENTS.

*To the Editor of the Legal Observer.*

Sir,

A measure being in contemplation for revising and consolidating the Stamp Duties, allow me to call the attention of the profession, through you, to the anomaly at present existing, of construing as bills of exchange all bills, drafts, or orders for the payment of any sum of money out of a particular fund; or when the payment depends upon a contingency, at the same time that it was evidently well known to the framer of the act 55 Geo. 3. c. 184., that such instruments could only take effect, if at all, as

agreements or admissions, and thus require an agreement stamp in addition.

It is probable, from a similar clause respecting promissory notes, which is, however, restrained to notes for sums under 20*l.*, that the object of the legislature was to restrain parties, in cases where the agreement duty did not apply, from evading the bill duty by making such instruments invalid as bills, and so construing them as agreements. As it is, however, the effect of the clause is to shut out the best species of evidence in mercantile actions, viz. written admissions of the debt, which the instruments in question generally amount to.

In *Butt* v. *Swan*, 2 B. & B. 78., an order to pay 600*l.* out of the first proceeds of a stock of gunpowder was held bad for want of a bill stamp, although it was evidently never intended for a bill, and bore an agreement stamp. And, in *Fairbank* v. *Bell*, 1 B. & Ald. 36., a somewhat similar order for the payment of 1500*l.* in bills, upon the sale of certain mahogany, contained in several letters which were stamped with 1*l.* 15*s.* stamp, was adjudged within the act, and liable to a bill stamp. Whilst, on the other hand, in *Jones* v. *Simpson*, 2 B. & C. 318., an order to pay to A. B. the proceeds of a shipment of goods valued *about* 2000*l.*, was considered clearly an agreement upon which the plaintiff recovered. Thus, it is seen, that, in the two first cases, orders which never could have taken effect as bills of exchange, are prevented being used — either as agreements or evidence of an account stated, whilst the plaintiff recovers upon the last only by the uncertainty of its amount.

I trust, sir, these cases show sufficiently the hardship as well as absurdity of the law as it at present stands, which makes an unwise distinction between bills of exchange and promissory notes — in some cases requires, as I presume, instruments to be stamped with the duty of two distinct instruments; and, as no bills can be stamped after being drawn, invalidates agreements which were never intended for, and never could have had the effect of bills of exchange.

I am, Sir,

Your obedient Servant,

D.

## ADMISSION OF ATTORNEYS.

*To the Editor of the Legal Observer.*

Sir,

In the fifteenth Number of the "Legal Observer," you state at page 240 respecting the admission of attorneys, "Those *who are not admitted within the four Terms after notice must repeat it.*"

In 6 Taunton's Reports, *Exparte Bonner*, 335. the notice of intention to apply for admission as an attorney required by rule of Court, Trin. Term 31 Geo. 3. must be given during the term *next immediately preceding the application.*

Being particularly interested in this question I should be glad to know if the statement alluded to in the above Number is correct.

I am, Sir, Your most obedient Servant,

A Subscriber.

Gray's Inn, Wednesday Morning.

*** We have made further enquiry on this subject, and are informed that it is the practice to repeat the notice when the admission does not take place in the course of the term specified in the notice. It does not appear, however, that the decision above referred to is strictly followed, for the notice is usually given not *during* but *before* the commencement of the preceding term. According to the rule of court, the notice must be given "one full term previous to the term in which such person shall apply to be admitted." It seems to be a hardship on the applicant, when prevented by illness or other unavoidable circumstance from attending the court, according to the notice given so long antecedently, that he must renew it, and at two seasons of the year submit to a delay of four or five months. We think the Court, in the exercise of its discretionary power, would feel bound to afford relief. No evil can be suggested, because the notice enables a party who may intend to oppose the admission to enter a caveat. The rule of court does not require the notice to be a full term *next* previous to the term of admission, and it might reasonably be extended to twelve months. — Ed.

## SUPERIOR COURTS.

### COURT OF KING'S BENCH.

#### CORPORATION. — SUGGESTION.

*Lord Tenterden* C. J. said, the Court had considered the application on the part of Sir Abraham Bradley King, to be discharged out of custody, in which he had been placed, under an execution issued on a judgment, against the Secretary of the St. Patrick's Insurance Society. The action was brought on a policy of insurance, against the secretary, who was the person appointed to sue and be sued on behalf of the company; and judgment having given against him, the execution was taken out, *not* against him, but against Sir Abraham Bradley King, who was stated to be a member of the company; and this was done on the ground, that by a statute, which gave the company some of the incidents of a corporation, it was enacted, that on judgment against the secretary, execution might be taken out against any of the members of the company. No leave of the Court had been applied for, nor had any suggestion been entered on the roll, that Sir A. B. King was a member of the company; and it was contended, that although the act authorised the issuing execution against any member on judgment against the secretary, that there ought to be an application to the Court for leave to enter a suggestion on the roll; or, that by some mode or other previous notice ought to be given to the person against whom it was intended to take out execution, in order to give him an opportunity of demurring or pleading: and the Court was of opinion, that the law was so. Certain documents had been handed in to the Court, to show what had been the course adopted by the court in Ireland. From this he collected, that the course in the Irish Court of Common Pleas was, to allow a

person who had obtained judgment in these cases, to take out execution against another person than the defendant, at his peril, as to whether the person against whom the execution was taken out was or was not a member. But that was contrary to the course of the King's Bench in Ireland, as appeared from an elaborate judgment pronounced by the Lord Chief Justice. The effect of that was, that a suggestion ought to be entered on the record, in these cases, in order to give the person, against whom execution was intended to be taken out under such circumstances, notice so as to enable him to plead or demur as the case might be. Unless this was done there would be an incongruity on the record, the judgment appearing to be against one, and the execution against another, without any reason assigned. In actions against the hundred, it was not unusual on a judgment against A. and B. to issue an execution against C. and D.; but then that was different from the present case, for there, the action, although nominally against A. and B., was, in fact, against the whole hundred, which was represented by A. and B. But where the party was not on the record it was fitting that a suggestion should be entered, so as to put the record in a proper form, to enable that party to demur or plead, and try the question, whether he was a member or not; or any other question that might be available for his defence. He was, therefore, of opinon, that Sir A. B. King was entitled to his discharge from the execution.

*Littledale* J. said this was no hardship on the plaintiff; for, supposing that he had brought the action against Sir A. B. King himself, he must prove that Sir A. B. King was a member; and it was but just that Sir A. B. King, or any other in his situation, should have an opportunity of showing that he was not a member, or of setting up any other proper matter of defence.

*Exparte Sir A. B. King*, in the case of *Bartlett* v. *Fentum*, Secretary to the St. Patrick's Insurance Company. H. T. 1831. K. B.

---

GAOL RATE.

A rule was obtained to show cause why an order of the justices of the town and county of Kingston-on-Hull, should not be moved by *certiorari* into this court, for the purpose of being quashed. The order was for making a rate on the town and county generally, to raise a sum of 2535*l.* for purchasing a site for a new gaol and house of correction, and for defraying the expense of raising these buildings, on the ground that the money ought to be paid by the corporation of Hull, and not by the county generally.

Sir *James Scarlett*, *F. Pollock* and *Cresswell*, showed cause, and contended that although the corporation might, perhaps, be bound by its charter to repair its gaol, yet there was no ground for the allegation that the corporation was bound, exclusively, to bear the expense of purchasing a new site, and erecting a new gaol and house of correction. By the new gaol act of the 4 Geo. 1. c. 61. the county was made liable to the expense, and, in point of fact, the rates in question had been mortgaged for the repayment of money which had been borrowed for the purchasing the site and erecting the buildings.

The *Attorney-General*, *Campbell*, *Coltman*, and *Archbold*, in support of the rule, submitted that the act of parliament in question did not remove the liability from those who were before liable; and the strong evidence that the corporation was liable, was, that they were bound by their charter to support, maintain, and repair the gaol, and that they had ever since done so. It made no difference that the site was changed, the maintaining of the gaol was a condition on which they had obtained their charter, and if they refused to fulfil the condition their franchise might be forfeited.

Lord *Tenterden* C. J. was of opinion that the rule ought to be discharged. By the act of the 23 Geo. 3. the town and county were ordered to build a gaol, and the mayor and burgesses to to keep it in repair. Then came the act of the 4 Geo. 4. c. 64. which enacted that the justices, not the mayor and burgesses, might, when necessary, erect new gaols and workhouses, and purchase sites for them, and might levy rates on their towns or counties, to repay the expenses; and it directed that the expenses were to be paid by those who were before liable. Now, by the provisions of the former act, the town and county were made liable to the expense of erecting the gaol, and the corporation to the burden of repairing it. Now this was not a question about repairing but about purchasing a site and erecting; and for the expenses of these the county generally appeared to be liable. The order of the justices was therefore correct.

The rest of the Court concurred in this opinion. Rule discharged. *Ex parte the Occupiers of Land in the Town and County of Kingston-on-Hull.* T. 1831. K. B.

---

PLEADING.

Trespass for entering a close and taking stones and gravel. Plea, a justification, as the defendant had a right to enter the close and take stones and gravel; for that, on the division of a common in 1754, four acres had been set apart and allotted to the commoners, out of which they were to be at liberty to take stones and gravel; and that the *locus in quo*, &c. (understood by the court to mean the place where the supposed trespass was committed), was a parcel of the four acres, and that the defendant was one of those who had right. At the trial, it appeared that the close or parcel of ground mentioned in the declaration, consisted of five acres, over one of which the right did not extend; but the defendant proved that the place where the alleged trespass was committed, was part of the four acres over which he had a right, and a verdict was found for the defendant. Rule to set the verdict aside, on the ground that the plea had not been made out; for that the plea was a right to enter, and take, &c. over the close mentioned in the declaration, that is the whole close, whereas the proof was a right only as to part. Cause being shown, it was submitted that the proof of right in the place where the supposed trespass was committed, was sufficient to support the plea. In support of the rule,—

if so, the record might afterwards be given in evidence of defendant's right over the whole close.

Lord *Tenterden* C. J. said the question was, what rule was most convenient to establish? and he was of opinion that it was most convenient to hold, that proof of right in the place where the supposed trespass was committed was sufficient to support such a plea; for if objections so very critical were allowed to prevail, it would often be exceedingly difficult and expensive to get causes decided on the merits. As to the effect of the record in evidence, proof might be given as to what close it exactly applied to.

*Littledale* J. Besides, the defendant would have no greater advantage by the record than the plaintiff would have had by the record if the verdict and judgment had been the other way, for then it might be given as evidence, that the defendant had no right over any part of the close or parcel of ground mentioned in the declaration. Rule refused. *Plassett* v. *Mitchell*, H. T. 1831. K. B.

---

## KING'S BENCH.

### *Sittings at Nisi Prius.*

### LIBEL.

In an action for libel, Charles Houlden Walker was the plaintiff, and Stephen Lushington, doctor of laws, Henry Barrow, Henry Winchester, and Alexander Varnham, were the defendants. The declaration stated that the plaintiff was an attorney and solicitor, and that he had been employed by a person of the name of Peddle as his attorney in a suit in the Prerogative Court of Canterbury; that Peddle had presented a petition, relating to certain matters in that suit, to the House of Commons, and that the defendants composed and published, in a publication called "*The Mirror of Parliament*," concerning the plaintiff, certain matter relating to his conduct in that suit, imputing to him that he was a pettifogging attorney, that he had been guilty of perjury, and had attempted extortion. The defendants had pleaded, first, the general issue, not guilty, and then six special pleas of justification; in which, in justification of that part of the libel which imputed perjury to the plaintiff, they alleged that he had been guilty of perjury. The defendant Barrow had pleaded, to the whole declaration, that the plaintiff had been guilty of the matters imputed to him. The plaintiff, by his replication, denied these allegations, and alleged that the defendants had published the libel of their own wrong.

The plaintiff, Mr. Walker, it appears, had been retained by a person of the name of Peddle, to conduct a suit for him in the Ecclesiastical Court, which had for its objects to set aside a will which had been set up by one class of claimants, and to establish another in which other parties were interested. A person named Evans had died, leaving two wills. One of them was proved; but Mr. Peddle having found another, which he was advised was the genuine will, the object of the suit was to get the probate of the first will rescinded, and to obtain probate of the second. Mr. Walker being thus employed by Peddle, had employed Mr. Toller as his proctor in the suit. It proceeded to a certain extent, and then Sir John Nicholl pronounced a judgment against Peddle, but without costs. This showed, at least, that the learned judge thought Peddle had reasonable grounds for instituting the suit. Mr. Peddle being advised by Mr. Toller, the proctor, that the judgment would be set aside on an appeal to the Court of Delegates, determined to carry the case up to that court, Mr. Toller undertaking that the utmost expense of that proceeding would not exceed 200*l*. The appeal was accordingly prosecuted before the Delegates; but that court confirmed the decision of Sir John Nicholl. The consequence of these proceedings was, that a considerable amount for costs became due. The expenses in the original suit were about 1000*l*., and the costs of the appeal 384*l*. Mr. Peddle finding that so large an amount of costs had been incurred, was induced to desire to have the bill taxed, and wished to have the assistance of Mr. Walker, his solicitor, in attending before the officer of the court, on the taxation. It appeared, however, that according to a rule of the Ecclesiastical Court, no one but the proctor in the cause was allowed to be present at the taxation of a bill by the registrar; and accordingly Mr. Walker was not permitted to attend. In consequence of this, a petition was presented to the learned judge of the court, and a motion made for Mr. Walker to be at liberty to attend the taxation. The application was refused, and then Mr. Peddle presented a petition to the House, stating what had occurred, and praying that some redress might be afforded him. Upon that petition, a debate took place, in the month of July, 1828, and at the close of the session of that year, the publication in question came out, containing the speech which was said to have been delivered by Dr. Lushington, and published with his corrections. The speech, after a general vindication of Sir John Nicholl, and a statement that he had acted only according to the rules of the court, proceeded in these terms: "I will only add, that this is not the petition of the person whose named is affixed to it; but it is that of a pettifogging attorney, who has been guilty of perjury and attempted extortion." In the same number of this publication was contained another speech of the learned doctor on the same subject. The part complained of ran thus: "In speaking of the solicitor, Mr. Walker, I have, I acknowledge, used very strong expressions: not one word of which will I now retract; for I should be ashamed to avail myself of any parliamentary privilege to state any matter which I could not afterwards fully substantiate." In order to explain an expression in one part of the speech, it must be stated, that an hon. member (Mr. W. Harvey) had defended Mr. Walker, and said that he never heard a more unwarrantable attack on any individual than to say of him that he had been convicted of perjury. To that observation, Dr. Lushington it appeared by the printed report of his speech, replied, "I did not say *convicted*, but *guilty*, of perjury." This speech appeared in *The Mirror of Parliament*, of which defendant Barrow was principal editor, and the two other defendants the publishers.

An unsuccessful attempt was made to show that Dr. Lushington had corrected the proof of his speech. The fact of Barrow being the editor, and the other two defendants the publishers, was clearly proved.

On the part of the defendants, no evidence was given in support of the pleas of justification.

*Lord Tenterden* C. J., told the jury, that the members of Parliament could not be questioned in that or any other court of justice for any matter which might fall from them in either house. They had perfect freedom of speech in Parliament, and they could not be called upon to answer for any thing they might utter there. But the liberty was confined to that which passed in the house; for if a member of either house of Parliament thought fit, after he had made a speech, to publish it, and it was found to contain a libel upon the character of another, he must be answerable for that; because his character, as a member of Parliament, did not give him the privilege of publishing that. As the speaker himself was not therefore privileged out of the house, neither could any other person; for that which was not lawful for him who originally uttered it, to publish, could not be lawful for any other person to publish. A great deal of time had been occupied in endeavouring to prove that Dr. Lushington had taken part in the publication, and that he had corrected the proofs. In that, however, the plaintiff had entirely failed, and their verdict must pass for Dr. Lushington, as there was not a tittle of evidence to connect him with the publication. As to the other three defendants, they were proved to be the editor and publishers; and the work had been bought at their office; and that being proved, the jury could not do otherwise than find a verdict for the plaintiff as against those defendants. It was not allowed for any man to publish that which was injurious to the character of another, whether the matter was originally uttered in the House of Commons, or any where else. It is a very fit and proper thing that the public should be informed of all that passes in Parliament, in order to judge as well of the conduct of those who manage the public business of the country, as of the members generally; but there is no reason why any thing which passes in either house of Parliament injurious to private individuals, should afterwards be published. No freedom or interest of the subject is concerned in that; and I am by law bound to tell you that the publication of this speech being proved, your verdict must, by law, pass against the three defendants.

The jury, after conferring together about ten minutes, found a verdict for the plaintiff, damages 50*l.*

Lord *Tenterden* then directed the verdict to be entered for the defendant, Dr. Lushington, on the plea *not guilty*, and discharged the jury from giving any verdict on the issue joined with that defendant on the plea of justification. The verdict was entered generally against the other defendants. *Walker* v. *Lushington, Esq. M. P. and others.* Sit. after H. T. 1851. K. B.

---

CONTRACT.

*Assumpsit* for carpenter's work done at a public-house kept by the defendant at Hornsey. The plaintiff produced a balance of account, estimating his work by measure and value. The demand was resisted on the ground that the work was to be done by contract. The sum for which the work was originally agreed to be done was 62*l.* 10*s.*, but some alterations and additions having been required, a further sum of 10*l.* was agreed upon. The plaintiff had received about 81*l.* in the whole, but he claimed a further sum, alleging that he had done extra work to a considerable amount; and that the sum he was entitled to by measure and value for that work, greatly exceeded the amount which he had received. The persons who had valued it, differed materially in their estimate. Some stating the value as high as 144*l.*, and others estimating it at only 75*l.*

Lord *Tenterden* C. J. said, this case involved a very important principle. The difference in the estimated value on the one side and on the other, (and such differences were by no means of unfrequent occurrence,) showed how important it was that parties should be bound by their contracts. A person who contracted to do work of this description for a certain stipulated sum, was not entitled to depart from that contract on account of alterations or additions afterwards made; unless, at the time those alterations or additions were proposed, he not only told his employer that they would have the effect of increasing the sum originally agreed on, but also expressly informed him what the additional amount would be. If it were otherwise, a man who had contracted to have his work done for a certain fixed sum, might be ultimately led into most ruinous expenses. If the jury were satisfied in this case, that the plaintiff had already received a sufficient compensation for the extra work not comprised in the contract, they would find for the defendant; but, if not, they would give the plaintiff such reasonable sum as they thought, under all the circumstances, he was entitled to recover.

The jury immediately found for the defendant. *Lovelock* v. *King.* Sit. after H. T.

---

LIBEL. — AGENT.

The declaration stated that the plaintiffs were the owners of the schooner *Delos*, and that the defendants published concerning that vessel, in a book called the "Register of Shipping," a statement representing, falsely, that her scantlings were small, and that her timbers and fastenings were of an inferior description; and that, in consequence of such statement, the underwriters refused to insure the vessel; and persons, who would otherwise have put goods on board of her, refused to do so. The defendants pleaded a justification, alleging that what they had published was true.

The plaintiffs were the owners of a schooner called the Delos. The defendants were the chairman, and two of the committee of a society called "the Register of Shipping Society;" and the book in question, which was published under their authority, professed to give the character, description, and history of every ship which was likely to be offered to the underwriters for insurance.

It was admitted that the plaintiffs were the owners of the Delos in March, 1829; and that "the Register of Shipping" for the year 1829 was printed by the order and authority of the committee for conducting the affairs of the Society for the Registry of Shipping, of which Society the defendants were the chairman and two of the committee for 1829.

Proof of the soundness of the vessel, and of the special damage, was given.

On the part of the defendants it was shown, that the plaintiff had requested that the surveyor of the Society would examine the vessel, that she might be put in the Register; that a survey was accordingly made, and the account of the vessel which had appeared in the Register was founded on the survey so made.

Lord *Tenterden* C. J. on this evidence directed the plaintiff to be called. *Kerr and Others* v. *Sedden and Others*. Sit. after H. T.

---

### COURT OF COMMON PLEAS.

#### LIBEL. — JUSTIFICATION.

In an action for libel the declaration alleged that the plaintiff had carried on in an honest and *lawful* manner the business or trade of a manufacturer of bitters; and that the defendant had published a certain libel of and concerning him in his trade. The defendant put no justification on the record, but merely pleaded the general issue. At the trial the plaintiff proved the publication of the libel, and after he had closed his case the defendant proposed to give evidence that the plaintiff had been engaged in the manufacture not of bitters, as alleged in his declaration, but of something of a different nature, and to be used for a different and illegal purpose. This evidence was objected to on the part of the plaintiff on the ground that it would go to prove the truth of the libel, which the defendant had no right to do, he not having pleaded a justification. The learned judge who tried the cause admitted the evidence, not in proof of the truth of the libel, but to show whether or not the plaintiff had, as alleged by him, carried on the lawful trade of a manufacturer of bitters, at the same time cautioning the jury not to give any weight to the evidence so far as regarded the question, whether the libel was true or false. On showing cause against a rule for a new trial, the question for the decision of the court was whether or not the learned judge below had decided properly in admitting the evidence.

The Court was of opinion, that he had decided properly in admitting it with reference to the point of whether or not the plaintiff had carried on a legal trade. There was no principle of law more firmly established, than that a defendant in an action of libel was not at liberty to adduce evidence in proof of the truth of the libel, unless it was specially pleaded in justification; but it was a principle equally well established, that if a defendant was charged with having published a libel of and concerning another in his trade he had a right to call evidence to prove the legality of the plaintiff's trade, even though such evidence might go to prove the truth of the libel. Suppose the declaration charged the defendant with having libelled the plaintiff in his trade as a manufacturer of bitters by stating that he had taken the benefit of the insolvent act and defrauded his creditors, would it not be competent to the defendant to show that the plaintiff was not a manufacturer of bitters, but of something totally different? and that being so, where was the difference between that and the present case? The mere fact of such evidence being calculated to prove the truth of the libel was no reason why, provided it were not offered and received for such purpose, the defendant should be debarred from adopting that line of defence. The plaintiff who alleged he carried on a *lawful* business must come down to court prepared to prove that it was lawful, and to disprove its illegality. If he failed upon that point he was not entitled to a verdict. For these reasons the court was of opinion, that the Learned Judge had done right in admitting the evidence, and that therefore the rule for a new trial must be discharged. *Manning* v. *Clement*. H. T. 1831.

---

## COMMON PLEAS SITTINGS.

*Easter Term*, 1831.

IN TERM.

| MIDDLESEX. | | LONDON. | |
|---|---|---|---|
| Wednesday | April 20 | Thursday | April 21 |
| | — 27 | | — 28 |
| | May 4 | | May 5 |

AFTER TERM.

Tuesday, - May 10 | Wednesday, May 11

The Court will sit at Eleven o'clock in the forenoon on each of the days in Term; and at half-past Nine precisely on each day after Term.

---

## EXCHEQUER SITTINGS.

*Easter Term*, 1831.

IN TERM.

| MIDDLESEX. | LONDON. |
|---|---|
| Monday, April 25. | Wednesday, April 27. |
| Saturday, April 7. | Friday, May 12. |

AFTER TERM.

| MIDDLESEX. | LONDON. |
|---|---|
| Monday, May 16. | Wednesday, May 11. |

The Court will sit at Twelve o'clock in the forenoon on each of the days in Term; and at Ten precisely on each day after Term.

---

## MINOR CORRESPONDENCE.

In Holliday's life of Lord Mansfield, a work I believe never held in high estimation, a speech of his Lordship is given, page 250, in which mention is made of a manuscript work of Lord C. J. Hale, respecting the power of the English legislature to make laws for Ireland. Can you or any of your correspondents say whether that MS. was ever published, and if so, under what title; if not, where it is now to be found? I remember many years ago to have read in a magazine or newspaper, a speech ascribed to Lord Mansfield, when Mr. Murray, said to have been made in consequence of the military having

been employed, as I best recollect, to quell a riot arising out of a contested election for Westminster, above seventy years ago. I do not observe that Holliday has noticed this circumstance, and I should be glad to learn where the speech to which I allude is to be found. Q.

Furnival's Inn,
31st March, 1831.

---

SIR,

Will you be so good as to inform me, or ask some of your correspondents, why whole classes of the most profitable professional business are left to be conducted by persons from whom no professional education is required, and who contribute nothing to the fiscal burdens laid on attorneys? I allude to such departments as those occupied by persons who call themselves *parliamentary, election, privy council, Scotch* and *Irish* AGENTS. The law and the revenue seem to have no cognizance of these gentlemen. Upon what principles of policy are the clerks and officers of parliament allowed to practise to the detriment of the profession and the obstruction of their official duties?

Yours, A. S.

---

The long existing abuses of the Court of Chancery being now under consideration, I take the liberty of proposing the following question as one not at all foreign to the enquiry. Is the statute 15 H. 6. c. 4. now in existence, enacting "that no bill in equity be commenced, and no subpœna be issued without security being first given for its due prosecution, that so the defendant may have recompense if he be unjustly harassed?" I can find no repeal, and submit that the same is now in full force and virtue. This statute in the year 1436, and for some years after, was productive of the greatest advantage both to the business of the court, and the interest of the party seeking its protection.

J. E. J.

New Court, Middle Temple,
April 2. 1831.

---

### QUERIES.

1. A. and B. are sureties in a joint and several bond to C. who compels payment from A., would A.'s proceeding against the principal discharge B., or is he obliged to enforce contribution from B. *first*, before proceeding against the principal? In whose names should the action be brought against the principal? F. F.

---

If A. devise lands to B. upon condition that at his (B's) death, they shall go to C.; and C. dies in the lifetime of B., do the lands at the death of B. revert to the next heir of A., or can B. bequeath the same to any person he may think proper?

---

Is the devise valid of an estate under a will which contains the following attestation, which, it will be perceived, *omits to state that the subscription of the witnesses* was in *the devisor's presence?* "Signed, sealed, published, and declared by me as and for my last will and testament, in the presence of" [three witnesses.]

### RESIGNATION OF THE ACCOUNTANT GENERAL OF THE COURT OF CHANCERY.

John Springett Harvey, Esq. the Accountant General of the Court of Chancery, has resigned his office. We have not yet heard the name of his successor: probably James Stephen, Esq., will be appointed.

---

## MISCELLANEA.

### ANTIQUITY OF THE COURT OF EXCHEQUER.

THE recent alterations regarding this Court may render the following account more than usually interesting. Gervasius Tilburiensis, in a manuscript as old as the time of Henry the Second,[1] has thus described its nature and origin.

"The Exchequer is a four cornered board, about ten feet long and five feet broad, fitted in manner of a table for men to sit about; on every side whereof is a standing ledge or border four fingers broad. Upon this board is laid a cloth, brought in Easter term, which is of black color, rowed with streaks distant about a foot or a span." He adds, "This Court, by report, began from the very conquest of this realm, and was erected by king William; but the reason and proportion thereof is taken from the Exchequer beyond sea." The particoloured cloth here mentioned, and called by the French chequy, resembles a chess-board; and on it when the king's accounts are made up, the sums are marked and scored with counters. "This very ancient court of record," says Herbert, in his History of the English law, from whence the following particulars are taken, "was a part of the aura regia,[2] though regulated and reduced to its present form by king Edward the First, and was intended principally to order the revenues of the crown, and to recover the king's debts and duties." With respect to the dignity and authority of this court Bracton tells us,[3] "that it is a part of that court of our lord the King in which he himself judges in proper person; and that its determination may not, except by that court, be infringed or contradicted; by which it evidently appears, that the court of Exchequer was then a distinct court from the one wherein the king himself customarily sat, and from whence there was no appeal. Here originally sat, by the institution of its founder William,[4] not only the great barons of the realm, ecclesiastical and secular, but also the justice of England, as president of the same by his office, and so continued to do for a considerable time afterwards. For in the reign of Henry the

---

[1] Tenis thesaur. et camerar. scacc.

[2] Madox Hist. Exch. 109.

[3] Ex. cod. nigro penes thesaur. et camerarios scacc. per Gerv. Tilbur. (ut fertur) composito temp. regis H. 2. cap. 1.

[4] Dialog. Scacc. per Gerv. Tilbur. cap. 4.

Second, 'the abbot of Abingdon[1] being dead, and an officer sent by the king's justices to seize the possessions of that monastery into the king's hands, de communi consilio, says the register of the house, misimus dominum Nicholaum priorem nostrum, &c., by common consent we despatched Nicholas our prior, and certain of the monks unto Ranulph de Glanvill, who then executed the power of justiciar under the king throughout his whole realm, to the end that he might, by word of mouth, represent to him our customs; and to entreat him that they might not be altered by reason of this seizure: and when they were come to the said Ranulph, then sitting in the Exchequer at Westminster, and had manifested to him what our liberties and customs were, he, advising with the bishops and other justices who also sat there, published the judgment of the Court, viz. that whether our church were destitute of a pastor or not, our customs should not be infringed.'

"In the time of Henry the Third, upon the seizure of certain lands which belonged to one Rose de Chesterton, who was then commanded to appear coram Huberto de Burgo, justiciario et baronibus de scaccario.[2]

"In this court, anciently, fines were sometimes levied and recorded, as upon an agreement[3] made betwixt Roger de Braie and Mabel, the daughter of William de Orgo, concerning lands in Maldone sold by the said Mabel to the same Roger, coram justiciariis regis, scie., Richardo Pictaviensi archidiacono, et Reginaldo de Warennâ apud Dunstaplam: which agreement concludes thus, Hanc cartem, quam sigillo meo confirmavi, concessi et confirmavi apud scaccarium, coram domino Richardo de Luci, et aliis baronibus de scaccario.

"This, though not dated, was in Henry the Second's reign; when Richard de Luig was justice of England, and sate in this court, with others already mentioned.

"After the confirmation of the great charter, for the greater part of the reign of Edward the First, the Common Pleas were usually held in this court: the statute of the 28th of that monarch being expressly made to prevent their being henceforth held there, contrary to the form of Magna Charta. Instead of ecclesiastical and secular barons, here sat canonists and other temporal persons learned in the laws, who had thereupon the name of barons, because they sat in the same place as the real barons did; the Lord High Treasurer also supplying the room of the Chief Justice of England, as we learn both by the testimony of Fleta and the record of 18th Henry 3., when William de Beauchamp was appointed a baron of this court, together with Alexander de Swereford, then treasurer of St. Paul's Cathedral, and Richard de Montfichet, each of whom had a pension of eleven marks per annum, payable out of the Exchequer, for their support."

[1] Regist. de Abbendon in Bibl. Cotton.

[2] Rot. fin. 8 Hen. 3. m. 5.

[3] Ex ipso autogr. penès prænob. Thomam dominum Bruce, comitem Elginiæ, an 1660.

STAPEL LAWS.

The stapel laws, or the right which many cities possessed to detain, for a certain time, in their own warehouses, all merchandise passing by or through their territories, and that they should be there exposed to sale, seriously injured the commerce of Germany.

A melancholy instance of this is given us in the stapel right enforced by the city of Dordrecht in Holland. It is a fact not to be denied, that the Rhenish cities, particularly Cologne, were formerly the most powerful and flourishing of all Germany, as the Cologne merchants were the first founders and occupiers of that house, celebrated in the annals of English commerce, the Gildehalla Teutonorum, known also by the name of Stalgeard, Steelyard, in London.

By the stapel right enforced by Dordrecht, not only their navigation was injured, but, powerful as the Germans were, they saw their greatest and most important river closed before their eyes, and had to wait the will of another as to what and how much merchandise they would please to take from them.—*Schmidt's History of Germany.*

TEMPLE GARDEN.

Shakespeare, whether from tradition or history is unknown, makes the Temple Garden the place in which the badges of the white and red rose originated; the distinctive cognisances of the houses of York and Lancaster, under which the respective partisans of each arranged themselves in the fatal quarrel which caused such torrents of blood to flow.

The scene is preserved in the First Part of Henry 4. (act 2. scene 4.), where Richard Plantagenet plucks a white rose, and the Earl of Somerset a red one. After a very tedious and heated controversy between them, the Earl of Warwick thus prophesies:

——"This brawl to day,
Grown to this faction in the Temple Garden,
Shall send, between the red rose and the white,
A thousand souls to death and deadly night."

LIBELS ON KINGS.

John Dickson, a stubborn Englishman, being commanded by an officer of the ordnance to veer his boat, and give place to king's artillery; he answered, that he would not veer his boat for either king or kaisar; and thereto added, that James I. was but a bastard king, and not worthy to be obliged, for which crimes he was condemned to death.

October 10th, 1600, Francis Tennant was indicted for a libel, as we should now call it, detracting from the king, and terming him (in allusion to Rizzio) the son of Signior Davie. He was sentenced to be taken to the market cross, his tongue cut out by the root, his brows crowned with a paper, on which his crime should be inscribed, and then hanged till death. A subsequent revision of the sentence dispensed with cutting out the tongue, or any further torture, such being the tender mercies of the monarch; but the punishment of death was inflicted.

# The Legal Observer.

VOL. I. SATURDAY, APRIL 23. 1831. No. XXV.

——— "Quod magis ad NOS
Pertinet, et nescire malum est, agitamus."
HORAT.

## SOCIETY FOR THE PROMOTION OF LAW REFORM.

*To the Editor of the Legal Observer.*

SIR,

I HAVE long been desirous of bringing before the profession and the public the plan which is the subject of this letter, and I think that your publication will enable me to do so to the greatest advantage, should you think proper to insert this letter. I view the present times with feelings which constantly vary; sometimes with hope, sometimes with fear. There is a strong and universal desire abroad for reform — reform in our state — reform in our church — reform in our laws. Now, sir, I partake of this feeling — I am also a reformer — I am also desirous of seeing a general amelioration of our institutions, and in particular of those of which, from my past occupations, I am best able to judge — of the laws of the land. I am most ready to admit that they have many faults which may and which must be amended. But I will frankly own, that I think that this feeling may be carried too far. I cannot join in an indiscriminate clamour against our legal institutions. I think that many of them are well calculated for the administration of sure and speedy justice, and I am desirous to see them preserved.

This is my opinion, sir, an opinion in which I am certainly not singular; and seeing a strong feeling abroad for law reform, and rejoicing at it, I am desirous of directing it to the proper objects. If it be kept in the right channel, it may be of great service, but it may otherwise effect no good purpose, and may be productive of much mischief. I have therefore been desirous of finding some means which will effect all the desired ends, and I consider that I am now able to propose them.

It appears to me, that a highly useful society might be immediately formed, the object of which should be to meet the feeling in favour of law reform, and to direct it into the proper channel. I should recommend that it should be composed of all branches of the profession, and of such other respectable persons as should think proper to join it — that the subscription should be moderate, so that its members might be numerous — that the exertions of the members, and the funds of the society, should be devoted to the investigation of all necessary law reforms — and that the results should be communicated to the society and to the public at an annual general meeting.

If a society of this description be formed, sir, I anticipate much benefit from its labours. We should then have the full and proper means for the discovery of all real abuses and evils in the administration of justice throughout the country, and we should then have the proper remedies suggested which practical wisdom and experience can alone propose. The amelioration of our laws might thus be gradually brought about, not by any violent change, but by steps slow and certain. The attention of the law reformers would thus be directed to the proper objects, and the demand for law reform might thus be attended with benefit.

I propose the formation of a society of this kind, sir, from the sincere belief that it will exist for the benefit of the country and the legal profession; but if this feeling creates no sympathy in the breasts of your readers, which I can hardly believe, I should then address them in a different style — I should then say, that it is absolutely necessary to satisfy the moderate demands which are now made for law reform. The real grievances, and there are many, must be redressed; or in the general shout for reform the good part of our present institutions may perish with the bad. If I could not speak to their feelings of justice, I would address their fears, and earnestly

exhort them to prove that they are busy in the work of rational reform.

The public might not be easily satisfied; but it would be easy to prove that all hasty and sweeping changes in the administration of justice have ever been productive of evil, confusion, and injustice; but that, on the contrary, the remedy of an actual grievance, proposed and carried into effect by men of experience, has been the best mode of effecting reform. This would be the object of the society which I would propose, and I sincerely trust it may be taken up and established by men of weight and importance. I am, Sir,

Your obedient servant,

A Practical Man.

## THE MASTER OF THE ROLLS AND THE VICE CHANCELLOR.

LETTERS OF A HEIDELBURG STUDENT ON THE JURIDICAL INSTITUTIONS OF GREAT BRITAIN.

### LETTER II.

My Dearest Friend,

In my last letter I described fully to you the court of the Lord Chancellor, and gave you my opinion on the eminent person who now presides there. I shall devote this letter to the other learned judges who sit in the inferior Courts of Chancery. But first I will mention to you a singular inconvenience that obtains in the administration of equity in this country.

So pleased was I with my first day in Westminster Hall, that I proceeded thither two days after my first visit, having been assured that the Lord Chancellor was sitting, but found to my mortification a very different scene from that which I have before described. The courts were all closed, the hall was empty and desolate, the busy faces were no longer seen, and I was the sole occupant of a place which, when I last had seen it, had been crowded with people.

I was just turning away much disappointed at the incorrectness of my information, when I met the very friend who had given it to me. "Why," I said hastily, "I thought you said the Lord Chancellor was sitting." "Yes, and so he is," was the answer. "It is with closed doors then." "No, he is sitting in Lincoln's Inn; I thought you knew enough of our institutions to know that he was sitting there. He only sits here in Term time." "What is the reason of the change of place?" "There is none, in Term time he sits here; at other times in Lincoln's Inn Hall." "Is the same business despatched by him at both places?" "Precisely the same." "Is not this change of place very inconvenient to the advocates and solicitors?" "Highly so; barristers are obliged to have their chambers in a particular part of the town, which is distant from this Hall, although near Lincoln's Inn Hall; and the changing about is highly troublesome to them. Nor are the solicitors better off, because they are frequently desirous of consulting counsel, and are prevented from doing so by the necessary absence either from their chambers or from court." "But surely," said I with some wonder, "there must be some reason for so absurd a custom." "There is none, I assure you," answered my friend, "except that it has always been so." "And has there never been any proposal to remedy this grievance?" "None that I am aware of, although it would be easily effected. All the Courts of Chancery should sit in one large building in the neighbourhood of Lincoln's Inn, and I think that there is a building now devoted to one court, which might easily be made fit for the whole; I mean the Rolls House which has lately been nearly unoccupied. This building, with some little trouble and expense, might be made to answer the purposes of all the courts, and the inconveniences of the present system, which are certainly considerable, might thus be removed."

But now let me proceed to the other Courts of Equity. The Court of the Master of the Rolls, is the next in rank to that of the Lord Chancellor, and the most eminent judges have presided there; and as the appointment is for life, many persons have preferred it to the Chancellorship. I shall shortly describe the judge who now presides there.

Sir John Leach has now acted as judge in equity, as Vice Chancellor and as Master of the Rolls, for about thirteen years. He possesses certain qualities in an eminent degree. He seizes, with most remarkable quickness, the real facts of the matter before him; he does not attempt to lay any foundation for the judgment which he shall give, but grapples with and surmounts the difficulty of the case at once. He certainly has extraordinary powers in despatching his business, exceeding, I am told, in this quality any other judge who ever presided in equity; but his decisions do not always give satisfaction; they are fre-

quently short, and apparently given without much reflection. Doubtless, however, he is right in the great majority of them, and a few inadvertencies may be well excused in a man to whom the country is under so many obligations. His manner to counsel is rather severe; so much so indeed, that I have heard some of the junior counsel say, that in transacting business before him, they recall the old feelings which they experienced when repeating their lessons before a schoolmaster. When Vice Chancellor he had a far more difficult post than at present. Independently of the more laborious duties of the office, he had repeated and almost daily conflicts with some particular counsel, in which all parties were certainly to blame. Since, however, he became Master of the Rolls, these have ceased almost entirely. His court is now perfectly quiet and serene; the business is conducted in a low and tranquil voice; it seems a mere conversation; so far from there being any angry disputation between the court and the bar, there is hardly any between the counsel on opposite sides. Occasionally, Sir John Leach will start up with something of his former energy, and expose the absurdity of some argument which a counsel is attempting to establish; but in general he is now satisfied to hear him to the end, contenting himself with a quiet sarcasm in his judgment.

Do not suppose, however, that his faculties are at all injured by his advancing years; on the contrary I am assured that they were never more bright and potent. He had at one time entirely disposed of all the business set down to be heard before him, and he is now not sufficiently employed. It has frequently been stated that one reason for his "clearing his paper," as it is termed, is that he refers almost every matter to the Master, who is a person appointed to enquire into certain details in a cause, or else sends it, which he may do, to a court of common law, to be tried either by way of *issue* on the facts, or of *special case* as to the law. This, like most general charges, is true to a certain extent. But with this allowance he still decides more points than any other judge; and it is to be observed he is particularly anxious that all the authorities on the subject should be before him, as he will frequently direct the cause to stand over for this purpose. He is remarkably tenacious of his own opinions, so that they say that if an advocate can only get one of his own decisions on the point he is sure of carrying him with him.

You must not suppose, my friend, that with all his talents, Sir John Leach is a mere lawyer. He is also anxious to shine in another field. The world of fashion holds equal sway over him with that of law. He maintains his place in both. He has readily changed the sittings of his court from the evening to morning; doubtless in the first place because he considered it would be more beneficial to the suitor, but also perhaps that he might devote his evenings to other engagements. He would indeed have been restless if he had missed a night at the opera, or failed to assist at a party of one of his circle.

His most admirable quality as a judge appears to me his power of collecting the facts of a cause from the confused mass of affidavits and addresses which are read and spoken to him, and then of reciting them as clearly, uninterruptedly, and intelligibly, as if he had written out his statement. I have often been unable to believe, when he has been delivering a long and luminous judgment, that he had heard the facts of the case for the first time. He is indeed an extraordinary man, and he would be greatly regretted if he were to retire.

The Vice Chancellor is Sir Launcelot Shadwell. He is still a young man, and in the full vigour of all his faculties, corporal as well as mental. He is certainly an able judge, and has lately given great satisfaction. He is a very quick man, and catches the facts of the case before him with great readiness, and his extensive knowledge of the principles of equity enables him soon to dispose of it. It has been sometimes mentioned that he makes up his mind too hastily, and will not always pay attention to the arguments against the opinion which he has formed. I can only say that I have for some time past paid considerable attention to his manner of despatching his business, and I do not think that it is open to this objection. His manners are remarkably kind, and he is always desirous of accommodating the practitioners in his court. Doubtless his duties as judge are more weighty and important than those of any other judge in equity. By far the heaviest business falls on him, and he is indefatigable in his exertions to dispose of it.

These, my friend, are the Judges in the English Courts of Equity. In my next letter I shall mention to you those who preside in the Courts of Common Law.

Believe me, &c.

* * * *

## PEDIGREES, ANCIENT RECORDS, ROLLS AND MANUSCRIPTS.

Our attention has lately been called to a quarto volume, which, though published two years since, is so useful, and, as we presume, so little known, that we are desirous of rendering it more generally serviceable to the profession. The work is entitled "Origines Genealogicæ; or, the Sources whence English Genealogies may be traced from the Conquest to the Present Time, accompanied by Specimens of Ancient Records, Rolls, and Manuscripts, with Proofs of their Genealogical Utility; published expressly for the Assistance of Claimants to Hereditary Titles, Honours, or Estates."

The author, *Mr. Stacey Grimaldi*, a solicitor and record lawyer, having spent many years in investigating the public records, and in collecting the sources from which pedigrees were to be traced, considered that he should afford some service to the profession if he printed his private, and perhaps unique collection; and accordingly he printed 250 copies (only) of a work, which to those who feel interested in *records* generally, as well as in *pedigrees*, must be of the greatest advantage; as to its utility, it may be sufficient to state, that it is the *only* book on the subject. It appears by the preface to have had the aid of nearly all the record keepers and genealogical antiquaries in the kingdom. The arrangement is chronological, commencing with Domesday Books, 1066:—and the plan pursued with this and each succeeding chapter or heading has been to give an account of the record, its contents, repository, and general history of the subject matter,—then a literal copy of a portion of it, with the original abbreviations, by way of specimen; and, lastly, instances of such record having been used as evidence in genealogical cases. Prefixed is a table of contents, and at the end is an index of twelve double-columned pages, serving well to show the multitude of documents described or noticed. It would be impossible in our limited space to enter even generally into all the information given in this volume, but we shall select from the table of contents a few of the most interesting records and documents which have been treated of. The Roman numerals designate the chapters we have selected:

XLIX. *Records of Clergymen.*
*Roman Catholics.*
*Jews.*
*Lawyers.*
*Surgeons.*
*Soldiers.*
*Sailors.*
*East India Company's Servants.*

The chapters which we have omitted refer to documents of equal value with those we have noticed; but as many of them relate to records, the very names of which are unknown to all but the record-lawyer and antiquary, it would have been useless to have printed their titles.

It is hardly to be expected that in perusing a work, which, like the present, is the only one hitherto published on the subject, (and that subject not being studied professionally by more than a dozen persons in the kingdom,) we should have the power of pointing out important defects, but we think that when Mr. Grimaldi limited the impression to 250 copies, he not only made an erroneous calculation of what would have been to his own advantage, but he judged incorrectly of the profession, by imagining that his work would not receive their general encouragement, since we know not how any person having a pedigree to trace, or seeking information upon titles, honours, or records, can do better than have recourse to this valuable book.

In the preface Mr. Grimaldi speaks with regret of an Exchequer Roll of the reign of Henry II. entitled "ROTULUS DE DOMINABUS, &c." containing the names, ages, lands, and heirships of the king's wards. This curious roll has since been discovered. It appears that about a year after the publication of the Origines Genealogicæ, Mr. Grimaldi met with an attested copy of it in the British Museum; and in order to prevent the possibility of the loss of every copy of the original, he transcribed and printed the contents of this roll at his own expense, and presented copies to most of the public libraries in the kingdom.

The value and advantage of Mr. Grimaldi's researches will, no doubt, be duly appreciated; and we are sure that he will have rendered much information and assistance to his brethren, in discovering, tracing, and investigating pedigrees, ancient records, and documents.

## LORD TENTERDEN'S ACT

### FOR SPEEDY JUDGMENT AND EXECUTION.

THE "Act for the more speedy Judgment and Execution in Actions brought in his Majesty's Superior Courts of Law," we observe, has received the royal assent.

This act is a very important one, inasmuch as it will materially facilitate the obtaining of judgment. The act provides, that, in all causes tried either in town or at the assizes, the party in whose favour the verdict is given may, upon obtaining the certificate of the judge, issue his execution forthwith.

It is very evident that this act will induce most practitioners to try their causes in London, when it can be done, instead of at the assizes, from the great advantage of obtaining execution *instanter* in all causes tried at the sittings either in or after term; and we have no doubt, with so able a judge as Lord LYNDHURST, that the Court of Exchequer will now become a most available court.

If in all cases upon actions of contract, whether under seal or not, a new rule were made to allow a plaintiff to lay his venue where it was evident he would expedite his judgment, the interest of suitors and the object of the act would be greatly promoted.

In this respect, also, we hope shortly to see an improvement in the law; so that a party may not, to his great disadvantage, in point of time, be confined to the county in which the cause of action arose. In many instances, the grounds on which an action is considered *transitory*, might be applied, with equal justice, to *local* actions. An early decision is generally the main object in all cases in which there is any real point in dispute; and there are many useful reforms which may be safely effected towards the accomplishment of this object, without destroying (in the emphatic language of the Lord Chancellor) "the ancient ways of the constitution."

## THE EXAMINATION OF AN ATTORNEY PREVIOUS TO ADMISSION.

THE man that should gravely propose the solemn examination of each cordwainer and carpenter, by an adept in his respective calling, before he should be sanctioned by the law, the one to plane wood, the other to mend shoes, would, no doubt, obtain the reputation rather of an original than a profound thinker. People would very naturally

tell such a political economist, that, from the time of St. Crispin downwards, there had been an unrestricted admission into the ranks of coblers, and that, as for the joiners, their craft had been unmeddled with from days of still more remote antiquity. The probable good to the community from such an innovation would also be questioned; since, without the requisite skill, artificers of these kinds have no chance of subsistence, and the prospect of securing it holds out the strongest possible motive for exertion, and one to which, therefore, an examination in sawing and hammering would add nothing. And, lastly, although a botching workman may, by strange good fortune, have it now and then in his power to mar fair materials, such opportunities must be of very rare occurrence; they admit of a simple remedy, and may be guarded against with ease; so that the danger in this respect is not sufficiently great to warrant the adoption of new and extraordinary measures to avert it. The same doctrine does not, however, hold, if applied to professions or trades, which, to be properly understood, require much early attention and great study, in the pursuit of which ignorance almost inevitably wrongs those who confide in it, and may inflict indefinite and irremediable injury, and which are in themselves of so recondite a nature that none but the formally initiated can distinguish the skilful from the inexpert practiser, or know, at the moment, when their welfare has been properly secured, and when neglected. In the former cases, neither the interest of the particular artisan, nor of the public, requires an examination; in the latter, both would seem to demand such a step: in those, want of skill is necessarily fatal to its subject, and can do the world but little harm; in these, it is quite compatible with the prosperity of the ignorant person, and may inflict upon others an untold misery, against which no ordinary prudence can ward. Such a profession is that of the attorney. To the proper, nay the safe discharge of his duties, no slight degree of legal science is essential: the persons who consult him, however, are incapable of appreciating the extent of his ability, and do so upon the faith of his being a regularly bred practitioner; and hence he may obtain practice and a livelihood, though from his culpable ignorance deserving of neither, and hence the innocent may be led into direful pitfalls, against which unprofessional sagacity will be of no avail to warn them. Institute a fair examination previously to admission, and you at the same time add a most powerful stimulus to the industry of the student, and secure to the nation, as far as possible, an intelligent and well qualified body of solicitors: you save the attorney from being a blockhead, and the layman from becoming the victim of his adviser's incompetency. No one will probably gainsay the extreme propriety of examining those who prescribe to the sick, operate upon the wounded, or dispense drugs to the ignorant. But for this and other congenial regulations, one half of the community would be the prey of sanguinary quacks; few men would know whether empiricism or science was feeling the pulse, directing the knife, compounding the potion; seldom would survivors have the melancholy consolation of thinking, that their friend or relative in battling with the last enemy, had taken his fair chance. These measures are in favour of life, and humanity would not endure their omission; the proposed measure is for the protection of property, which, next to life, men prize the most, and seems to be equally invoked by sound policy. The benefits of an examination would not, however, be confined to the prevention of an ignorance that often makes the well meaning the cause of serious evil; it would, in all probability, go far to sweep from the face of the earth, the race of *pettifoggers*, numbers of whom, from the absence of a sufficient goad to their sluggish natures, in early life, have then formed those habits, which in course of time, have deadened in their minds every characteristic of the man of honour or the gentleman. They have, from the same deficiency, grown up as ignorant as they were vicious, and have been at length sent forth, under the fiat of a judge, to prey upon society, to bring an indelible obloquy upon the whole body to which they belong, and even to discredit the law itself. They have become the prolific generators of discord and litigation. Some men, it is true, have so strong a moral depravity of nature, that no mental culture, no wholesome discipline, will make them honest; to this end the treatises of moralists and the exercise of the treadmill are alike unavailing. These, however, may be characterised as forming an exception to the general rule; and observation will instruct us that, in general, vice may be rather attributed to a number of concurring circumstantial causes than to the active predominancy of a sinful principle. Whatever, again, has a tendency to elevate the intellectual character of a body of men must be highly beneficial to them, both in their own peculiar province of application and in the public esteem.

Letters are of a very sociable disposition; — "*Etenim omnes artes, quæ ad humanitatem pertinent, habent quoddam commune vinculum, et quasi cognatione quâdam inter se continentur* *;" and he who devotes himself assiduously to any one branch of learning, forms a habit, that enables, and a disposition that prompts, him to enlarge the field of his study. What is it that, within the last three centuries, has raised the surgeons, from being a co-fraternity with the hair-dressers under the comprehensive designation of "barber-surgeons," to the rank of one of the most scientific, and best informed body of men in the community? That attention to their profession, and to the general cultivation of their minds, which have been so mainly promoted by the preliminary examination which they undergo. Those who look to the past for excellent examples will find, that so early as the 4 H. 4. the propriety of examining the attorney, touching both his capacity and general fitness for the profession was admitted, and the practice enjoined. This statute has grown obsolete; though, no doubt, the judges, without any assistance from the legislature, might now act upon its provisions. The statute 2 G. 2. c. 23. directing the swearing, admission, and enrolling of attorneys, and that persons should serve five years under articles, &c. before being admitted, though it rendered an examination certainly less imperative, by no means dispensed with its propriety. But it is now time to enquire, what objections have been urged against the examination of attorneys? They seem to have been two only; and those of a somewhat whimsical kind. The first has been, the alleged impossibility of conducting such an examination upon fair grounds. This is certainly highly flattering to the judges; although, in fact, nothing could be more easy than for an experienced lawyer to put such questions as must elicit the facts, whether the candidate for admission possessed moderate capacity, and during his clerkship had exercised ordinary diligence. A general acquaintance with the leading theoretical principles, and the practical details of the law, is all that a young attorney under the circumstances can be expected to possess; and to say that A., possessed of such information, cannot ascertain whether B., speaking the same language, also possesses it, seems truly absurd. The following string of questions may serve to show, at least, the possibility of framing an appropriate course of examination: —

1. What are the various kinds of legal interest that one may have in lands; the peculiarities of each; and their subdivisions?

2. What is the most usual mode of conveying a fee-simple; what its general form; and what its mode of operation?

3. What are the different forms of action generally in use; and what the characteristics of each form?

4. What is the difference between proceedings by bill, and proceedings by original; and when are the latter necessary?

5. What are a declaration, plea, similiter, issue, nisi-prius, record, postea, judgment, taxation of costs, execution, and how many kinds of the latter are there?

6. What constitutes murder; what manslaughter; what justifiable homicide; what felony in general; what burglary; what larceny; what embezzlement?

It must be perceived that an examination of this kind, of no great length, must enable an examiner to know the extent of the general knowledge possessed by the individual examined. But, indeed, this objection is so frivolous, that had it not been much urged it would not have deserved a reply. The second objection sometimes urged is, that the friends of youths might frequently, after a great expense of money and anxiety, be chagrined by the refusal of a judge to admit the scapegrace, upon whom such money and care had been thrown away. An evil this, no doubt; but, at the same time, much less than would probably follow to himself, his friends, and mankind, from the admission of such an one within the pale of the profession. Besides, unless a student were verily desperate, the prospect of an examination would as before intimated, prove a great incitement to application; and probably, by that means, save a world of pain and disgrace to those friends for whom such a laudable, but narrow and ill-timed sympathy is here exhibited. In short, it is impossible to conceive even a plausible objection to a fair and moderate, not a captious or over-learned examination of all persons applying to be admitted attorneys, but, on the contrary, every reason of which the nature of the subject admits seems to urge its adoption without delay.

Δ.

* Cic. Orat. pro. Arch. Poë.

## ON THE STUDY OF THE CIVIL LAW.

It was not without reason that Sir John Fortescue's zeal was excited in defence of the common against the civil law; for the influence of the Roman law on that of England has been

much more considerable than most lawyers are aware. "Inasmuch as the laws of all nations," said the Lord Chief Justice *Holt*, "are doubtless raised up out of the ruins of the civil law, as all governments are sprung out of the Roman empire, it must be owned that the principles of our law are borrowed from the civil law, and therefore grounded upon the same reason in many things." A similar opinion is delivered by Dr. Wood, who was both a civilian and a common lawyer. "Upon a review, I think it may be maintained, that a great part of the civil law is part of the law of England, and interwoven with it throughout." According to Dr. Cowell, the common law of England is nothing else but a mixture of the feudal and the Roman law. And, in reference to the Pandects, Sir William Jones has hazarded the subsequent opinion: "With all its imperfections it is a most valuable mine of judicial knowledge; it gives law at this hour to the greatest part of Europe, and, though few English lawyers dare make such an acknowledgment, it is the true source of nearly all our English laws that are not of a feudal origin." Many other testimonies might easily be added: — Of these Roger North remarks, that "besides history, there are other sorts of learning most reasonable for a lawyer to have some knowledge of, though even superficial, as of the civil law. A man of the law would not be willing to stand mute to the question,—what is the difference between the civil and the common law, what is the imperial law, what the canon, what the pandects, codes, &c.? It is not at all needful to study questions in these laws; but the rise and progress of them in gross is but a necessary knowledge, and so far taking up but little time, and had by mere inspection of some books, and perusing their introductions." But higher still, and more express, is the opinion and the example of Sir Matthew Hale upon this subject. We are informed by his biographer, Bishop Burnet, that Hale "set himself much to the study of the Roman law, and, though he liked the way of judicature in England by juries, much better than that of the civil law, where so much was trusted to the judge; yet he often said, that the true grounds and reasons of law were so well delivered in the digests, that a man could never understand law as a science so well as by seeking it there, and therefore lamented much that it was so little studied in England."

Much of all this, however, was in the womb of time when Fortescue wrote; and, after allowing all that can be claimed for his zeal against one set of laws in favour of another, we must carry a great deal to the account of the state of literature, and its ideal character, in times which were but anticipations, and obscure prophecies of something to be more fully developed in the long arriving future. Shadows they were of coming events which the latter, as they always do, had cast before them, as indications of their approach. And, in this mist and twilight, the subject of study was magnified by the medium through which it was contemplated. No wonder, then, that the reasoners of this period formed some such abstract an idea of law as Hooker, in a subsequent reign, thus sublimely expressed: —

"Of law there can be no less acknowledged, than that her seat is the bosom of God, her voice the harmony of the world: all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power: both angels and men, and creatures of what condition soever, though each in different sort and manner, yet all with uniform consent admiring her as the mother of their peace and joy."

## DISPUTED DECISIONS.

### No. I.

We intend under this head to discuss the legality of such recent decisions, whether in *banc* or at *nisi prius*, as appear to us to be of a doubtful nature. We shall occasionally avail ourselves of the remarks of some of our able correspondents on these subjects — taking the liberty to alter and abridge or extend their communications as may be deemed necessary; and, at other times, investigating the cases according to our own views. For the present we would direct the attention of our readers to the following decisions.

TRESPASS. — SHOOTING A DOG.

*Wells* v. *Head.*

This was an action of trespass, for shooting a dog, tried at the last Aylesbury assizes, before Mr. Justice *Alderson*. It appeared that the plaintiff and defendant were respectable farmers residing at Ellesborough. That the plaintiff kept a pointer dog, which was often found chasing and worrying the defendant's sheep, of which the plaintiff had been apprised. On the 11th of December 1830, the dog again worried the flock, and just as it was retreating across a field belonging to the defendant, and adjoining that in which the sheep were, the defendant overtook and shot the dog. Plea, a justification. The learned judge decided, that a sufficient justification was not made out, observing that, "if the defendant *had found the dog worrying the sheep*, and had *no other mode of* protecting his flock at the time, he would have been justified, but, as the dog *had ceased to worry them*, and had gone a field's distance at the time it was killed, the defendant had no right, in point of law, to follow it for the purpose of killing it." Verdict for the plaintiff, damages one guinea.

Now, it is submitted, that there is no decision of the point of law arising in the above case anterior to that trial; and that the general law on the subject is not in accordance with that decision.

In Cro. Car. 248., 487., we read: The owner of a dog is bound to muzzle it if mischievous; and, if a man doth keep a dog that useth to bite cattle, &c., and after notice given to him of it, or his knowing the dog to be mischievous, the creature shall do any hurt, the owner shall answer for it. And, it is sufficient to prove the *scienter* of the owner, that the dog had once bitten sheep before.

In *Jenkins* v. *Turner*, 2 Lord Raym. 118., it was held, that if one has a dog used to bite sheep, and he bites a horse, it is actionable; for the owner of the dog, after notice of the first mischief done, *should have destroyed the dog to prevent further mischief.*

In *Smith* v. *Pelah*, Stra. 1264., *Lee* C. J. ruled — that if a dog have once bit a man, and the owner having notice thereof, keep the dog and let it go about, and it bite another person, case will lie against the owner, at the suit of the person bit, (though it happened by his treading on the dog's toes,) *for the owner ought to have hanged the dog on the first notice.*

In *Jones* v. *Perry*, 2 Esp. N. P. C. 482., it was held that the owner of a fierce and unruly dog is bound to secure it *without actual notice* of its ferocity.

Mr. Justice *Alderson* appears, mainly, to have founded his decision upon the circumstance, that the dog "had ceased to worry the sheep," and had gone away a field's distance from them before the defendant came up and shot it.

Now, let it be observed, that the dog had trespassed *ab initio*, and was trespassing on the defendant's field at the moment it was shot, a fact which makes this case very different from what it would have been had the dog casually met the flock in a high road, and been shot when retreating. And, if the defendant had not followed the dog and killed it, with what security could he have left his flock? Might he not very reasonably apprehend the return of the dog to the sheep the moment the defendant disappeared, whose approach was perhaps the signal for the dog's retreating? — Who can conjecture what "other method" to protect the flock his Lordship could have contemplated? Ought the defendant to have hazarded a bite from the dog, which was rabid for aught he knew, by taking it *molliter manu?* or should he have endeavoured to have driven it away by blows or otherwise?

If the dog, failing all other methods, could only be legally shot "at the time it was worrying the sheep," is it not probable, that the defendant, instead of protecting his flock, by firing at the dog, might unfortunately have killed some of the sheep? It is moreover an irresistible inference, that if the dog could not legally be shot "*after* it had ceased to worry the sheep," it could not legally be shot *before* it commenced to worry them: so that, had the defendant caught the dog (whose vicious habits the flock had before experienced) ranging his field, and approaching the sheep with open mouth, he must wait until it actually seized a victim, because it would be illegal to shoot the dog when it was yet a few yards from the flock!

But is it not to be understood from the authorities before quoted, that the defendant was, "in point of law," justified in killing the dog? According to those authorities was not the dog, proscribed by law, outlawed as it were; and *civiliter mortuus* from the first moment it indisputably manifested a propensity to worry sheep, of which the dog's owner had notice? Did not the judge in one of the quoted cases hold, that "after notice of the first mischief done by the dog the owner *should have* destroyed it to prevent further injury?" And did not Lord Chief Justice Lee, in another of those cases, confirm this doctrine, and even point out the mode whereby the dog ought to have been destroyed, when he held, "that the owner should have *hanged* the dog on the first notice of its having done mischief?" Surely, when those learned judges said the owner "should have destroyed the dog after notice," they must have meant that, by *law*, the owner was bound to do so: otherwise, we must suppose their lordships were inculcating from the judicial bench a mere moral duty of "imperfect obligation;" that, as a good neighbour, and for convenience, the owner ought to have killed the mischievous dog. Then, as the plaintiff in the case under consideration, notwithstanding he had several times been apprised of his dog's having worried the defendant's sheep, *did not comply with the law*, by destroying the dog; as he did not take even the reasonable precaution, to prevent further mischief, by "muzzling the dog" (which, according to the case in Cro. Car. first cited, every owner of a mischievous dog is *bound* to do); could he "with clean hands" go into court and claim compensation from the defendant for his having done that which the law required the plaintiff to have done, but which he neglected to do? If the law require a man *now* to kill his dog to prevent further mischief, is not another man, whose flock that dog again worries, justified if he kills it to prevent *still further mischief?*

The law distinguishes such animals as are *ferœ naturæ*, as lions, wolves, &c., which a man must keep at his peril, from those which are *mansuetæ naturæ*, and break through the tameness of their nature. In the latter case the owner must have notice — in the former an action lies against him without notice. Rex. v. Higgins, 2 Raym. 1583. With those animals which are *mansuetæ naturæ* the law classes dogs — which upon a presumption that they are harmless, and for the convenience of mankind, are suffered to go at large. But, after notice that his dog is vicious, manifested by worrying sheep, &c., a contrary presumption clearly ceases, and it then goes at large at the owner's risk and the dog's peril; for, the man whose sheep it worries, may, it is submitted, destroy that dog (as he would any ferocious animal) at any time before it returns to its kennel, or is otherwise *placed under restraint* by its owner. In point of legality could there be any difference whether a man shot a dog or a wolf which from time to time worried his sheep?

As the plaintiff would not secure his dog, it became a dangerous nuisance to the defendant; to *remove* which he had no other method than killing it. To afford the defendant effectual relief, and his flock security, the law under such circumstances *must* justify his so doing. Is it reasonable that the defendant should be constantly night and day watching his sheep to protect them from the predatory attacks of the plaintiff's dog? or must the defendant be perpetually involved in law by bringing successive actions for every successive injury the dog may occasion; because, either from unavoidable absence, or other cause, he unfortunately could not kill the dog at "the moment it worried the sheep?"

It is submitted, therefore, that the true principles of our law will not support the learned judge's *nisi prius* decision, but justify the defendant in shooting the dog, and make the plaintiff liable for the injury it had done.*

T. P.

---

## No. II.

### PURCHASES FROM TRADERS. — BANKRUPTCY.

THE case of *Cook and another* v. *Caldecott*, appearing in the Legal Observer, p. 249., and in Messrs. Moody & Malkin's Reports, p. 522., is of so important a description, and the statement of the law by Lord Tenterden in his summing up so different to what might have been anticipated, that I should feel obliged by the insertion of the following remarks, which are intended to show that there are some weighty objections to the decision, and to point out that the remedy proposed for the mischief mentioned in the case must be sought, not in a strained construction of the bankrupt law, but in a course of proceedings essentially different.

The first important objection that occurs to me is, that the 6 G. 4. c. 16. § 3. does not support my Lord Tenterden's decision. That clause makes "a fraudulent gift, delivery, or transfer" (not a word about *sale*) "of goods or chattels, with intent to delay or defeat creditors," an act of bankruptcy. Every art, trick, or device, resorted to by a man, in collusion with another, to defeat or delay creditors, is, and very justly, decided to be an act of bankruptcy. But a sale in open day, after a fair bargaining on the part of the purchaser, for ready money, where the goods are immediately delivered on the one side and the price paid on the other, without any playing into each other's hands, or underhand collusive design, was, I should conceive, never intended to be affected by the statute. If it were, it would operate in restraint of trade, and introduce the utmost uncertainty, confusion, and distrust into the dealings of men with each other.

It would restrain trade, because it would prevent competition, than which nothing is more beneficial to the public. There would be one price of articles among the dealers, which would ultimately confine the various branches of business to a very few hands. The evils of monopoly are too well known to require any enumeration. Uncertainty, want of confidence, and confusion would ensue, because men would be afraid to purchase any thing that seemed to be a bargain, lest the seller should happen to be a bankrupt, and an action of trover compel them to return it. So many preliminary enquiries would be necessary, that the season of availing one's self of a favourable offer would have passed away, and caution and prudence would redound only to the disadvantage of their possessor.

But, if we examine the thing a little further, we shall see the hardship of the decision in a very glaring light. Lord Tenterden says a sale is a fraudulent transaction, "if it takes place under such circumstances that the buyer, as a man of sense and understanding, ought to suspect and believe that the seller means by it to get money for himself in fraud of his creditors, and that the sale is made for that purpose." But what are these circumstances to be? Is it because a man offers his goods on exceedingly low terms, that he is *therefore* to be suspected of a design to defraud his creditors? This would be extremely uncharitable, and often contrary to fact. The stocks of bankrupts and insolvents are frequently sold on very advantageous terms; and individuals retiring from trade are, in many instances, willing to dispose of their stocks at greatly reduced prices. The purchasers of these stocks can therefore afford to sell them much below the market price, and yet put a sufficient profit into their own pockets. The most solvent man, too, may require, on some occasions, a supply of ready money, and, in order to obtain it, may be induced to carry goods into the market at a very low rate. Surely, in all these cases, no design to defeat or delay creditors can be charged. Many a man, too, sells cheap at his first entering into business, in order to gain a connection; when that is obtained, he gradually rises to the regular prices. Is his object to defraud his creditors? Is it not the reverse?

Again, men possessed of large capital always possess a great advantage. By being enabled to purchase large stocks, they can vend their goods much lower than other persons. There is no dishonest design in this. Besides, in many articles, those depending on fancy and fashion particularly, there is often, in the course of a short period, a great depreciation in price; so that they become at last a mere drug, and the trader is ready to sell them on any terms. The cost price of the articles, compared with the selling price, will, therefore, furnish no criterion. And how is a man purchasing goods to know what the seller gave for them? This must depend upon the time and manner in which the seller purchased them. If the decision in question were to prevail, the history of goods would be as necessary as the pedigree of a race-horse. Every tradesman must become acquainted with the rules of evidence, by which he must examine and decide upon every transaction — having the terrors of Westminster Hall full in view. This would be a great clog to business, and tend to the introduction of worse evils than that pretended to be remedied.

Besides, what is to be the amount of the deduction at which honesty ends and fraud begins? Is it five, ten, fifteen, twenty, or a larger *per cent.* discount? And how is a purchaser to know that the deduction pretended to be granted by the seller is the legitimate deduction? Sincerity is greatly respected as a virtue, but voted to be too sacred for human use. To say the thing that is not, to induce buyers, is not of unfrequent occurrence. We must not, therefore, take the asseveration of the seller, but seek out the person who sold to him. Suppose A, living at York, wants to purchase goods there, and finds they

---

* See also Sarch *v.* Blackbourne, 1 Moo. and Mal. 505. S. C. 4 C. & P. 297.; and ante, 360. ED. L. O.

were forwarded to the tradesman from London; to the house in London he must then apply. He can hardly expect the tradesman to wait till he has obtained the particulars. A less scrupulous customer presents himself, and A loses an excellent bargain. But I will not dwell longer on this point.

Other arguments have occurred to me, but I forbear to trouble you with them.

But it will be said, that frauds upon creditors, by means of sacrificing goods, are of constant occurrence, and daily increasing; and, therefore, a judicial decision, such as the one in question, is necessary to put a stop to them. I admit the existence of the mischief, but deny the propriety of the remedy. I intend to propose another and more effectual remedy; but it will be first necessary to show the *cause* of the evil. It originates thus:—Large wholesale houses are in the habit of furnishing goods to individuals who have a respectable appearance, and seem, *primâ facie*, to be doing well. References may be perhaps asked for, but a strict enquiry is rarely made. The consequence is, that very many designing men obtain credit for goods, whose only object is to turn them into money at whatever sacrifice. These swindlers manage to pay for a time, only to pave the way for an opportunity of defrauding to a considerable extent. Their chief creditors, those who supply them with goods, are perfectly regardless of the manner in which they are going on; nay, often wilfully shut their eyes to circumstances of a very startling description. In the end the debtors fail; and the creditors step forward, assume the appearance of innocence and surprise, and utter loud complaints against the villany of the insolvents, though they themselves are, in truth, *particeps criminis*.

A little more enquiry into character and circumstances is all that is wanted. When men have the power in their own hands, why should an act of parliament be tortured to supply their carelessness and deficiency?

I hope that the doctrine laid down in the case before me will be reconsidered, and thoroughly examined, before it shall be made a precedent. It appears to me that it is uncalled for, and not justified by the terms of the statute. Its consequences have a most pernicious tendency—its utility, in any point of view, is very questionable.

F. W. G.

---

## No. III.

### ESSEX LENT ASSIZES, 1831.

#### PROOF OF HANDWRITING.

*The King* v. *Cooke.*

On the trial of an indictment on the 4 G. 4. c. 54. § 3., for sending a letter threatening to kill the prosecutor, the handwriting of the prisoner in the letter was sought to be proved thus: — The prisoner when examined before the magistrates had signed his examination. Several persons who had seen him sign it were called to prove the identity of the handwriting. The examination bearing his signature was produced.

*Knox*, for the prosecution, proposed to let the jury see the signature of the prisoner as well as the threatening letter.

*Bowling*, for the defence, objected to the jury's being allowed to see the signature of the prisoner, as that would be permitting them to make use of the comparison of handwriting to strengthen the evidence given by the witnesses. Now, since witnesses were not allowed to speak to handwriting merely by comparison, it was clear that the jury ought not to be allowed to judge by it. If the jury were not permitted, by the rules of law, to avail themselves of an opinion formed by a witness from the comparison of handwriting, they ought not to be permitted to avail themselves of their own, formed by the same means.

*Bayley* B., overruled the objection, and permitted the jury to see both the letter and the signature of the prisoner.

The prisoner was ultimately acquitted.

*** Now, with all humility and deference towards the very learned Baron who made the above decision, we think that the jury ought not to have seen the signature of the prisoner as the law now stands. Mr. Phillipps* states, "It is an established rule of evidence, that handwriting cannot be proved by comparing the paper in dispute with any other papers acknowledged to be genuine." This authority, it appears to us, supports the reasoning of the counsel for the defence on the above case. And it may be observed, still further, that the opinion which the jury might form on this comparison might also enable them to disbelieve the statements of the witnesses who had been examined. Their statements would thus be overturned by a species of evidence which could not be adduced in support of them.

Although we make these remarks on the decision of the learned Baron from a consideration of the law as it now stands, we cannot avoid thinking his decision much more consonant with good sense than the law itself.

Why should not evidence of handwriting by comparison be admissible? It is every day's practice to admit evidence of identity by comparison in the case of corn, timber, and various other matters. Why should any difference be made in the case of handwriting? Besides, after all, it is only comparison which enables a man, who has seen another write, to speak to his handwriting. He compares the idea he has of another's handwriting with the document in dispute, and from that comparison forms his opinion. Now this must be a much more unsatisfactory species of comparison than that of two documents placed together, the one of which is acknowledged to be the handwriting of the party in question, and the other the document in dispute. Surely it must be much more probable that the result of the comparison in the latter case will be correct than in the former. The

* On Evidence, vol. i. p. 490.

former is the comparison of a vague idea with a reality, the latter is the comparison of two realities.

It is said, however, that unless a jury can read, they would be unable to institute a comparison, or judge of the supposed resemblance. That is no reason for rendering the evidence inadmissible. For, though some of the jury may be unable to read, that is no reason why those who are able should be deprived of an opportunity of considering the comparison. Besides, it is making the rules of evidence depend on the progress of society; whereas they ought to be permanent and applicable in all stages of it.

It is also urged, that the writing intended to be compared with the disputed paper would be brought together by a party to the suit whose interest it is to select such writings only as are likely to serve his purpose; and they are not likely, therefore, to exhibit a fair specimen of the general character of handwriting. This, however, is an objection to the credibility, and not to the admissibility, of the evidence. The circumstances attending the paper, between which and the disputed document comparison is to be made, would be a matter of observation to the opposite counsel, the judge and the jury. Such evidence might be very satisfactory, or very unsatisfactory. The value to be attached to it would be for the jury to determine. In the same manner the evidence of a person who has seen another write may be very satisfactory, or very unsatisfactory. If he has only seen that other write once, a long time since, his name only, his evidence of handwriting will be very unsatisfactory: if he has seen him write frequently, lately, a great deal, his evidence will be very satisfactory. How far it is satisfactory is for the jury to determine. In both cases the question of credibility is for the jury. But surely the evidence in both cases ought to be admissible. Such evidence is admitted in the case of ancient writing, where the antiquity of a writing purporting to bear a person's signature, makes it impossible for a witness to swear that he has ever seen the party write. There* it has been held sufficient, that the witness should have become acquainted with the manner of signing his name as the party in question, by an inspection of other ancient writings which bear the same signature, provided those ancient writings have been treated and regularly preserved as authentic documents. In the case of ancient and modern writings, the means of becoming acquainted with the character of the handwriting is evidently the same.

Upon the whole, therefore, no valid reason occurs to us why evidence of handwriting by comparison should not be admissible, leaving the credibility of it to the jury.

* Phil. Evid. n. 1. pp. 491, 492., and the cases cited in the note.

## PRACTICAL POINTS. No. I.

We propose, under this head, from time to time to mention such reported cases as decide points which are likely to occur in practice. The following case is important to all pedestrians:—

An action was brought for an injury sustained by the plaintiff, in consequence of his having fallen into a space occasioned by the opening of a trap-door in the foot pavement, in front of the house of the defendant, who was a publican, and, at the time of the injury, being lamp-light in the evening, had just had a butt of beer let down by the aperture in question into his cellar. *Tindal* C. J., in summing up, said, The question is, whether a proper degree of caution was used by the defendant? He was not bound to every mode of security that could be surmised, but he was bound to use such a degree of caution as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury. The public had a right to walk along these footpaths with ordinary security. It may be said, on the one hand, that these kind of things must be, and that trade cannot be carried on without them; but, on the other hand, it must be understood, that as they are for the private advantage of an individual, he is bound to take proper care, when he is using his cellar, to prevent injury. With respect to the plaintiff, you will have to consider, whether there was so little care and caution on his part that he was himself guilty of negligence in running into the danger. If there had been sufficient light, most likely it would have prevented him from falling in. A more infirm person might have sustained a greater injury than it appears the plaintiff has received. The question is, whether you think this flap was in the nature of a nuisance used in the manner it was, and whether, looking at all the circumstances, the plaintiff fell in, owing to the carelessness and negligence of the defendant in not sufficiently protecting the place at this hour, being after dark? If you think so, you will find for the plaintiff; but if you think that the plaintiff did not himself use due caution in the matter, then you will give your verdict for the defendant. Verdict for the plaintiff—Damages 5*l*. *Proctor* v. *Harris*, 4 C. & P. 337.

## VACANT COMMISSIONERSHIP OF BANKRUPTS.

A COMMISSIONERSHIP of bankrupts is just vacant by the death of James Macarthur, Esq. The present Chancellor will thus have had during his first six months of office, the Accountant Generalship, three Masterships, and three Commissionerships at his disposal.

## TAXATION OF COSTS. — GRATUITIES TO MASTERS' CLERKS.

*To the Editor of the Legal Observer.*

Sir,

The Lord Chancellor, under complete misapprehension, or misled by most unfair or ignorant misrepresentation, has stigmatised all practising solicitors, and the principal clerks of the Masters, on the subject of the taxation of costs.

A correspondent of the Legal Observer (p. 299.) has already, I am aware, briefly and tersely pointed out this mistake of the Lord Chancellor; but your correspondent wrote for the profession, I wish to write for the public.

In opposition to his Lordship's sportive infliction let me quote Mr. Spence, also a law reformer, a man well calculated to elucidate the abuses of the practice in Chancery, one to whom the merit of affording to Lord Brougham a great proportion of the information which grounds his Lordship's speeches on the subject, is attributed. Mr. Spence, in his pamphlet entitled "The Evils and Abuses of the Court of Chancery, and proposed Amendments," published in this very year, thus writes: "The other principal source of emolument to the sworn clerks," and by that term, I explain for the non-professional part of the public, are meant, not the Masters' clerks, the *judicious* men, but the Sixty Clerks, or clerks in court of the Six Clerks' Office, "arises from the fee of 6*s.* 8*d.* allowed by Lord Hardwicke's order of 1743, for every attendance on the Master on taxing costs. This fee deserves particular consideration. It is the Master's duty to tax the costs himself; every order for taxation directs him to do it. In practice, however, as I learn from practitioners, there are few bills referred for taxation that the Master ever knows any thing about. The sworn clerk for each of the parties interested, or his agent, generally takes the bill *to the Six Clerks' Office;* they then tax the bill *without the intervention of the Master,* and when the taxation is concluded, the Master's certificate is obtained." (pp. 15, 16.) "I shall have occasion again to advert to the subject of taxing costs when I come to the Masters' offices; I will here merely remark, that the clerks in court, by this, as I consider, perversion of Lord Hardwicke's order, have, in effect, become substituted for the Master in this most important duty. It was proper, no doubt, to provide, that when it was necessary to call in the aid of a clerk in court, a competent fee should be secured to him for his attendance; but it surely never was intended that the clerks in court should be substituted for the Masters as taxing officers; that the Masters should have fees assigned for this purpose, and depute some one else to do their duties." (pp. 16, 17.) "I have before stated that the taxation of costs, another important branch of the Master's duties, is deputed to the sworn clerks: indeed the Masters, as it would appear, know little or nothing about taxing costs." (p. 46.) Mr. Spence founds his remarks on the evidence given before the commissioners.

No addition to this testimony can be needed, but thus much I venture to say: — in not one of the Masters' offices, when the Lord Chancellor spoke, were the bills of solicitors (the *worthy* men) taxed by the Master's clerk (the *judicious* man), with one solitary exception only, the office of Master Stephen: *in that office, and in that office alone, were no gratuities permitted to be taken.* The whole ground of the Lord Chancellor's playful, imaginative, sweeping censure on the solicitors and the Masters' clerks, in that respect, therefore fails, — the censure is void, and, I wish I could add, of none effect.

I am, Sir,
Your obedient servant,
Archibald R. F. Rosser.

19. Great Ormond Street,
14th April, 1831.

## SUPERIOR COURTS.

### ROLLS' COURT.

VARYING DECREE — PRACTICE.

In this case the original bill was filed on the 29th November, 1827, and a decree was obtained on the 14th of February, 1829, directing a reference to the Master to enquire, whether Joseph Piggott, one of the defendants, had sold a certain estate to the testator in the cause? Joseph Piggott died in October, 1829. The petitioners, however, were ignorant of his death, and in December, 1830, the cause came on for further directions, and a further decree was made thereupon. Soon afterwards the petitioners were informed of his death, when they revived the suit against his real and personal representatives, and presented the present petition, for the purpose of varying the decree, so that the same relief might be obtained against the representatives of Piggott as against himself.

Mr. *Spence*, Mr. *Rolfe*, and Mr. *James Stewart*, appeared for the different parties.

The *Master of the Rolls* was of opinion, that the decree could not be varied on petition; but that the cause must be set down for further directions, when the variation might be made. *Waight* v. *Barnes*, M. R. April 14. 1831.

### COURT OF KING'S BENCH.

EASTER TERM 1831. — PRACTICE COURT.

APPEARANCE DAY OF WRIT.

*Willan* v. *Collins and wife.*

*Hutchinson* moved for a rule to show cause why the bill of Middlesex in this case should not be set aside, on the ground that in the body of the writ the defendant was required to appear on Tuesday the 15th of April, there being no such day. In the notice, however, the day of appearance was stated to be Friday the 15th of April.

*Taunton* J. I think that will do. Though the date of the appearance day mentioned in the body of the writ is inconsistent, yet, as the notice is the material part, and as the day of appearance is properly stated there, the inconsistency is cured. Rule refused.

OLD WARRANT OF ATTORNEY — ANONYMOUS.

*Clarkson* moved to enter up judgment on an old warrant of attorney, the party being sworn to be alive on the day before the first day in full term. He admitted that the application was unusual, since the party was not sworn to have been alive on a day in full term. But as the party had been alive since the essoign day, he suggested that that would be sufficient.

*Taunton* J. That is not sufficient. The party must be sworn to have been alive on a day within full term. Rule refused.

---

SECOND COMMISSION. — SHERIFF'S INDEMNITY.

*Ibberson* v. *Dicas.*

*Wightman* shewed cause against a rule obtained by *Clarkson* in last Hilary Term, on the part of the sheriff of Kent, calling on the plaintiff to show cause why the return of the writ of *fi. fa.* issued against the goods of the defendant should not be stayed until an indemnity be given to the sheriff by the plaintiff. The sheriff having seized, received a notice from the assignees under a second commission of bankrupt, which had issued against the defendant, that the estate of the defendant under that commission had not paid 15*s.* in the pound, and therefore, under the 6 G. 4. c. 16. § 127. was vested in the assignees. The words of the section were, "that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects, (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children,) shall vest in the assignees under the said commission, who shall be entitled to seize the same, in like manner as they might have seized property of which such a bankrupt was possessed at the issuing the commission." The question between the judgment creditor and the assignees was, whether this section of the act was to be construed retrospectively or prospectively? Mr. Justice *Littledale* *, before whom this case had been in the course of last Michaelmas Term, had been of opinion that the act was prospective. A similar opinion had been entertained by the other learned judges before whom it had been. There had not, however, been any formal decision of the courts as to the mode in which the statute ought to be construed.

*Taunton* J., the question, then, is one of law, undecided by the courts. Why should the sheriff be obliged to take upon himself to decide it? He is not bound to do so. I think he ought therefore to have an indemnity.

Rule absolute.

* L. O. p. 109.

ATTORNEY'S BILL. — STATUTE OF LIMITATION.

*Evans, Executor,* v. *Heathcote.*

In an action by the executor of an attorney, to recover the amount of a debt due from the defendant to the testator, the defendant pleaded, first, the general issue, and, secondly, the statute of limitations. In order to take the debt out of the statute of limitations, a letter from the defendant was produced, in which were these expressions: "Besides the great delay, is the great difficulty of ascertaining how much is correct, or otherwise. Not the least reliance is to be placed on his books (meaning the testator's books), as abundant evidence has proved, that not only the bill against my late father, but that against myself too, have been manufactured. I am quite willing to pay what is just, but not by compulsion; and whenever any thing is threatened, my answer is, to take your own course." A verdict was found for the plaintiff, with leave to the defendant to move to enter a nonsuit if the court should be of opinion that this letter was not a sufficient memorandum in writing, within the meaning of Lord Tenterden's act †, to take the case out of the statute of limitations.

*Gurney* now moved, and the court being of opinion, that it was such a memorandum as satisfied the act, refused the rule.

Rule refused.

---

## *IRELAND.*

### COURT OF CHANCERY.

A MOTHER IS LEGALLY ENTITLED TO GUARDIANSHIP OF ILLEGITIMATE CHILDREN PROVIDED FOR BY WILL OF DECEASED, UNLESS SUCH AN OBJECTION TO HER, AS TO FATHER OF ILLEGITIMATE CHILDREN.

*In re Cairncross, Minors.*

Mr. Litton (with whom was Mr. *Lefroy*) moved to confirm the report of the Master, approving of one of the Masters as a proper person to be guardian of the property, and that the Rev. Charles Osborne should be guardian of the persons of the two minors, boys under six years of age. There was a motion on the part of the mother of the minors, that the report be confirmed, save as to that part relating to Mr. Osborne's appointment, and that it should be referred back to the Master to appoint a Roman Catholic as their guardian. This the counsel have delayed making. I hope it will be unnecessary to state the affidavits we have, as to the impropriety of the conduct of the mother of these minors, which renders her quite disqualified to interfere with these children in any way. The children are illegitimate, and entitled to a handsome provision by their father's will.

Mr. *Wolfe* (on behalf of Mrs. Smith, the mother of these children).—I would urge, that by the common law the right of the mother of an illegitimate child is to have the guardianship of it, in preference to the father.—5th Term Reports, 271., the *King* v. *Slopes*, where Lord Kenyon said, that a putative father had no right to the custody of the child, although an order of filiation had been got against him to support

† 9 G. 4. c. 14. § 1.

it. There are cases in 7th East, 579., and in 4th Taunton, 498., which show, that the mother of an illegitimate child stands in the same position to it as the father of legitimate children does to them. Therefore, the Court must be certain that it is necessary for it to controul the guardianship before it will interfere with the wishes of a *father* of *legitimate* children, or with those of the *mother* of *illegitimate* children, both standing in the same situation at common law; and the Court never interferes with this common law of the land, except in such a case as is reported in 2d Russell, of the *Duke of Beaufort* v. *Wellesley*, where there is some just exception to the conduct of the parent, which makes it necessary to cut down his or her rights; so here, the Court will not cut down the rights which this mother has at common law, but will leave her to judge of those matters, in which she considers their interest is most materially concerned. I allude now to the religion of those children. I will, for argument sake, admit, that in consequence of the handsome provision the father has made for these children, and from the situation in life that they may hereafter occupy, that they should not be educated and brought up by their mother; but, I say that she has a right to interfere, so that they may be brought up in that faith she herself maintains, and in which, there are affidavits to show, was the faith, at least latterly, adopted by their father. The kindness of the legislature has put that religion on an equal footing with the Protestant religion, and those who profess it have equal rights. Now, the Rev. Charles Osborne is a clergyman of the established church, and it is not denied that the intention is to rear these children as Protestants. We swear that the father died a Roman Catholic, and would have brought up his children in that faith. There are certainly affidavits on the other side to the contrary.

*Lord Chancellor.*—Does the Master say any thing in his report of the religion of the father?

Mr. *Wolfe.*—He does not. They swear on the other side that all his family had been Protestants; that they were all freemen of the city of Dublin, and that, therefore, he ought to be a Protestant; that whenever he did attend a house of worship, it was to a Protestant church he went; and that he ate meat on Fridays and Saturdays; and that they never heard of his going to a Roman Catholic chapel, and that is the way they prove him to have been a Protestant.

*Lord Chancellor.*—The material fact in the case appearing to me to be necessary to be known is, what actually was the religion of the father? The Master says nothing on the subject. I will not decide on contradictory affidavits, but will send it back to the Master to report on this fact.

Mr. *Wolfe.*—Can the Court consider that a material fact, when I have, I think, shown, that the mother of these children has a right to have them brought up as she thinks best? I will even suppose, now, that the father was, and died a Protestant; she has the common law right. But, besides, in 2 Simon, 37., it will be found, that children, even if the Court thinks it necessary to take them finally from the mother, it will not do so while they are in the age of nurture, when they cannot dispense with a mother's care and attention, which is laid down there to be the age of seven years—the eldest of these children is not six. [Counsel then went into various circumstances in the affidavits, to defend the mother from the charges made against her, and that the impropriety imputed to her by an old relation of the father's was denied by the affidavit of the person with whom it was sworn to have been committed.]

*Lord Chancellor.*—If the father was alive here, and expressed a desire as to the religion in which these children should be educated, could I possibly have interfered with his wishes? I think, then, his religion is most important for me to know, and I must send it back to the Master to enquire the religion of the father, and whether he had expressed any wishes or opinion as to the religion in which these children should be brought up.

Mr. *Lefroy* then went minutely into the affidavits, to show the objection to the character of this mother, who was sworn to have lived on improper terms with the solicitor now concerned for her, even during the life of Mr. Cairncross. He showed, from documentary evidence, the truth of the allegation in the affidavits, of the religion of Cairncross and his family. He admitted, that the mother of illegitimate children had at common law the right for which Mr. Wolfe contended; but as a father of legitimate children would not be permitted to interfere with his legitimate offspring, if sufficient ground were laid of the impropriety of his general conduct, on the same grounds he now insisted that this mother could not hope to have any sort of interference with these children, after the conduct which had been imputed to her by these affidavits.

Mr. *Litton.*—The petition on the other side insists on none but a Roman Catholic being appointed guardian. It admits that the gentleman appointed is above all exception; and the Master reports him a most proper person to be a guardian. Now, if the Master should, under the order about to be pronounced, report that the father had been a Roman Catholic, surely the Court would not, under the circumstances detailed in the affidavits, disturb the rest of the report.

*Lord Chancellor.*—I certainly would not confirm that report if the Master now reports that the father was a Roman Catholic, or desired that the children should be educated in that persuasion.

Mr. *Litton.*—The Master has suggested no person to be the guardian: by whom is that now to be done?

*Lord Chancellor.*—We will enquire into that when the report comes back; I cannot decide on this report. Feb. 19. 1831. [*From the Law Recorder.*]

## MINOR CORRESPONDENCE.

### ANSWERS TO QUERIES IN NO. XXIII.

#### TO THE FIRST QUERY, page 366.

I HAVE been informed by an officer of the Exchequer of Pleas, that one of the Judges having

considered no arrest could be made in Wales under *50l.*, a meeting was had between Lord Tenterden and some of the other Judges, or an application was made to the Court of King's Bench, and it was decided that Wales was in the same situation as England, and that, consequently, an arrest could be made for *20l.* The question arose, I understand, upon an application to discharge a bail bond.

G. P. P.

TO THE SECOND QUERY, page 367.

It is obvious that the introduction of such an unusual condition must, in most cases, be against the vendor's interest, as calculated to prejudice the sale. Actual notice to the attorney of incumbrances, &c. acquired previously to his employment by the purchaser would not, perhaps, amount to constructive notice, so as to affect the latter, *Toulmin* v. *Steere*, 3 Mer. 210. *Mountfort* v. *Scott*, 3 Madd. 34.

TO THE THIRD QUERY.

I am not aware, nor do I think, any such case has been so decided. I know that many executions have, since the time stated, issued under similar circumstances, without any writ of enquiry, and that no irregularity has been complained of on that account. It has been suggested that the rule should be, to have an enquiry in such cases, 1 Chitt. Rep. 621. And it was *doubted* by Holroyd J., in *Arden* v. *Connell*, 5 Barn. & Ald. 885., whether a writ of enquiry was not necessary before final judgment in an action of debt for use and occupation; but I think that nothing further has since occurred in any of the courts. If such an important point had, as it is supposed, been decided, it would have undoubtedly appeared in the Reports. H. H.'s informant was, perhaps, under misapprehension as to the result of the case in 5 Barn. & Ald.

TO THE FOURTH QUERY.

The term of five years would be insufficient. The business of an attorney is not a trade; and, upon the slight enquiry I have had an opportunity to make, it does not appear that there is any instance, in London, where an attorney's clerk has been admitted to his freedom under any period of service. In *Rex* v. *Mayor of Doncaster*, 7 Barn. & Cress. 631., where, by the custom, all persons having served an apprenticeship for seven years to a free burgess carrying on trade within the borough were entitled to be admitted to the office of a free burgess, it was ruled, that an articled clerk who had served that time to an attorney, a free burgess resident within the borough, was not entitled to his freedom.

TO THE FIFTH QUERY.

It should seem that an infant is *not* competent to act as an attorney at law, or in any office of public trust, Co. Litt. 128. a.; and see *Claridge* v. *Evelyn*, 5 Barn. & Ald. 81. Sir William Blackstone says, that "an attorney is a person put in the place, stead, or turn, of another, to manage his law concerns," 3 Com. 25.; and it is stated, that the reason why an infant cannot sue or defend but by guardian is, because he has not the knowledge of his own affairs, and sufficient discretion to choose a man to plead well for him, 2 Roll. 287, &c. Now it could not be exactly the "perfection of reason," as we are taught to consider the "law," to hold, that an infant attorney was competent (particularly as no examination of fitness now takes place) to manage his client's affairs better than the law would give him the credit of having the ability to conduct his own. The Court surely would never sanction the appointment of the blind to lead the blind.

X. D.

## MISCELLANEA.

TRIAL BY BATTEL.

In the year 1242, David de Hastings, Earl of Atholl, was among other Scottish nobles engaged in a tournament, where he chanced to overthrow William Bisset, a favourite of the king, whose interest was great, and his family powerful and numerous. A fatal animosity rose; in consequence of which (as was at least generally supposed), the Earl of Atholl was assassinated at Haddington; and the house in which he lodged was burned. Suspicion fell on Bisset; and the nobility of Scotland rose in arms and demanded his life. Bisset stood on his defence. He declared that he was fifty miles distant from Haddington on the night the murder was perpetrated. He offered to vindicate his innocence by single combat against every accuser; and to prove by the oaths of any number of veteran soldiers whose testimony should be required, that he was incapable of such an act of treachery as had been charged against him. The queen herself, a beautiful princess of the heroic family of Couci, offered, as a compurgator, to make her solemn oath, that Bisset had never meditated so enormous a crime. But the nobles around the king rejected the defences offered by Bisset, demanding, at the same time, if he was willing to commit himself to the oaths of his fellow-subjects and the opinion of the neighbourhood. This he refused, "considering," says Fordun, "the malicious prepossessions of rustics, and the general prejudice of the province." He was obliged therefore to fly from Scotland; and the event was his ruin, and that of his numerous family and allies.—*Quarterly Review for February.*

LORD ERSKINE.

When Lord Erskine made his *début* at the bar, his agitation almost overcame him, and he was just going to sit down. "At that moment," said he, "I thought I felt my little children tugging at my gown, and the idea roused me to an exertion of which I did not think myself capable."

ALCHEMY.

The following act of parliament, which Lord Coke calls the shortest he ever met with, was passed in the fifth year of the reign of Henry IV. "None from henceforth shall use to multiply gold or silver, or use the craft of multiplications; and if any the same do, he shall incur the pain of felony."

# The Legal Observer.

VOL. I. SATURDAY, APRIL 30. 1831. No. XXVI.

"——— Quod magis ad nos
Pertinet, et nescire malum est, agitamus."
HORAT.

## ON THE MEASURES

### PROPOSED BY THE REAL PROPERTY COMMISSIONERS.

SOME few persons have doubted whether any benefit would result from the labours of the Commissioners appointed to revise and amend the laws of the country. We have, however, always looked towards them with confidence: had our feelings been different, we think we should be forced to admit that the bills lately proposed by the Real Property Commission, and introduced into the late House of Commons by Mr. Campbell, were entitled to the approbation and support of the profession and of the country. They effect, we confess, the kind of reform to which we incline — a reform which applies a direct and complete remedy to a defined and positive grievance; a reform which proceeds by degrees; a reform, all the consequences of which are well considered and provided for; a reform which has long been demanded, and the necessity of which is universally conceded. This is the sort of reform that should be introduced into our laws. This is the reform contemplated by Mr. Campbell's bills; and we are happy to express our pleasure and satisfaction in witnessing their introduction, and our concurrence in most of their provisions.

In our Monthly Record for the present month we have reported the interesting debate which took place on the motion for bringing in these bills. We had intended to have presented our readers with an analysis of them; but as they are now necessarily postponed, and may be introduced into another parliament in a different shape, this, we think, will be unnecessary, and it will be our simple duty shortly to state their purport.

In the first place, they will alter the laws respecting inheritance and descent. By the present law, as is well known, a father cannot inherit land directly from his child: land cannot lineally ascend. It is proposed to allow him to inherit his son's lands, in default of issue of his son.

By another well known anomaly, the half-blood is excluded from the inheritance of land. It is proposed, after the issue and the father of the owner, and his brothers and sisters of the full-blood, are exhausted, to allow the half-blood to inherit.

By the present law, a widow, on the death of her husband, becomes entitled for her life to one third of the lands of which her husband was seised at any time during the coverture. This inconvenient rule is evaded by limitations which are technically known as *uses to bar dower*, which are at best a clumsy contrivance, and are sometimes of much practical inconvenience, as they often leave outstanding a fraction of the legal estate. The Commissioners propose to give to the widow for life one third of the lands of which her husband dies seised and undisposed of by will. Thus he may, during the coverture, alien such lands as he may please, without the necessity of the concurrence of his wife. The widow, however, will have an equal right to a third of the equitable as well as the legal estates of her husband, to which she is not now entitled. This will remove one great restraint upon alienation. We think, however, that a clause might be advantageously introduced, allowing a person to have lands conveyed to him, if he please, free from all claim to dower; and that a mere declaration of such a wish in the deed should be sufficient. We may also suggest, that a difficulty will arise as to whether a *contract* for lands would defeat a title to dower; and that this should be provided for expressly.

The law of curtesy is also to be altered. At present, if a man have issue by his wife he is entitled to a life interest in all her lands. It is proposed that he shall have

this interest whether he has issue or not, with this exception, that if she had issue by a former marriage, his life interest shall obtain in one half only of her lands, and that the absolute interest in the other half, and the remainder in fee in the half to which the husband is entitled for life, shall go immediately to the issue by the former marriage.

The axe is next laid to the root of much delay and expense — fines and recoveries. There will be much mourning at this alteration among the cursitors and at the king's silver office. One conveyancer is reported to have said, on hearing of the alteration, in the frenzy of the moment, that he would rather "part with his bowels than treble voucher!" The Commissioners have, however, remained unmoved by this threat; and we think they have the public and the large majority of the profession with them. It is proposed that a simple conveyance should be substituted in the place of these theatrical assurances.

The only other alteration at present proposed is the change of the period of limitation from sixty to twenty years. This is by far the most important proposition; and we are not prepared to give our unqualified support to it. It is in some respects in conflict with the bill of Lord Tenterden* respecting prescription; and we anticipate and should recommend that one complete bill on the subject should be introduced.

We think this so likely, that we shall forbear to discuss the details of either bill. There is one point, however, in which both of them concur, to which we also most cordially agree. They both endeavour to fix some limitation to claims made to church property. The old maxim of *Nullum tempus occurrit ecclesiæ* is attended with extraordinary grievances in practice, and inflicts great injury on the alienation of all church property. We were surprised, therefore, to see an opposition to the measure of Lord Tenterden display itself on the right reverend bench of bishops. They might have trusted, we should have thought, to so old and tried a friend to the church as the present Chief Justice of England.

These bills, together with the other bills for the amendment of our laws, are now once more defeated. We hope, however, that, as the principles on which they are founded have been fully discussed, no delay will attend them in a new parliament, but that they will be permitted to pass without any further opposition.

* See analysis of the bill, *antè*, p. 344.

## REMARKABLE TRIALS. — No. III.

### *Hawkins and Simpson's Case.*

JOHN Hawkins and George Simpson were indicted for robbing the mail on the 16th April, 1722. Hawkins, in his defence, set up an *alibi*; to prove which, he called one William Fuller, who deposed that Hawkins came to his house on Sunday the 15th of April, and lay there that night, and did not go out until the next morning. Being asked by the counsel, "By what token do you remember that it was the 15th of April?" he replied, "By a very good token; for he owed me a sum of money for horse hire; and on Tuesday the 10th of April he called upon me, and paid me in full, and I gave him a receipt; and I very well remember that he lay at my house the Sunday night following." The receipt was now produced: — "April the 10th, 1722. Received of Mr. John Hawkins the sum of 1*l.* 10*s.* in full of all accounts. Per me,—'William Fuller.'" Upon inspecting the receipt, the Court asked Fuller who wrote it: he replied, "Hawkins wrote the body of it, and I signed it." — Court. "Did you see him write it?" — Fuller. "Yes." — Court. "And how long was it after he wrote it before you signed?" — Fuller. "I signed it immediately, without going from the table." — Court. "How many standishes do you keep in the house?" — Fuller. "Standishes!" — Court. "Standishes; it is a plain question." — Fuller. "My Lord, but one; and that is enough for the little writing we have to do." — Court. "Then you signed the receipt with the same ink that Hawkins wrote the body of it with?" — Fuller. "For certain."—Court. "Officer, hand the receipt to the jury. Gentlemen, you will see that the body of the note is written with one kind of ink, and the name at the bottom with another very different; and yet this witness has sworn that they were both written with the same ink, and one immediately after the other. You will judge what credit is to be given to his evidence."

Thus the authority of the receipt and the credit of the witness were overthrown by the sagacity of the Court. But while the judge (Lord Chief Baron *Montague*) was summing up the evidence, he was interrupted by the following occurrence: — The person who reports the trials was then taking notes of the proceedings: his ink, as it happened, was very bad, being thick at the bottom, and thin and waterish at the top; so that, accordingly, as he dipped the pen the writing appeared very pale or pretty black. This circumstance being remarked by some gentlemen present, they handed the book to the jury. The judge perceiving them very attentively inspecting it, called to them — "Gentlemen, what are you doing: what book is that?" They told him that it was the writer's book, and that they were observing how the same ink appeared pale in one place, and black in another. The judge then told them—"You ought not, gentlemen, to take notice of any thing but what is produced in evidence;" and then, turning to the writer, demanded what he meant by showing that book to the jury; and being informed by the writer that it was taken from him, he enquired who took it, and who handed it to the jury. But

this the writer could not say, as the gentlemen near him were all strangers to him, and he had not taken any particualr notice of the person who took his book.

Hawkins and Simpson were convicted and executed; indeed, the evidence against them was very strong: but had the fate of Hawkins depended upon the single testimony of Fuller, he would, but for this occurrence, have fallen a sacrifice to the acuteness of the judge, who appears to have been much displeased at the accidental confutation of his remarks on the receipt, although it was an accident in favour of life; and had it not been in a case where other evidence was so strong against the accused, it must have been looked on as the special interposition of Providence.

## THE UNIVERSITY OF LONDON.— LAW CLASS.

### LECTURES OF MR. THEOBALD ON THE LAW OF PRINCIPAL AND SURETY.

### No. IV.

### *Of the Manner in which the Obligation of Surety may be extinguished.*

FIRST, The obligation of surety may be extinguished in all the different ways in which any other kind of obligation may be extinguished; as, for instance, by performance; by a release; by accord with satisfaction; by the lapse of time under the statute of limitations if the obligation arises by simple contract, or under the presumptive bar if it arises by specialty; by the bankruptcy and certificate of the surety; by the adjudication of his discharge under the insolvent debtors' act; and other means applicable to contracts generally. The lecturer observed, with respect to the discharge of the surety under the statute of limitations, that the statute begins to run, not from the time when the contract is made, but when a cause of action arises upon it, which, in the case of a bill of exchange or promissory note, is when the bill and note become due, and, analogously, in the case of a guarantee is when the principal makes default; and therefore a plea of the statute alleges that the plaintiff's cause of action, if any, did not accrue within six years; and if it merely alleges that the defendant's promise or contract was not made within six years, it may be specially demurred to.

For an acknowledgment made by the surety within six years to be a valid answer to a plea of the statute, it must be in writing, through previously to Lord Tenterden's act[a] a verbal acknowledgment was sufficient.[b]

[a] 9 Geo. 4. c. 14.

[b] *Gibbons* v. *M'Casland*, 1 Barn. & Ald. 690.

If the surety, instead of being engaged by the proper contract of guarantee, is engaged *quasi* a joint debtor upon a joint or joint and several contract, as is the case, for instance, when he joins his principal in a joint and several promissory note, a part-payment by his principal will take the debt out of the statute as against him[c] also; provided the payment was made in his lifetime; but if not made until after his death, it would not have that effect[d], and his executor would not be chargeable.

2. As to a discharge by bankruptcy and certificate, until the principal has made default, the obligation of the surety is contingent only; and therefore prior to the default of the principal, the creditor cannot prove under a commission against the surety; and consequently, also, the certificate of the surety obtained prior to the default of the principal will not discharge the surety.[e]

It has been decided in one case, and one only, which is reported in the Legal Observer alone, (No. 15.) that the clause in the present bankrupt act providing for the proof of contingent claims does not apply to the case of the surety.

Secondly, From the definition and accessory nature of the contract of surety, it follows, that the obligation of the surety is extinguished by the extinction of that of the principal debtor. In conformity with which is the expression of Mr. Justice Holroyd in *Lewis* v. *Jones*[f], "If the original debt be satisfied and gone, no action will lie against the surety. The extinguishment of the debt puts an end to the agreement of the principal and surety."

The lecturer exemplified the various modes of discharge included under the above divisions by a copious statement of cases; accompanied with a concise expression of their legal effect, and of the rules deducible from them.

Thus, if the creditor releases his debtor, or agrees to accept of him a composition, the surety is discharged from his obligation. In *Lewis* v. *Jones*, already referred to, the defendant was sued on a promissory note, which he had indorsed for the accommodation of the maker. He was, therefore, in fact, a surety for the maker. The plaintiff, the indorsee, had agreed with the maker to accept five shillings in the pound

[c] *Burleigh* v. *Stott*, 8 Barn. & Cres. 36.

[d] *Atkins* v. *Tredgold*, 2 Barn. & Cres. 25.

[e] *Ex parte Adney*, Cowp. R. 560. *Overseers of St. Martin in the Fields* v. *Warren*, 1 Barn. & Ald. 491.

[f] 4 Barn. & Cres. 506.

for the debt for which the note was given; and it was holden that this agreement had discharged the surety.

An agreement between the two principal parties to alter in the slightest degree their original contract, will discharge the person who acceded to the contract as surety. Thus, in *Whitcher* v. *Hall*[g], by a special agreement between the plaintiff of the one part, and Joseph Hall as principal, and the defendant as his surety, of the other part; the plaintiff was to let, and Joseph Hall take, the milking of thirty cows at a certain rate per cow *per annum*, from the 14th of February following. On that day possession was given of the dairy of thirty cows, only ten of which were fit for milking. At Lady-day, the plaintiff put two more milking cows into the dairy, making thirty-two; and subsequently the principal parties exchanged cows from time to time, the plaintiff putting in those fit for milking, instead of others which were not so. In May, Joseph Hall had thirty-two cows; and he made the following agreement with the plaintiff, viz. that the plaintiff, instead of taking out two then, should be at liberty to take out four at the fall of the year. This new arrangement was acted upon; and being new, the Court held it discharged the surety; though, in point of profit, it was proved to be equivalent to the original agreement. *Eyre* v. *Bartrop*[h] was cited by Mr. Theobald as a case to the same effect in equity.

An agreement between the creditor and principal debtor, which would have the effect of discharging the surety, supposing it to have been made *bonâ fide* on the side of the debtor, will also have that effect, although it was fraudulent on the side of the debtor. For instance: Huey and Wilcox as principals, and Edwards as their surety, were severally and jointly bound to the plaintiff in a penalty for the payment of 2000*l.* on a specified day; before which day Huey prevailed on the plaintiff to give him up the bond, and to accept, in lieu of it, four notes of different persons, payable at future days; and he signed an agreement, in the names of himself, Wilcox, and Edwards, that if the notes did not produce the 2000*l.* they would see him paid the deficiency; and he also gave the plaintiff a draft on his banker, dated one day forward; but on the same day he gave it, he drew his money out of the banker's hands. Huey and Wilcox having become bankrupt, the plaintiff brought his bill against Edwards, the surety for the residue of the principal and interest due on the bond; insisting that, as Huey had prevailed on him by fraud to deliver up the bond, Edwards was not discharged. But the Lord Chancellor held, that as Edwards was not a party to the fraud, he was discharged by the new agreement.[i]

The rule that any agreement between the principal parties which is inconsistent with the terms of the original agreement, will discharge the surety, prevails in favour of replevin sureties. Thus, the condition of a replevin bond being for the appearance of the tenant at the next county court, and that he shall prosecute his suit with effect and without delay; an agreement afterwards between the tenant and avowant to refer the suit to an arbitrator discharges the sureties.[k]

The surety is discharged by the creditor's agreeing to give time to the principal debtor. The cases cited by Mr. Theobald here were, *Nisbet* v. *Smith*[l]; *Samuel* v. *Howorth*[m]; *Governor and Company of Bank of Ireland* v. *Bursford*[n]; *Crickett* v. *Maghin*[o]; *Boultbee* v. *Stubbs*[p]; and some others.

The *Governor and Company of the Bank of Ireland* v. *Bursford* was an appeal from the Court of Exchequer in Ireland to the House of Lords. It appeared that the respondents had executed a bond and warrant of attorney to secure to the appellants the sum of 10,000*l.*, which they had advanced to one Blair. Blair, therefore, was the principal debtor, and the respondents were his sureties. Blair had obtained several extensions of credit after the loan had become due, and at length he became bankrupt, still owing the money. The appellants then entered up judgment against the respondents on the bond and warrant; and being about to levy the debt, the respondents filed a bill in the court below, and obtained a decree of a perpetual injunction to restrain the appellants; which decree the House of Lords affirmed, on the ground that credit had been extended to Blair without the consent of the respondents.

---

[g] 5 Barn. & Cres. 269.
[h] 3 Madd. 221.
[i] 3 Atk. 91.
[k] *Archer* v. *Hale*, 4 Bing. 464., overruling *Moore* v. *Bowmaker*, 6 Taunt. 379. *Bowmaker* v. *Moore*, 3 Price, 213.
[l] 2 Bro. Ca. 579.
[m] 3 Meriv. 272.
[n] 6 Dow. 233.
[o] 2 Swanst. 185.
[p] 18 Ves. 20.

But merely taking fresh security of the debtor, without any agreement to give him time, will not discharge the surety.[q]

The surety also is not discharged by the creditor's agreeing to give time to the principal, if he authorised or ratified the agreement.[r]

And if the creditor merely refrains from the active diligence which he might use against his debtor, his passiveness will not discharge the surety; because the creditor is under no obligation to use active diligence against his debtor. Thus, in *Eyre* v. *Everett*[s], the plaintiff, a surety, filed a bill for relief, on the ground that disputes had arisen five years before between him and the creditors; and that, although he then denied his liability, they had nevertheless suffered that period to elapse without taking means to obtain payment from the principal debtor, who had since fled. But the Court adjudged that these facts proved only passiveness on the side of the creditor, and refused the relief prayed for.

So, too, at law, in an action against a surety, on a bond conditioned for the honesty of one whom the plaintiffs had appointed their collector; it appeared the collector had been in arrear to the plaintiffs for several years, and that his accounts had never been properly examined; and also, that no complaint had been made to the defendant, the surety. With reference to these facts, Lord Ellenborough remarked, that the laches of the obligees in not calling on the principal so soon as they might have done had the accounts been properly examined, was no estoppel at law in favour of the surety; and the Court further ruled, that the surety was not entitled to notice of the default of the debtor.[t] But as the rule established in these cases is founded on the supposition of the creditor being under no obligation to sue the debtor, or to use diligence against him, it does not apply to cases in which the creditor is under such an obligation; and in those cases his passiveness towards the debtor would discharge the surety.

The remaining topics treated of in this lecture we postpone to our next number.

---

[q] *Twopenny* v. *Young*, 3 Barn. & Cres. 208.

[r] *Tyson* v. *Cox*, 1 Turner, C. C. 395.

[s] 2 Russell, 381.

[t] *Naus* v. *Rowles*, 14 East, 510. See also *Goring* v. *Edwards*, 6 Bing. 94. *London Assurance Company* v. *Buckle*, 4 J. B. Moore, 153.

## REVIEW.

*Dignities, Feudal and Parliamentary, and the Constitutional Legislature of the United Kingdom. The Nature and Functions of the Aula Regis, the Magna Concilia, and the Communia Concilia of England, and the History of the Parliaments of France, England, Scotland, and Ireland, investigated and considered with a View to ascertain the Origin, Progress, and final Establishment of Legislative Parliaments, and of the Dignity of a Peer, or Lord of Parliament.* By Sir William Betham, Ulster King of Arms, and Keeper of the Records in the Tower of His Majesty's Castle of Dublin, M.R.I.A. F.S.A. F.L.S. &c. Vol. I. London, 1830. Thomas and William Boone, New Bond Street.

It appears that this work was suggested to the learned author by Lord Chancellor Lyndhurst, and we think it has been ably executed. So much of it as relates to the constitutional legislature of the United Kingdom, and the history of Parliament, must be read with peculiar interest in the present state of public affairs by every one who is desirous for the welfare of his country.

The volume now before us, which is to be succeeded by a second at the end of this year, comprises, in the first chapter, many general observations which will be found particularly valuable. From these the author passes to the ancient councils, parliaments, peers and nobles, of *France*, from whence he considers the feudal institutions, both of the Saxons and Normans, were borrowed.

Sir William Betham next investigates the nature of the feudal courts in England in the Saxon times, and from the Conqueror down to the reign of Henry III.

He then devotes four chapters to an historical view, with relation to the immediate subject of his book, during the reigns of Henry III., Edward I., Edward II., and Edward III.

The modern peers of parliament are next treated of, and this chapter is followed by another on the constitution of the *aula regis*.

We are then introduced to the feudal institutions and parliaments of *Scotland*; and the remaining chapters are devoted to *Ireland*, its councils and parliaments, from the first statute in Henry III. down to the death of Richard III.

Having thus described the general scope and objects of the work, we shall proceed to make such selections as appear to us most likely to be acceptable to our readers.

We shall principally direct our attention to the origin of the legislative assemblies of England, and the trial by jury.—First, of the peers:

It seems to have been a common mistake to confound the feudal earls and barons with modern peers; a mistake which arose from their being called by the same names. Sir William Betham contends that, although feudal dignities were introduced by the Normans, the lords of parliament were purely of English origin, and that nobility was not necessarily connected with sitting in parliament.

On these points our author observes:—

"Writers on the history and constitution of England have fondly clung to the idea, that from, and even before, the Norman conquest, there existed something like a popular, constitutional, and free government, and a representation of the people, which they imagined to have exercised the functions of legislation during the period of Saxon jurisdiction, continued, but in a modified and altered shape, in the reigns of the first eight kings of the Norman race. Even the Lords' Committees were not free from the influence of this national, this patriotic infirmity; for they repeatedly admit they can discover no evidence of a popular constitutional legislation, yet speak of the *constituent parts of the legislative assemblies* of those times."

* * *

"Early in the investigation, I found that many individuals were denominated *barons* who never could have obtained that title by *sitting in parliament*, and *earls palatine*, who did not bear, as titles, the names of the counties of which they were earls; these titles could have no necessary connection with sitting in parliament, and, therefore, *earls* and *barons* were not, as such, *peers* or *lords of parliament*. This led to a conclusion that the ancient assemblies of barons were different in their constitution and objects to those we now call parliaments, and opened an extensive field for investigation.

"The Lords' Committees, in the following extract, have suggested a reason why the history of the parliaments of England has so long been a matter of difficulty and obscurity:—

"'One thing has been sufficiently shown by these reports, namely, the *danger of going far back* into antiquity, and establish rights to the dignity of peer of the realm, *not sanctioned by continued usage of later years*; and of applying the principles *established by modern resolutions and decisions to what has passed in earlier times.*'"*

Sir William then proceeds to account for the error which has been fallen into, and makes the following remarks on Mr. Cruise's work on Dignities:—

"The feudal system obtained almost all over Europe, with certain local peculiarities; for it accommodated itself to those customs and laws which existed in the countries where it was introduced, and its *principle* was to vest in the chief of a district, whether called an earl, baron, or lord, judicial authority, and cognizance of the pleas peculiar to the country. Thus, the Saxon laws, pleas, and customs, found in England at the Conquest, were, after that event, administered in the feudal courts of the Norman barons, although very dissimilar to those of Normandy. Earls (or counts) and barons, existed in countries where legislative assemblies were unknown. In most parts of Europe, individuals were invested by the sovereigns with extensive territories, who, in these seignories, possessed jurisdiction and power, and they had their courts and judges, where they administered justice and law, rendering homage, fealty, and military service, to the sovereign. In the Gallic possessions of the English kings there were earls and barons, who owed them service, while the kings themselves were vassals of, and did homage to, the sovereigns of France, as their liege lord.

"Cruise commences his able and useful work with the common errors, and thus the evidence he produces annuls his conclusions. He says,—

"'The dignities or titles of honour which *exist in England* derive their origin from the feudal institutions, and were introduced into this country by the Normans.'

"Having thus laid down as a principle, that the ancient *barons* were possessed of similar functions as a *modern peer of parliament*, he calls the assemblies of those barons *parliaments*, and the laws enacted in those times by the king, *acts of parliament*; and by thus embarrassing his subject, becomes involved in difficulties from which he attempts to extricate himself by presuming the enactment of imaginary laws, at some period of English history, which he is totally unable to fix upon, or even to guess at, from any indications, or signs of the times, to be found in record or history.

"That feudal or territorial seignories, called counties palatines, or earldoms, and baronies, were established in England by the Conqueror, there can be no doubt; but the *names* only of the *existing dignities* are of Norman origin, their *nature* and *origin* are altogether of English growth."

* * *

"In page 10., Mr. Cruise calls the councils, directed to be summoned under the 14th chapter of Magna Charta, *parliaments*, and again, in § 34., he says, that 'the right of *sitting in parliament*, was confined to those who held *entire baronies*, and that before the reign of Henry III. every tenant in capite was *ipso facto* a *parliamentary baron*, and entitled to be summoned either by the king's writ, or by the sheriff of his county; *yet about that time some new law was made, by which it was established that no person, though possessed of a barony, should come to parliament without being expressly summoned by the king's writ.*'

"Mr. Cruise is compelled to *presume a law*, in order to account for what his intelligent mind was convinced was true, namely, that no one could attend a *parliament unless summoned*, and yet not even a reference to any such law is to be found."

* "Third Report of the Lords' Committee, p. 236."

* * * *

"After a patient and careful examination of the Lords' Reports, the ancient statutes, and the records of both England and Ireland, the conclusion forced upon the understanding is—that previous to the reign of Henry III., although the sovereign occasionally called councils, and asked their advice, which he followed or not, at his pleasure, there existed no *deliberative legislative assembly in England;* that the parliaments of the reign of that king were temporary revolutionary conventions, arising out of, and the natural consequences of, civil wars and commotions; that their enactments were abrogated by the king, after the battle of Evesham, and things returned to the *status quo ante bellum.* Edward I., feeling he required the assistance of his people, and that his power would be thereby strengthened, first promulgated the principle, which he called the *lex justissima*, viz. *where all were interested, all should be consulted,* summoned the first *legislative assembly* ever convened by legal authority in England. When his turn was served, he seemed to have forgotten the principle; or, perhaps, he only considered the emergency as one requiring and calling for extraordinary measures, and that the assembly he then called was not to be considered as one of *periodical convoking*, but only to be adopted on pressing national calamities or dangers: it appears certain, he acted as if he considered the summoning that assembly did not abrogate or diminish his own power and royal prerogative, or as establishing any thing like a free constitutional assembly, for legislative purposes, to be summoned at regular periods; for we find him afterwards altering statutes, and enacting new laws, of his own mere motion."

In the fifteenth year of Edward II., according to our author, it was, for the *first time*, enacted, that the legislative authority should be in the king, with the advice and assent of the lords spiritual and temporal, and commons, in parliament assembled.

"This enactment," says Sir William Betham, "was a compromise for mutual safety between the king and the barons; the representatives of the landholders, the citizens and burgesses, were called into action, after the revolutionary example set by Montfort, Earl of Leicester, in the reign of Henry III.; this may be considered the first successful and effectual attempt to settle a free constitutional government. The assembly was afterwards modified from time to time, until the reign of Henry IV., about which time it obtained the division into two distinct houses, as it has since continued.

"Thus the parliament was the creature of political convulsion, and the result of a continuous struggle of near two centuries, between the kings and their barons. As it did not arise in any respect from feudal institutions, it is not possible that the titles or dignities consequent on feudality can have any reference to that legislative assembly, and feudal or territorial honours, whether earldoms or baronies, must have been totally distinct from, and altogether unconnected with, *sitting in parliament.*"

The history of the *trial by jury* is interwoven with this account of the origin of the house of peers. The feudal barons were liable to attend, and were fined for not attending, the king's parliaments. But here, as our author observes, we have two distinct and different things called by the same name. The *aula regis*, or king's high court of justice, was also called a parliament during the reign of Henry III.; and the feudal barons were liable to attend that court of justice, of which they were *quasi jurors*, suitors, or *sectatores*, and decided matters of fact by their votes.

"'The earliest mention we find of any thing like a jury, was in the reign of William the Conqueror, in a cause upon a question of land, where Gundolph, bishop of Rochester, was a party. The king had referred it to the county, that is, to the *sectatores*, to determine in their county court, as the course then was, according to the Saxon establishment; and the *sectatores* gave their opinion of the matter. But Odo, bishop of Bayeux, who presided at the hearing of the cause, not satisfied with their determination, directed, that if they were still confident that they spoke the truth, and persisted in the same opinion, they should choose twelve from among themselves, who should confirm it upon their *oaths*. It seems as if the bishop had here taken a step which was not in the usual way of proceeding, but that he ventured upon it in conformity with the practice of his own country; the general law of England, that a judicial enquiry concerning a fact should be collected *per omnes comitatûs probos homines*. Thus it appears, that in a cause where this same Odo was one party, and archbishop Lanfranc the other, the king directed *totum comitatum considere*, that all men of the county, as well French as English (particularly the latter), that were learned in the law and custom of the realm, should be convened; upon which they all met at Pinendena, and then it was determined *ab omnibus illis probis*, and agreed and adjudged *à toto comitatu*. In the reign of William Rufus, in a cause between the monastery of Croyland and Evan Talbois, in the county court, there is no mention of a jury; and so late as the reign of Stephen, in a cause between the monks of Christ Church, Canterbury, and Radulph Picot, it appears from the acts of the court* that it was determined *per judicium totius comitatus.*†

"'This trial by an indefinite number of *sectatores* or *suitors* of court, continued for many years after the conquest; these are the persons meant by the terms *pares curiæ*, and *judicium parium*, so often found in writings of this period. Successive attempts gradually introduced jurors, to the exclusion of the *sectatores*; and a variety of practice no doubt prevailed till the Norman law was thoroughly established. It was not till the reign of Henry II. that the trial by jury became general; and, by that time, the king's

* "Bib. Cott. Faust, A. 3. 11. 31."
† "Hickes Thes. Diss. Ep. 56."

itinerant courts, in which there were no *pares curiæ*, had attracted so many of the country causes, that the *sectatores* were rarely called into action.'

"'The barons were the *sectatores* and *pares curiæ* of the *aula regis*, or king's high court of justice, and certain of them were summoned to attend at the periodical meetings of that body, at the usual terms; any baron *might* attend; but those who *had been summoned* were liable to fine and amerciament if they were absent; thus barons often appear to have taken part in the acts of the king's baronial court, whose names do not appear on the list of those summoned, and some of those whose names appear on the list summoned are not affixed to certain letters written by the barons present. *A certain number* was necessary to constitute the *plenum parliamentum*, or full court, without which no business could be done. In France, four was the minimum.

"'After the establishment of a legislative parliament, this high court was united to it, and, for some time, continued its operations under the name of the high court of parliament, and pleas and suits of original jurisdiction were entertained, heard, and decided with all the regularity of the legal terms of modern times; and it would appear that one of the last modifications was limiting the judicial character of the parliament to appellant jurisdiction; the greater number, but not all, the rich and powerful magnates and proceres of the nation, were the prelates, earls, and barons, who were *sectatores* in the king's former high court, and as such, if summoned, still bound to attend the parliament, to which the judicial character and power of the king's court had thus been united; and, in their newly-settled constitution, Edward I. and II. naturally summoned the most influential of them among the peers, and thus the feudal baron and the peer in a few generations were considered the same, because they were called by the same name."

In the year 1242, according to Matthew Paris, there is the first mention in any public document of a "parliament." The assembly referred to was composed of bishops, earls, barons, abbots, and priors; but it was not a legislative assembly.

It was in 1253 (38 Hen. 3.) that knights of the shire were first summoned to the king's council at Westminster.

"'A writ issued 38 Henry III., the king being in Gascony, and the queen and the earl of Cornwall regents, entitled in the margin of the roll, '*de magnatibus vocatis ad concilium*,' is directed to the archbishop of Canterbury, and begins, 'Cum quedam ardua et urgentia negotia statum nostrum et regni nostri tangentia, habeamus vobis communicanda, *que sine consilio vestro, et aliorum magnatum nostrorum, nolumus expediri* vobis mandamus, &c. In this writ, the king exercised the royal right to summons his barons to his assistance in council. Several similar writs were issued by Henry about this time. A remarkable writ issued 11th of February in this same year, states, that the earls, barons, and other magnates, had engaged to repair to London in three weeks after Easter, with horses and arms, ready to proceed to Gascony. This writ was directed to the sheriff of Bedford and Bucks, and is tested by the regents; and the sheriff is directed to cause two lawful and discreet knights for each county to be chosen by them, vice *omnium et singulorum eorundem*, to come before the king's council at Westminster, "ad providendum unacum militibus aliorum comitatuum, quos ad eundem diem vocari fecimus, quale auxilium nobis in tanta necessitate impendere voluerint. Tu ipse militibus et aliis de comitatu predicto necessitatem nostram et tam urgens negotium nostrum diligenter exponas, et ad competens auxilium nobis ad præsens impendentium efficaciter inducas: ita quod prefati quatuor milites prefato consilio nostro, ad predictum terminum paschæ, respondere possint super predicto auxilio pro singulis comitatuum predictorum.'

"'This writ is the more remarkable, as it appears to have been the first attempt at representation, and giving consent to the imposition of an aid by elected deputies for the shires. The object of the writ was double, first, to obtain a commutation for services and a voluntary aid. But it 'tends strongly to show that there then existed no law by which a representation' was specially provided, for the constituting an assembly for granting an aid. Their lordships conclude, *the constitution of the government was to this period the same as it was in the reign of John*, and that this substitution of two elected knights for each county was a *novel proceeding*. The administration of justice between individuals continued the same as hitherto. 'But the weakness of Henry, his necessities, the distress of the country, and the power and ambition of individuals, began at this period to involve the king in great difficulties, to urge him to arbitrary conduct, and to lead to that opposition which produced a civil war, annihilated the royal power, and led to the *gradual establishment of the system of legislation* which eventually prevailed in England.'"*

Citizens and burgesses were not summoned to parliament till 1264.

"The forty-ninth of Henry was, however, the commencement of an important æra in England; for in that year was summoned the first assembly considered a parliament, of which the writs remain on record, and in which writs were, *for the first time*, directed to the counties, cities, and boroughs, to send representatives, in the form in which parliaments were afterwards summoned. It was, although but a revolutionary proceeding, and an assembly of the Earl of Leicester's adherents, the king and his eldest son Edward being then in their power, very important in its consequences, as it became the model of the future parliaments of England; and peers now sit in the House of Lords in consequence of writs summoning their ancestors to this assembly, although but a revolutionary convention, and provisional assembly, unknown to the laws and constitution of the time."

* "First Report, see page 97."

It is observable that at the parliament at York, in the sixth year of Edward III., the bishops and clergy acted by themselves; the peers by themselves; and the knights and commons by themselves. But frequently the knights acted separately from the citizens and burgesses, who were little regarded, unless when an aid was required.

"'The parliament, therefore, had not yet completely assumed its present form; the *Lords and Commons were not yet considered as two houses perfectly distinct, and acting separately*, and on perfect equality in their different functions; the knights of the shires appear to have been treated as *a higher order* than the representatives of cities and boroughs, and on this, as on other occasions, *the parliament continued after the knights, citizens, and burgesses had been dismissed.*'*

In the thirteenth year of Edward III. the king, *for the first time, signified to the Commons the cause of* the meeting of parliament, which shows a further increase of consequence, and it was agreed to assist the king with a considerable grant of money. The *grauntz* gave an answer in writing, in which they gave the king the tenth sheaf of corn of every kind of their demesne lands except from the lands of their bondsmen, the tenth fleece, and the tenth lamb of the next year; but they stipulated that the old tax (*maltolt*) on wool, and other demands, should not be levied in future.

"The commons gave their answer in writing, that they must consult their constituents, and requested another parliament to be summoned; but, in the mean time, they would do their utmost to obtain the king a proper aid."

In the fiftieth year of Edward III. the knights of the shire, on the petition of the commons, were directed to be "elected by common assent of the county."

On the deposition of Richard II. the functions of the commons were still further extended.

"To this period their *assent* only had been necessary to a grant of an *aid;* on this occasion the king willed and gave them power *to advise on all things for the common profit of the realm.* Thus, by each new revolution, the commons acquired new powers, and eventually became a separate and distinct estate and chamber of parliament.

"'In the speech of the chief justice to the Commons, by the king's command, in the 2d Henry IV., they were directed to elect a common speaker, and to present him to the king, "*come le manere est,*" on the next day, which was done, and the whole of the proceedings of this parliament bear a nearer resemblance than those in former parliaments to the proceedings at the present time.'†

"In the 7th and 8th of Henry IV. the descent of the crown was settled by statute on the king and his heirs male. The knights, citizens, and burgesses, assembled in parliament, were in this statute considered as the proxies and attorneys *or representatives of the whole kingdom*, and had power to act *for the whole*. 'This seems to have been intended as a legislative declaration of what was then considered as the true constitution of the legislation of the kingdom, established by the custom and usage of the kingdom, to give authority to the solemn act for the settlement of the crown.'*

"'In the same parliament, provision was made touching the election of knights of the shires, that at the next county, after the delivery of the writ to the sheriff, proclamation should be made, in full county, of the day and place of the parliament, and that all those who should be present, as well *suitors summoned for any cause* as others,' 'should go to the election;' that is to say, the freeholders, who were and are the only suitors in the county court."

We have thus laid before our brethren those portions of the work which we consider generally interesting to professional men, and are not without expectation that they will be also in no small degree acceptable to the general reader.

* "First Report, 307."
† "First Report, 354."

## ADMISSION OF ATTORNEYS AND SOLICITORS
### IN THE COURT OF EXCHEQUER.

According to the late regulations of the Court of Exchequer, practitioners are obliged to be admitted on both the law and equity side of the court, and double fees are consequently required. Individually, the amount of these fees may not be of much consequence, but to the profession at large the sum is of great magnitude. On the plea side, the fees demanded amount to one pound three shillings and sixpence, exclusive of the Baron's Fiat, and on the equity side to one pound six shillings. It has been questioned whether any more can be demanded than one shilling for the oath. We have been favoured with the papers in a case decided many years ago in the Common Pleas, but which was never reported, wherein the same question seems to have arisen, and the Court decided against the officers' right to the fees claimed.

The facts were as follow:—

Mr. Brundrett, of the Inner Temple, one of the attorneys of the Court of King's Bench, having procured a fiat to be admitted in the Common Pleas, delivered the fiat, with a memorial of his intended admission, to be signed by a judge and one of the prothonotaries of the court, and also the memorial of his admission as an attorney of the Court of King's Bench to a clerk of one of the secondaries. The usual oaths were then taken on his being admitted an attorney. Afterwards, intending to be admitted a solicitor of the Court of Chancery, and the me-

* "First Report, 354."

morial of admission in the Court of King's Bench being required to be produced, Mr. Brundrett went to the Secondaries' Office, and required the memorial to be delivered. This was refused, unless he paid a fee of three shillings. Having complied with this demand, Mr. Brundrett afterwards applied for the memorial of his admission as an attorney of the Common Pleas, signed by one of the judges and a prothonotary of the court; but the secondary refused to deliver it, unless he received the further sum of eight shillings and sixpence, which he demanded for further fees. These were refused to be paid, and the question before the court was, whether the demand could be legally sustained.

In support of the motion, the 2 Geo. 2. c. 23. was referred to, by the second section of which it is enacted, That the judges of the said courts respectively, or any one or more of them, shall, and they are hereby authorised and required, before they shall admit such person to take the said oath, to examine and enquire, by such ways and means as they shall think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively shall be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then, and not otherwise, the said judge or judges of the said court respectively *shall* and they are thereby authorised to administer to such person the oath thereinafter directed to be taken by attorneys; and, after such oath taken, to cause him to be admitted an attorney of such court respectively, and his name to be enrolled as an attorney of such court respectively, *without any fee or reward, other than one shilling for administering such oath;* which admission shall be written on parchment, in the English tongue, in a common legible hand, and signed by such judge or judges respectively, whereon the lawful stamp shall be first impressed, *and shall be delivered to such person so admitted.*

The facts, as here stated, having been proved by affidavit, the *Court* ordered, that the secondaries should deliver to Mr. Brundrett his admission as an attorney of the court, and pay the costs of the application, to be taxed by one of the prothonotaries.

## COSTS BEFORE ACTION.

*To the Editor of the Legal Observer.*

Sir,

In this reforming age, when every thing but what is practicable is proposed to be done to remedy that which is, or is fancied to be, wrong, perhaps I may not exactly please those who expect miracles, instead of wholesome corrections, effected in a business-like manner, by the course I have already adopted, and intend to adopt, of pointing out the particular cases where alterations made without the aid of magic would be useful, and by which the ground of complaint which at present exists would be entirely removed. But so long, sir, as I am favoured with the sanction and encouragement of yourself and many others, who view things with temper, and feel desirous that the pruning-knife should be applied, and alterations made, *only* where needed, I shall be very little solicitous about the cavils of the class of individuals before alluded to.

But, not to intrude too much upon you, I shall proceed at once to that which I intend to form the subject of this paper. Every one knows that the costs of the profession are condemned as exorbitant, except by the practitioners, who are the best judges; — what if I show that the complainants are often themselves most wilfully the cause of that very amount of costs against which they so loudly exclaim?

To take an instance of common occurrence. My client directs me to apply to his debtor. I write, but receive no reply. When my client calls to ascertain the result, wishing to lean to the side of mercy, he instructs me to make another written application; and, if that also fail, a personal call. Well; at last I obtain the money without suit; — and the debtor is of course exceedingly thankful that large expense has not been incurred, and pays me with readiness the trifling sum I ask for my trouble. No. Quite the reverse! He says, "There is the amount of the debt I owe Mr. So-and-so, and you must look to him for your costs." Should I remonstrate, I am thus silenced: "You know, sir, you cannot *demand* any thing, for you have not issued a writ." The man thinks he has outwitted the lawyer, and tells the circumstance to his intimates with as much glee and satisfaction as if he had done a praiseworthy action.

Now, it is not very often, in cases of this description, that an attorney likes to charge his client for what he has done: at all events, not adequately. The consequence is, that, having frequently been tricked, he gives but short notice of his instructions to sue, and, immediately upon its expiration, commences proceedings. These, if allowed to go on for a stage or two, occasion comparatively large costs, but the debtor is *legally obliged* to pay *them*, if he have the means. Thus, an imperfection in the law, and an eager desire to turn that imperfection to an improper account, have caused many a man to pay a much greater sum for costs than the attorney would otherwise have felt inclined to demand.

Lord *Tenterden* has, in the case of *Monson* v. *Summers*, K. B. M. T. 1830, (as reported in the fifth Number of the Legal Observer, p. 77.) endeavoured to remedy the evil to a certain extent: but half measures will not do. He merely says, that "if, in answer to an application by a creditor's attorney for payment, the debtor applies for time, and receives the indulgence he desires, he ought to pay the attorney's charge for the application, and for the attendance, which have been rendered necessary by his own request." But in most cases the debtor makes no request: still, he ought in justice to pay the costs. At present, he cannot be compelled to do so. I hope, then, these things will meet with consideration from those whom they concern, and who have the power to remedy the defect; and remain, sir,

Your most obedient servant,

F. W. G.

## DETAINER OF INSOLVENT DEBTORS.

*To the Editor of the Legal Observer.*

SIR,

I BEG to call the attention of the profession to a point connected with the Insolvent Debtors' Act, which, probably, may not be well known; and it is so preposterous, that no one would anticipate such a rule, had they not felt its consequences.

An insolvent debtor is in custody at the suit of a creditor; and, as is most frequently the case, the arrest has been made by *a friend, by way of assisting an application for a discharge.* Another creditor opposes the discharge, and the court remand the insolvent for gross fraud for six months. The insolvent appearing the following week *at large*, the creditor who opposed naturally enquires, how this can be? the answer is, "The marshal of the King's Bench will not recognise the power of the insolvent court; the man has been discharged in *common course* by his detaining creditor, and is no longer in custody." And it appears that at *the end of the six months* for which he was remanded by the Insolvent Debtors' Court, he will be discharged *from all his debts in the schedule* in the same manner as if he had remained in custody. The opposing creditor is then told that he must proceed to arrest, or (as in the case I am alluding to) to judgment and execution; and then he may take him on a *ca. sa.*, which will place him in custody to the termination of *the six months* only, when he will be discharged as a matter of course, under the order made by the Insolvent Debtors' Court.

This, of course, makes it necessary that the opposing creditor should, upon a remand of the prisoner, immediately lodge a detainer. But the doctrine is so monstrous and absurd, that I cannot help calling the attention of the profession to it: and probably the legislature may think fit to make some alteration in the law; or the power of the court seems only given to be laughed at and abused.

I am, Sir,

Your obedient Servant,

B. A.

Gray's Inn,
April 26. 1831.

## BAIL COURT. — KING'S BENCH.

IT may not, perhaps, be unimportant to the profession to know, that the bail court of the Court of King's Bench sits now, and will continue to sit, at ten o'clock in the morning, instead of half past nine. This intention of the court was declared by Mr. Justice *James Parke* in the last term. The continuation of the sitting of the court at half past nine, instead of ten o'clock, the hour at which the other court sits, would, indeed, be absurd, since the reason for the difference of the hours has ceased. It was, previous to the 11 Geo. 4. and 1 Will. 4. c. 70. § 1., advantageous that the bail court should sit at half past nine o'clock, in order to allow the single judge presiding in that court to meet the other judges at ten o'clock, so that there might be a full court at that hour. But since the increase in the number of judges under the provisions of the above act, no benefit can arise from the continuance of that practice. The hours and place of holding the bail court have been frequently changed at different times. Previous to *Warren Hastings*'s trial, bail were justified in the King's Bench, in the same manner as they were in the Common Pleas and Exchequer before the passing of Sir *James Scarlett*'s act. At that trial, by a rule of court* it was directed that the Court of King's Bench should sit in *Serjeants' Inn Hall*, during term, from half past eight o'clock till ten, for the purpose of taking justification of bail, and hearing motions of course, and discharging insolvent debtors: and that it should adjourn on Mondays, Fridays, and Saturdays, from *Serjeants' Inn Hall* to Westminster Hall, to transact the usual business, except the justifying of bail and discharging insolvent debtors, which business was directed to be transacted entirely at *Serjeants' Inn Hall;* and it was ordered that the bail should attend before half past nine, and that, if they did not, they should not be permitted to justify. This rule was repealed by a subsequent one, ordering that the sittings of the court in *Serjeants' Inn* should be discontinued, and that the business there transacted should be done in the Court of King's Bench at Westminster, where one of the judges would sit, during term time, every morning at half past nine o'clock, for the purpose of taking the justification of bail, and discharging insolvent debtors; and it was directed that no bail should be permitted to justify after ten o'clock. Accordingly, when the bail court was established, Mr. Justice *Bayley*, sitting in that court, directed it to be understood in future, that bail intended for justification must be in Westminster Hall by half past nine o'clock in the morning; and that, if the bail were not ready, and the papers delivered to counsel, by ten o'clock, no bail would be taken after that hour. When there are but few bail, it is necessary that they should be very punctual in the time of their attendance; for if they are not ready when the judge takes his seat, he will not wait for them till ten o'clock; but when the bail are numerous, the exact time of their attendance is not so material.† The arrangement with respect to the judge not waiting for the bail, if not ready at the time of his sitting, was not universal. Mr. Justice *Bayley* and Mr. Justice *Littledale* were always accustomed to sit till ten o'clock, whether any bail presented themselves

* East. T. 28 Geo. 3.

† Tidd, Prac. vol. i. page 262., 9th ed.

or not. Mr. Justice *James Parke*, on the contrary, used to rise after sitting a few minutes, if no bail presented themselves. Now, the course is for the bail to be taken as long as the papers are handed in, until the common paper is called, or motions have begun. In either of those cases no more bail will be taken. On the last day of term the same rule exists as before, of taking bail at the rising of the court.*

The course of business in this court is now as follows:—At the sitting of the court, all oaths and declarations are taken and received, first by official persons, next by barristers, and last by attorneys. Bail in person, and by affidavit, are then taken. The Judge then goes through the bar for motions which are not contested, and then for motions which are contested. The peremptory paper is then called, and disposed of. The cases in this peremptory paper, of course, only relate to matters of practice. The common paper is taken here, instead of the large court, on Tuesdays and Fridays, and immediately after the bail business is concluded. After the peremptory paper has been disposed of, the Judge goes through the bar as long as any gentlemen have motions to make. As soon as there appear to be no more motions to make, his Lordship rises. He does not, however, sit longer at any time than will permit him to reach chambers by three o'clock.

It is frequently the custom in this court for rules *nisi* to be granted by the judge in matters of a much more important description than those of practice, and then cause is shown before the other judges. In cases, too, of practice, where there appears to be a difference in the decisions, the barrister making the motion is either referred to the other judges, or the judge presiding in the court consults them, and afterwards informs the bar what is their opinion.

## COMMISSIONERS OF BANKRUPTCY.

Mr. Park, the son of Mr. Justice Allan Park, has been appointed a Commissioner of Bankrupts, in the place of Mr. Macarthur.

Another vacant Commissionership has occurred by the death of John Calthorpe Gough, Esq. of the Twelfth List.

## SUPERIOR COURTS.

### LORD CHANCELLOR'S COURT.

FOREIGN STATE. — FRAUD. — USURY.

This was an appeal from a decision of the Vice-Chancellor, who had allowed a demurrer which the defendant had filed to the plaintiff's bill. The bill charged the defendants (Barclay and Co.) with having committed certain frauds of a serious nature. It stated that they had represented themselves to be the agents authorised by the Guatemala Government to contract a loan; the Guatemala Government being formerly a colony of Spain, but which had revolted from her dominion, and the independence of which was not recognised by England; and that the defendants Powles and Co. had represented themselves as parties to the loan, for the contracting of which the defendants (Barclay and Co.) were said to be agents. The bill further stated, that on the faith of these representations the plaintiff had contracted for scrip, and given a certain price for it which he would not otherwise have given; and further charged, that the alleged representations on the part of the defendants were untrue, and that the defendants (Barclay and Co.) and Powles and Co. were in league together. To this bill the defendants demurred, and the Vice-Chancellor allowed the demurrer.

The *Lord Chancellor* was of opinion that this decision was correct. In the argument, three objections were made to the contract in support of the defendant's case:—1. That, the transaction was usurious. 2. That there was a general want of equity. 3. That, from the peculiar character of the Guatemala Government, there was nothing to entitle the plaintiff to the relief he sought. As to the first, he thought that the transaction was not usurious. It was true that the words "six per cent. loan" were inscribed at the head of the scrip receipts. These words might indicate a loan at six per cent., but they were not sufficient to justify the court in applying to the whole transaction the nullities which had been enacted by the statutes against usury. He disagreed with the ground taken by the Vice-Chancellor, that it was not usurious because it did not appear from the contract that the interest was to be payable in this country. If the contract was made in this country, and was for the payment of a higher rate of interest than this country allowed, that would be clearly usurious; but this was not sufficiently clearly stated in the bill. As to the second point, he thought that there was sufficient equity, and referred to *Cobb* v. *Woollaston*, 2 P. Wms. 134. *Kemp* v. *Price*, 7 Ves. 237. *Green* v. *Barret*, 1 Sim. 45. It was upon the third point that he founded his judgment; and he relied upon the case of *Jones* v. *Garcia del Rio*, 1 Turn. & Russ. 297., which was sufficient to support the Vice-Chancellor's opinion. Had this case not been decided, he might have decided differently; but as it was, he considered himself bound by them; and he would also refer to the cases of *Detrütz* v. *Hendricks*, 2 Bing. 314.; and *Kinder* v. *Everett*, 3 Bing. 250.

*Thompson* v. *Barclay and others*, L. C. April 15. 1831.

### DE CONTUMACE CAPIENDO — PRIVILEGE.

Mr. *Bacon* applied to the *Lord Chancellor* for an order that the cursitor might issue the writ *de contumace capiendo* against the Marquess of

* Tidd, Prac. vol. 1. p. 362. 9th ed.

Westmeath, or that a day might be appointed to enquire into the objections made by that officer. The petition stated that Lord Westmeath had been ordered by the Court of Delegates to pay the sum of 200*l.* for costs, and that, upon his failing to obey that order, they signified the same to the *Lord Chancellor*, and Lady Westmeath thereupon applied for the writ *de contumace capiendo*, under the statute 53 Geo. 3. c. 127. *Lord Lyndhurst* directed this writ to be suspended until it might be discussed whether Lord Westmeath, being an Irish peer, was liable to be proceeded against by this writ. The matter had subsequently come on before the present Chancellor, and been argued before him by counsel, and he eventually ordered the writ to be issued. The cursitor now objected to issue the writ, because the significavit had abated by the death of the late king, George the Fourth, in whose reign it was made, and because the writ had in fact been made out, although it had not been issued.

The *Lord Chancellor* said, he could not make the order at once. The question was in all respects a very important one, and must be fully gone into. The point upon which *Lord Lyndhurst* had entertained a doubt was, whether Lord Westmeath, being a peer of Ireland, and being entitled to certain privileges, could allege those privileges in bar of the proceedings to be issued from this court in furtherance of the ecclesiastical process. He had since heard that question debated before him, and had been of opinion that the writ ought to issue. But with respect to the objections now made, it would be necessary to hear counsel on the part of Lord Westmeath.

His Lordship afterwards directed that notice of the petition should be given to the opposite party, and that it should come on for hearing on Saturday next.—The *Marchioness of Westmeath* v. *The Marquess of Westmeath*. L. C. April 21. 1831.

---

## VICE-CHANCELLOR'S COURT.

### INJUNCTION.—LORD MAYOR'S COURT.

An injunction was applied for *ex parte* to restrain the defendant proceeding in a case now pending in the Lord Mayor's Court. The facts were as follows: — The plaintiff was trustee under the marriage settlement of the defendant; and some years ago the defendant and his wife obtained from the plaintiff the whole of the trust money, amounting to 6000*l.* They had since gone to America, and had invested the money in the funds in the name of the defendant instead of the plaintiff; and soon afterwards defendant sold out a part of the fund, to the amount of about 600*l.*, and returned to England. This remittance came to the hands of Messrs. White and Pickersgill, American merchants in London; and the plaintiff, having obtained information of the fact, attached it in the Lord Mayor's Court. The money was given to the plaintiff, upon his giving sureties to return it within a year and a day, agreeably to the practice of that court. The plaintiff had given a declaration, and the defendant had pleaded the statute of limitation. The present bill was filed to obtain a discovery, and to restrain the defendant from any further proceedings in the Lord Mayor's Court.

The *Vice-Chancellor* granted the injunction. — *Hopkins* v. *Newton*. April 21. 1831.

---

## COURT OF KING'S BENCH.

### VENUE. — COSTS.

*Jenkinson* v. *Turner*.

*White* moved for a rule to show cause why, on the taxation of costs, the plaintiff should not be allowed the same costs as if the cause had been tried in the county of Middlesex. The cause was tried in the county of Surrey, and a verdict found for the plaintiff. All the witnesses were resident in Middlesex, and were taken thence to Kingston. The action was transitory, and therefore the plaintiff had a right to lay the venue where he pleased. If he did choose to lay the venue in a county different from that in which all the witnesses resided, he surely ought not to be allowed to make the defendant pay for that exercise of his caprice. If he were permitted to do it in this case, he might as well change the venue into the county of Northumberland, and thus put the defendant to all the extraordinary expenses thence arising.

*Taunton* J. But here it is not removed to any such remote county, but merely into the adjoining one. Kingston, too, is only twelve miles from London. There is no allegation of the change of venue being made for the sake of oppression. If that had been so, you should have applied before the trial to change the venue on any ground you thought it right to urge.

Rule refused.

---

### PAROL EVIDENCE.

*The King* v. *Hinckley*.

This was a case stated, from the sessions, for the opinion of this Court, whether parol evidence of the contents of a bond for the maintenance of certain persons could be received.

*Hildyard* and *Humphreys* appeared for the respondents; *Dwarris* and *Power* for the appellants.

The facts were these. Declarations by a rated inhabitant of the respondent parish named Arnold, stating that the bond in question was in his possession, were proved. It was also proved that the rated inhabitant, Arnold, was dead. Proof was then given that notice to produce the bond had been served on the parish officers of the respondent parish. The respondents urged, that the notice was of no avail, because the bond had not been traced to their possession. Parol evidence of the contents of the bond was then tendered. The sessions refused to receive it, and on this refusal the question as to the admissibility of that parol evidence came before this court.

Lord *Tenterden* C. J. The only question which the sessions have reserved for our consideration is, whether parol evidence of the contents of this bond ought to have been received or not by the sessions. In my opinion it ought not. Notice to produce it was served on the parish officers. Now, the only reason or argument for the admissibility of parol evidence of

its contents is, that the bond being properly in the custody of the parish, and in the parish chest, the non-production of it by the parish officers would be sufficient to render parol evidence of its contents admissible. Now, there is no evidence that the bond was in the parish chest. On the contrary, the only person whose declarations give any proof of its existence is Arnold; and he states that it was in his possession. It was consequently not in the possession of the parish; and therefore a notice to the parish officers to produce the bond could not render parol evidence of its contents admissible.

*Littledale* J. and *Parke* J. concurred.

*Patteson* J. It was impossible to infer that the bond was in the custody of the parish, after the direct declaration of Arnold that it was in his possession. In order to render parol evidence of its contents admissible, proof should have been given that it had come into the possession of the parish, or that application to, and search by, the legal representatives of Arnold had been made, and that it could not be found.

Rule discharged.

---

INSURANCE — FRAUD.

*Barber, Executrix of Barber*, v. *Morris.*

In this case the defendant had, in 1813, purchased an annuity of 100*l.* from the Rev. Mr. Hornby, for a sum of 700*l.*; the annuity to cease on payment of the 700*l.*, after three months' notice. For his own security, he insured Mr. Hornby's life at the Pelican Insurance Office. In 1824, Hornby gave notice that he meant to pay the 700*l.* at the end of three months from the date of the notice. The defendant then caused the policy to be sold by auction, and it was purchased by the testator, an attorney, who paid 64*l.* for it. His widow, the plaintiff, brought an action to recover back the money, on the ground that the policy, when sold, was worth nothing, or about to become worth nothing.

Lord *Tenterden* C. J., before whom the cause was tried at the last sittings for London, left it to the jury to say whether there was any misrepresentation or concealment on the part of the defendant at the time of the sale; and the jury being of opinion that there was not, found for the defendant.

*F. Pollock* applied for a rule *nisi* for a new trial, on the ground that the defendant knew, at the time of the sale, that the interest was about to cease, and consequently that the liability of the office to pay was about to cease also, and that there was no evidence, that he had communicated that circumstance to the purchaser. This, he contended, was an improper concealment. A witness from the Pelican Office had indeed proved that they were not in the habit of enquiring whether there was any interest or not, but paid when the event happened. But they were not bound in law to do so, and the practice was illegal.

The Court was of opinion that the purchaser, whether he made enquiries or not, meant to take his chance of payment by the office; and as the jury had negatived any fraud or concealment, the defendant was not bound to refund the price.

Rule refused.

---

MANDAMUS.

*In the matter of the Bishop of Gloucester.*

The *Attorney General*, on behalf of the Rev. Messrs. Halifax and Benson, Registrars of the diocese of Gloucester, applied to the court for a *mandamus* to be directed to the bishop of Gloucester, commanding him to assign his reasons for refusing to approve of Mr. Bonner, an attorney at Gloucester, who had been appointed by the applicants Deputy Registrar of the Diocese. By the patent, the applicants had the power to appoint the deputy, subject to the bishop's approval. The bishop refused to approve in this case, for good and sufficient reasons as he said, but without any intention to cast the slightest imputation on Mr. Bonner.

The Court, considering that as it was merely a question for the discretion of the bishop, who had exercised that discretion for good and sufficient reasons, as they appeared to him, refused to interfere.

Writ refused.

---

APOTHECARIES' ACT.

*Apothecaries' Company* v. *Ryan.*

In an action brought to recover penalties under the Apothecaries' Act, it appeared that the defendant was a surgeon practising near the village of Farningham in Kent; and seven cases were given in evidence, in which, as was alleged, he had practised as an apothecary; but the verdict, which was for the plaintiffs, turned only on one of them. In that, the defendant had been called in to the assistance of a person of the name of Hancock, whose disease was inflammation of the lungs and consumption, and bled him, and sent him a bottle of medicine, but sent no bill. Mr. Baron *Bayley*, at the trial, told the jury that the business of a surgeon was confined to external injuries, and under that direction the jury found for the plaintiffs.

*Platt* moved for a rule to show cause why the verdict should not be set aside, on the ground that a surgeon was authorised to exhibit medicine where that was incidental to surgical cases, and that this was a case of that description.

The Court was of opinion, that, although the rule laid down by Mr. Baron *Bayley* was too narrow, consumption was clearly a medical and not a surgical case, and refused the rule on that ground.

Rule refused.

---

KING'S BENCH PRACTICE COURT.

ATTORNEY. — PROCESS.

*Rex* v. *Ward.*

*Roe* obtained a rule in the last term to show cause why a person named Thomas Wallis should not be discharged out of custody, and the proceedings against him set aside; and why a person named Ward, at whose instance the former had been arrested, should not pay the costs of those proceedings; and why an attachment should not issue against the said Ward. The facts he stated were these: Wallis was arrested on a *latitat* indorsed with the name of Mr. John James Dawson, an attorney of this

Court. Ward was the plaintiff in the action; and it appeared that the writ was issued by him. The affidavit of Mr. John James Dawson was produced, and in it he swore that he had issued no such writ, and had given no authority to issue it in his name.

The defendant Ward now showed cause in person, and produced his own affidavit, in which he stated that he had given instructions to Mr. Dawson's brother, who was his managing clerk, to issue the writ; that the latter had gone with him to the different offices, and managed the whole, with the exception of the sealing. To the seal office he had gone alone, by the direction of the brother, and paid the usual fee.

*Roe*, in support of the rule, contended that this was no answer to his application. He in fact admitted he had done that which was essential to the issue of the writ, without the presence of Mr. John James Dawson's brother; and he must therefore be taken to have done that act himself. The defendant had therefore brought himself within the provisions of the 2 Geo. 2. c. 23. § 17. He cited *Oppenhein* v. *Harrison*, 1 Bur. p. 20. and 1 Tidd, Prac. pp. 73, 74. ed. 9.

*Taunton* J. That statute only applies to cases of parties practising in the name of attorneys. But here Ward only went to the Seal Office, and paid the usual fee. The case is therefore not within that statute. The whole transaction is certainly full of suspicion. The circumstance of Mr. John James Dawson's clerk not having made an affidavit to substantiate the statement of the defendant is very suspicious. But I think justice will be satisfied by making the rule absolute for setting aside the proceedings. I know it is the practice in many offices for managing clerks to issue writs in the absence, and without the knowledge, of their principals. Whether that is a commendable practice or not, is not for me to say. The rule must be discharged as to the costs and the attachment, and made absolute for setting aside the proceedings.

Rule absolute.

## MINOR CORRESPONDENCE.

Having served my clerkship in one of the most respectable offices in the profession, I cannot resist the impulse of the moment, by taking up my pen in behalf of that diligent class in society "the clerks of the profession." I suggested to the clerks in that office, the good effect which might arise by their embodying themselves into a society for their mutual improvement and benefit, and they immediately made answer, that attempts had been made by a few, but without effect. They complain that the whole of their time being so completely taken up by their employers, they scarcely can get one hour of an evening for their own amusement, and they partly attribute this as a cause of there being no society amongst them. I have two clerks myself, and I hope a suggestion coming from me as one of the profession, will not be deemed too presuming; but I think if during the vacation between the terms, the profession would mutually agree to close their offices at five, and require the attendance of their clerks from nine till that hour, their business would be perhaps more attended to, and at all events I think they would be no losers; and if this plan were adopted, the clerks would have an opportunity of reaping the advantages of the numerous institutions established in the metropolis, from which they are at present excluded.

Should you consider the insertion of this in your valuable paper likely to aid its object, by so doing you will greatly merit their esteem.

A SUBSCRIBER.

Lincoln's Inn,
March 3d. 1831.

## ANSWERS TO QUERIES IN NO. XXIV.

### PARLIAMENTARY AGENTS.

In answer to A. S.'s question, the only principle on which the gentlemen alluded to are allowed to practise is to be found, I think, in this saying, though "somewhat musty," —

> "For why? Because the good old rule
> Sufficeth them, — the simple plan,
> That they should take who have the power,
> And they should keep who can."

I quote from memory: but, seriously, I would propose a question in return. Are not the gentlemen so acting, not being solicitors, liable to the penalties of some or one of the acts relating to attorneys?

H. F. G.

### BILLS IN EQUITY, 15 H. 6. c. 4.

The act alluded to only imposed the same form in equitable proceedings as at the same period was required in proceedings at law. Witness our old friends and "pledges to prosecute, John Doe and Richard Roe." The latter form has been allowed to slumber without question for many generations, and we may presume for good cause. The like good and, I conceive, obvious cause has, I suppose, poured the same "oblivious antidote" over the act in question. Besides, the security in either case is only for "due prosecution;" and, if enforced, might only tend to aggravate a present evil.

H. F. G.

### JOINT AND SEVERAL BONDS.

1. Supposing *A.* to have the right of contribution against *B.*, I cannot conceive any ground why he may not proceed against the principal, and in his own name, without affecting his claim against *B.* I can conceive no plea that *B.* could avail himself of at law, and it would not certainly be a case for equitable relief. It seems to afford a much better plea for *B.* that *A.* has *not* proceeded against the principal, and this very point has been taken, but overruled, in 2 Bos. & Pul. 268. The only doubt on the right of contribution is on the *several* as well as joint nature of the bond; but I believe the right of contribution *does* exist.

H. F. G.

2. I am not aware of any case precisely in point, but I do not see upon what principle it could be contended that *A.*'s proceeding first against the original debtor would discharge the

co-surety, and, in my opinion, that circumstance alone would *not* have such an effect; but if by *A.*'s acts, the situation of the co-surety, against his consent, or without his concurrence, was altered or prejudiced in any way, then perhaps he would not continue liable. As, for instance, if *A.* accepted of a composition upon the whole debt from the principal without *B.*'s assent; or if *A.*, in a legal sense, was the author of the loss, 2 Bos. & Pul. 271. In Ellis's Law of Debtor and Creditor it is stated, that by suing the principal first the *obligee* discharges *the surety*, but there is no authority cited. I apprehend that the parties to the action against the principal must depend upon the fund by which the money was paid. That if one surety pays the whole, he is entitled to sue in his own name; if both sureties contribute, they must each sue separately; and that, if the fund is joint, the action must be joint.

X. D.

### CONDITIONAL DEVISE.

1. The query does not state what estate *B.* took or *C. was* to take. If *B.* took strictly on *condition* which it became impossible to fulfil, he would, I conceive, retain the estate, *Poor* v. *Mial*, 6 Madd. 32. The difficulty is, how such a bequest *could* be construed as a condition, though that very word might be used. It seems to be more properly either a remainder or executory devise, and would take effect or not, according to the estates of the parties, which, as I have observed, are not stated. Supposing *C.*'s estate to have failed, then *B.*'s heirs or devisees would take or not, according as *B.*'s estates were a fee, or for life only.

If this case be "founded on fact," there is obviously too little stated to form any just conclusion. If hypothetical, it is of no general importance, and idly put.

H. F. G.

2. I should consider *B.* has only a life interest in the lands, as they were devised to *B.* on condition that at his (*B.*'s) death they should go to *C.* Now, the words of the devise will not admit of any other construction than *B.*'s only possessing a life interest, as the words to *B.* and *his heirs*, or to *B. for ever*, are wanting, which would create a fee simple (*Fitz. Devise*, 16., and *Shep. Touchstone*); though, perhaps, the absence of these words might be looked over in a will, yet the meaning of the devisor here is evidently that *B.* should only hold the lands for his own life, and therefore I should consider they must revert to the next heir of *A.*

T. E.

3. The intent of the testator is clear that *B.* should only take a life estate; and, indeed, there are no words which would pass a larger estate (see 6 Cruise, 283., and the numerous cases on this point); and *C.*'s life estate being contingent on his surviving *B.*, determined at his death, therefore the heir upon the death of *B.* is the only person who can by possibility take.

A Subscriber.

## QUERIES.

### JOINT ACTION.

*A.* sues *B.* and *C.* jointly in *assumpsit*. *B.* pleads issuably, but *C.* suffers judgment by default. The issue is made up and delivered to *B.*, and notice of assessing damages served upon *C.* Afterwards *A.* wishes to amend his declaration, by adding a count containing a new cause of action. Can he do so without making *C.* a party to the amendment? H. C.

### SURVIVING PARTNERS.

By a deed of partnership between several persons, each partner, so far as relates to the performance by him, *his heirs, appointees, executors, administrators, and assigns*, for himself, his heirs, executors, and administrators, covenants with the other partners, their heirs executors, administrators, and assigns, that each of them, *his heirs, appointees, and assigns*, shall, for the term of fourteen years, continue as partners, &c. No provision is made in case of the death of any of them.

One of them having died, I would know whether the partnership is *ipso facto* dissolved, or whether the representatives of the deceased are to be considered as partners, and can be compelled to contribute their share towards the expenses incurred subsequent to his decease, the concern being a losing one.

The general rule is, that a partnership, on the death of one member, survives to the others, as joint tenants. Does the introduction of the words "heirs, appointees, executors, administrators, and assigns," take the present case out of the rule? J.

## MISCELLANEA.

### 'ATTORNEY'S BILL.

Among the persons opposing the discharge of Sir John Ignatius Burt, who lately applied for relief under the Insolvent Debtors' Act, were several agents. Rather a curious *item* was introduced into the bill of one of them, which was the following: —

"To coming from Dublin to Holyhead in a storm, for you; in fact, Sir John, for doing impossibilities for you, 500*l.*"

### SIR THOMAS MORE.

Roper, in his life of Sir Thomas More, mentions "that he was introduced by his father into the house of the right reverend, wise, and learned prelate, Cardinal Maerton, where, thoughe he was younge of years, yet would he at Christmas-tide sodenly sometimes stepp in among the players studinge for the matter, make a part of his own, there presently among them, which made the lookers on more sport than all the players beside. In whose witt to towardnesse the Cardinal, much delighting, would often say of him unto the nobles that divers times dined with him, 'This child here waiting at table, whosoever shall live to see it, will prove a marvelous man.'"

# INDEX TO VOLUME I.

*The Quarterly Digest will contain the* points decided *by the Cases reported for the "Legal Observer." The general subjects of the Decisions are here stated.*

A

D



E

J



K



L



M

S

END OF THE FIRST VOLUME.

LONDON:
Printed by A. & R. Spottiswoode,
New-Street-Square.