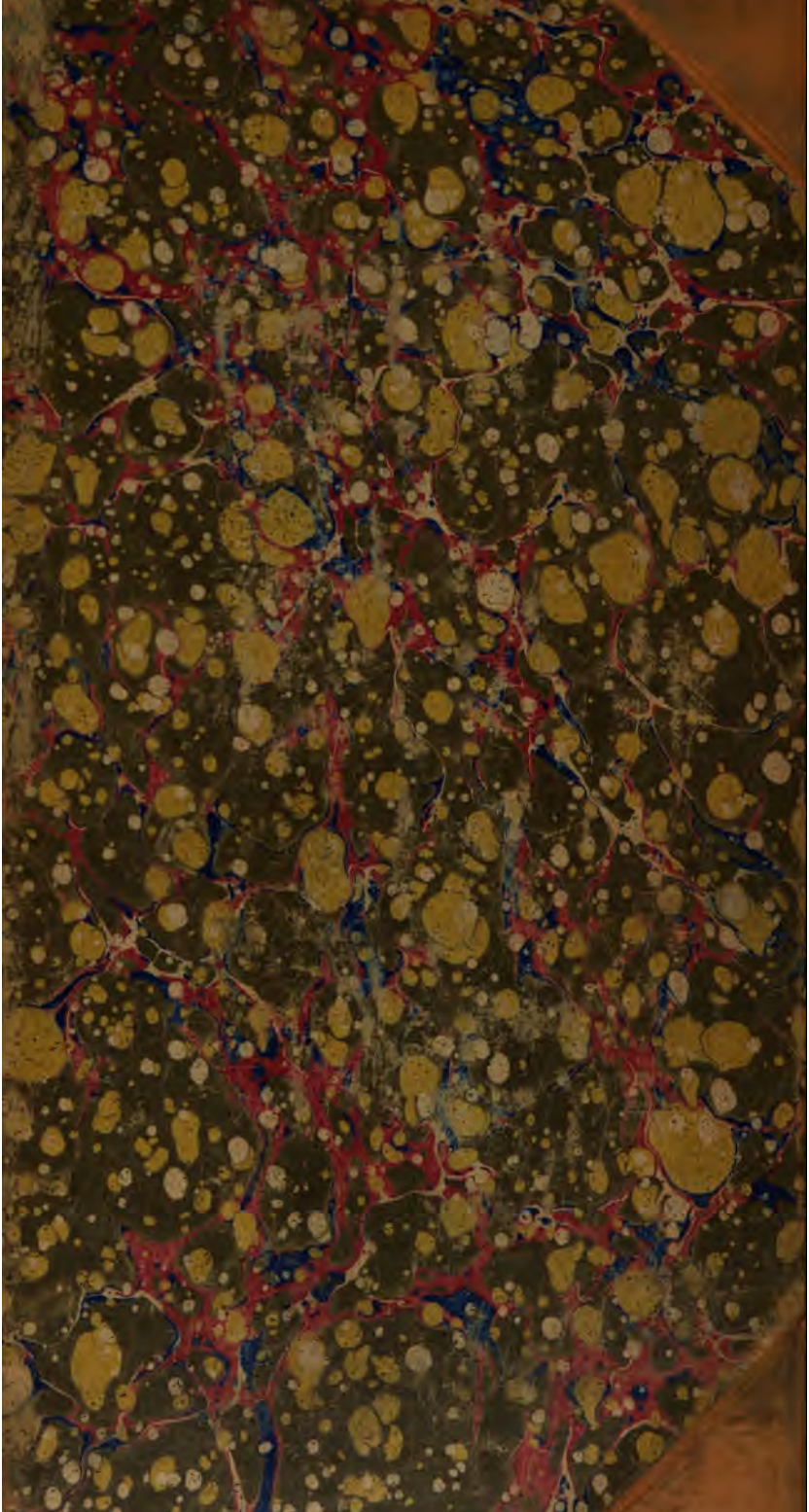

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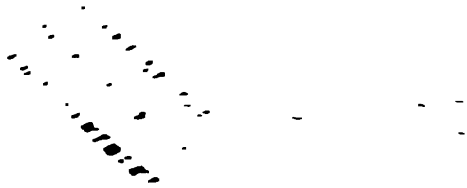

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No. XLIX.

ART. I.—OUR JUDICIAL SYSTEM; ITS PRINCIPAL DEFECTS, AND SUGGESTIONS FOR ITS AMENDMENT.

NO one can fail to be struck with the progress which has been made by the cause of Law Reform within the present generation. Within the memory of some now at the Bar, the grotesque fictions of Fines and Recoveries were resorted to for the purpose of barring estates tail; and it is not twenty years since Doe and Roe carried on their pranks in Westminster Hall. Owing to the sharp line of demarcation between matters of legal, and matters of equitable cognizance, a plaintiff was frequently uncertain in what court to take proceedings. And often, when a suit was begun in equity, the scene of the litigation was shifted to a court of common law. In no case was the equity judge bound by the proceedings at law. Where an equity judge sent a case for the opinion of a court of common law, if that opinion were not satisfactory to the equity judge, he might send the case into another court; and sometimes to a third. In some instances, after obtaining opinions from more than one court of common law, the Court of Chancery declined to adopt any one of them, and decided

at last upon its own view of the case. So absurdly strict was the law of evidence, that no person who had the remotest pecuniary interest in the result of any litigation was admitted to give evidence, and thus justice was defeated by the exclusion of the testimony of the persons best acquainted with the merits of the question at issue.

These and other kindred abuses have been in part remedied by the following Acts among others; as to the Common Law, by the Acts for improving the Law of Evidence, and the Common Law Procedure Acts, of 1852, 1854, and 1860; as to Chancery, by the Chancery Jurisdiction Act, 1852; the Chancery Amendment Act, 1858; and the Chancery Regulation Act, 1862. The powers of the courts, both of common law and equity, are now considerably enlarged, so that the jurisdiction of each has been extended to embrace much that formerly belonged exclusively to the other. Courts of common law have now power, in certain cases, to grant writs of injunction, and to entertain equitable pleas and replications. Courts of equity are empowered to decide questions of legal right, which may come before them, and, in certain cases, to award damages to parties injured. The restrictions on the admissibility of evidence have been, in all but a few cases, removed; and fictitious and needless averments are abolished.

Are, then, the reforms which have been effected sufficient for the administration of substantial justice without let or hindrance, or is it desirable to make further progress in the direction indicated by recent legislation? Can it be said that the Acts, to which we have referred, proceeded on any broad and definite principles, or that they did more than remedy some of the more glaring inconveniences which, until lately, encumbered the course of justice?

We would begin by offering a few remarks on a question which has occupied considerable attention of late, whether a complete fusion between "law" and "equity" might not be desirable.

By the "fusion of law and equity" is meant, *not* the abolition

of any of those rights which, in technical language, are called "legal," or of any of those rights which are called "equitable," *but* the abolition of the broad and artificial line of demarcation which English jurisprudence draws between them, and of the separate administration for the two classes of rights which now exist. It will not be denied that all needless administrative distinctions should be avoided, as tending to encumber the course of justice. Is then the distinction in question a rational or a purely technical distinction?

"It will be obvious," say the Chancery Commissioners,* "on considering the different subject matters of which courts of law and equity are ordinarily required to take cognizance, that there must be different rules of procedure with respect to some of these matters; a necessity which arises, not from any technical rules, but from an inherent difference in the nature of the subjects to be dealt with." But the question is not, whether the subjects which come under the cognizance of courts of equity are in general different from those which come under the cognizance of courts of law, or whether they sometimes require a different procedure, but whether the difference is of such a nature as to justify entirely distinct administrative systems. Is there any greater difference between legal rights and equitable rights than there is between different classes of equitable rights? Granted that there is a wide difference between an action for the non-delivery of goods and a suit for the administration of a deceased's estate; is there not as great a difference between an administration suit and a proceeding to restrain a nuisance by injunction? And if the jurisdiction of a court of equity be wide enough to embrace the two latter objects, why should the equity court be incompetent to take cognizance of ordinary actions of tort and contract? The Commissioners urge that the machinery of a court of law is not adapted for the consideration of the complex cases which often come before courts of equity; but that it is applicable where one party

* First Report, 27th Jan. 1852, pp. 2, 3.

seeks to recover from another a sum of money or specific goods, or land, &c. Undoubtedly; but does the converse hold good? Is the machinery of a court of equity inapplicable in the latter class of cases? Let us consider what in general constitutes a particular matter the subject of equity jurisdiction. It is the negative circumstance, that justice in the case can not, or originally could not, be adequately and efficiently done in courts of law. Thus it is clear that equity jurisprudence must embrace a wide field of heterogeneous matter. What objection can there be to extending this field a little further, and making our courts of equity, or any courts which may be substituted for them, courts, not of law or of equity in the technical sense of these expressions, but courts of justice?

It is a strong presumption against the reasonableness of the distinction which we are considering, that it is utterly unknown in any systems of jurisprudence, except the Roman and English. "The distinction," says Austin,* "of positive law into law and equity arose in the Roman, and also in the English nation, from circumstances purely anomalous. The distinction is utterly senseless, when tried by general principles; and is one prolific source of the needless and vicious complexness which disgraces the systems of jurisprudence wherein the distinction obtains." And Mr. Haynes says:† "The distinction between equity in the technical sense and law, is truly matter of history, and not matter of substance. The strongest argument in support of this assertion is that derived from the fact, that in our country alone (I except, of course, such of the American States as have inherited or adopted our equity system) are to be found the double jurisdictions of law and equity. The short sum of the matter is this,—that the Court of Chancery recognizes certain rights and applies certain remedies, which the courts of law might have equally recognized and applied, but did not."

It must be observed, that, in order to a complete fusion of

* Jurisprudence, vol. i. p. lxix. ed. 1860.
† Outlines of Equity, pp. 7, 8.

law and equity, it is not sufficient that there should be one court for the administration of legal and equitable rights. If, in bringing his plaint before a court, a plaintiff is bound to proceed on the "common law side" or "equity side" of the court, according as the matter is one of legal or equitable cognizance, under such a system the distinction between law and equity still subsists. In order to an entire fusion, the distinction between matters of legal and matters of equitable cognizance must be obliterated as completely as was the distinction between different forms of action by the Common Law Procedure Act of 1852.*

But, it is said, the modes of procedure at law and in equity are wholly different. The one is adapted to comparatively simple, the other to more complex cases. Now we fully admit that the cases of which equity takes cognizance are in general more complex than those of which the common law takes cognizance. But, so far as this is a natural distinction, it is a distinction only of degree and not in kind. Actions of contract in general involve more complicated issues than actions of tort; yet we have not separate courts for the trial of these different classes of actions. It should further be remarked, that the comparatively complex character of equity suits consists, not so much in the matters of fact to be investigated, as in the nature of the relief sought. The facts necessary to establish a case may be perfectly simple, and yet, for the purpose of securing the relief prayed for, a very complicated machinery may be requisite. A suit for the administration of the trusts of a will or a marriage settlement may possibly not involve a single disputed question of fact or of law. Again, an action on a policy of insurance, though only an action for damages, may involve issues the most complicated. Now if, as we suggest, the powers of the courts of law and equity were united in a court of justice, such court must be armed with sufficient machinery to do justice in every case which may be brought before

* 15 & 16 Vict. c. 76. s. 3.

it. It would not be necessary to obliterate the present distinctive modes of procedure. The plaintiff's advisers might be allowed the choice of either mode of proceeding, either by declaration or petition,* whichever in their opinion might meet the exigencies of the case. Similarly, a defendant or respondent not demurring might be at liberty to make his defence by plea or answer; the main distinction between the two classes of pleading being, that the former would be confined to the *substantive facts* material to the case of the party, whereas the latter, being the party's story of the case, might comprise a good deal of matter which would be merely evidence. It should be open to either party, by joinder at any stage of the pleadings, to leave a more or less complicated issue to the decision of the Court. Circumstances of justification or extenuation on the part of a defendant or respondent should not be admissible in evidence under the general issue. Contradictory pleas by the same party as to any matter which must, by the nature of the case, be within his knowledge, should not be permitted; and the wilful insertion of false matter into any pleading should be punished, at least as a contempt of court. Needless prolixity in the pleadings would be punished in the taxation of the costs.

The above rules might, without much difficulty, be adapted to cases in which there might be three or more distinct parties. It is not, however, an object of the present paper to discuss the rules of pleading, so much as to insist that the present distinctive procedures in common law and equity need be no bar to the desired administrative fusion of those two branches of jurisprudence.

Assuming, however, that it is desirable to fuse the administrations of law and equity, is it desirable to extend this fusion

* Even if it be determined to retain the present distinctive administrations of law and equity, the distinction between "bills" and "petitions" in Chancery might, with advantage, be abolished. Every bill is in substance a petition; and no petitioner should be subjected to the liability of having his petition dismissed because the relief prayed for ought to have been sought by bill, or *vice versâ*.

so as to embrace other courts? Should there be one court, or one class of similar courts, embracing in their scope all matter, not only of Law and Equity, but also questions of Bankruptcy and Lunacy, and all matters of Probate, Matrimonial, and Admiralty jurisdiction?

We do not think that there need be any difficulty as to cases of Bankruptcy and Lunacy, considering the jurisdiction which is at present exercised upon these matters by the Lord Chancellor, and Lords Justices of Appeal in Chancery.

With regard to the Court of Probate and Divorce, there is no reason why it should continue a distinct court. The Commissary Courts of Scotland, which formerly had jurisdiction over matters testamentary and matrimonial, are abolished, and their duties transferred to the Sheriffs and the Court of Session. There can be no reason why a similar course should not be adopted in England, and the cognizance over probates of wills transferred to the ordinary courts of the country. As the law at present stands, it is necessary to go the Court of Probate in order to establish the validity of a will; but if the construction of a will be doubtful, recourse must in general be had to the Court of Chancery; and, so far as the will disposes of legal interests in real estate, its construction must be determined by a court of common law.

Suits for divorce and judicial separation have such a strong resemblance to ordinary criminal cases, that there does not seem any necessity for their cognizance by a distinct court.

Nor can there be any reason why the Court of Admiralty should remain a distinct court. Here, too, we have the example of Scotch legislation to guide us. Matters of Admiralty jurisdiction (including, it is true, many questions which in England would be settled by an ordinary civil action) have been, even more completely than consistorial cases, incorporated into the general jurisprudence of that country.

What we would suggest, is, that there should be no distinction between different courts with regard to the subject matters of their jurisdiction, but that all courts should be simply courts

of justice, with full powers in every case to administer such relief, and to impose such penalties as may be sanctioned by the law of the land. This rule, however, would naturally be subject to one important exception or qualification. Cases of importance ought to come under the exclusive jurisdiction of a superior class of tribunals; whereas cases of a trivial nature might be effectually dealt with by inferior jurisdictions. Hence all cases of divorce, and all capital cases, as well as many other cases, whether of a civil or criminal nature, would come under the exclusive cognizance of the superior tribunals; the inferior tribunals having, however, a power over such cases to the extent of certifying the existence of a *primâ facie* case for investigation by the superior tribunals.

Putting aside, then, for the present, the question of appellate jurisdiction, which we will consider separately, we would suggest: That all executive courts (that is, courts not of appeal) should be distinguished into two classes only; superior and inferior courts: That the superior courts should have jurisdiction to do full justice in every case, whatever its nature, importance, or triviality: That the inferior courts should have final jurisdiction only in cases of a less grave nature, but that in matters of importance their functions should be confined to putting cases in train for fuller investigation by the superior courts: That the extent of the jurisdiction of the inferior courts should be defined by parliamentary enactment; but that the distribution of business between one inferior court and another, or between one superior court and another, should, so far as such distribution were desirable, be effected by General Orders: That the courts, both superior and inferior, should be distributed about the country, and not be confined to the metropolis. The judicial officers of the superior courts might be styled "judges;" those of the inferior courts "magistrates," or "justices of the peace." All powers exercised by inferior courts should, in general, be exerciseable by superior courts, subject to any plan which might be settled by General Orders. For the judgeships of the metropolitan

courts, it would be specially important that persons of high legal talent and eminence should be selected, and that a considerable number (at least of the superior courts) above the usual proportion should be collected in the metropolis for the trial of those cases which, though not arising in the metropolitan district, might, through their non-local character, or their importance, or other reason, be more conveniently or more properly tried in the metropolis. But the judges of the metropolitan courts would be merely *primi inter pares*, bearing much the same relation to the judges of provincial courts as the Recorder of London bears to the Recorder of any provincial town.

Many important questions would, of course, arise for consideration: 1. Should the courts we propose to erect sit permanently for the transaction of any business which might be brought before them, or should they hold occasional sessions only? 2. Should they consist of one judge only, or of more than one? 3. Should each judge be fixed locally in one court, or visit different places in circuit? 4. How many of such courts should there be? Should there be besides the metropolitan courts, seven or eight superior courts distributed through the country in the principal towns, or should there be, on the average, one in every county? 5. Should the inferior courts be entirely independent of any superior courts, or should each superior court have a number of inferior courts dependent on it, and more or less under its control? 6. Should the principle of local or territorial jurisdiction be recognized in the case of either of these classes of courts, and, if so, to what extent; or how otherwise should a plaintiff or promoter of a suit be controlled in his choice of courts, and his manner of conducting the suit? 7. To what extent should trial by jury be admitted, and, in general, how far should the lay element be admitted in the administration of justice?

On the first point, we have no hesitation in saying that the courts we propose to erect ought to hold permanent sittings. If any vacations were desirable, six weeks in the autumn,

a fortnight at Christmas, a week at Easter, and (perhaps) a week at Whitsuntide, would be amply sufficient for that purpose. These things, however, should be matter merely of judicial arrangement, and no decree or decision of any court should be inoperative because it happened to be made in the legal vacation or on any holiday. The country has a right to expect of a person who undertakes a judicial office that he will bestow all his energies on the work which he has undertaken, and not be engaged in any independent functions. No judge, whether of a superior or inferior court, should be allowed to practice at the Bar, while holding the office of judge. Under a system of entire separation of the courts of appeal from the courts of original jurisdiction, one of the principal reasons for dividing the legal year into terms and vacations as is now done, would cease to exist. Under the present system the judges of the courts of Westminster are compelled to be absent from London for a considerable period while they are trying cases at the assizes. Again, as the assizes occur only twice or three times in the year, and the sessions four times in the year, it is evident that a good deal of delay takes place in the administration of justice, which might be avoided if the courts held more frequent or permanent sittings. Persons accused of crime are sometimes detained in prison several months before they are brought to trial, not from any difficulty in their case, but merely from the infrequency of the assizes.

On the question whether a court should consist of one judge only, it might be urged that if, from sudden death, illness, or other cause, a judge were rendered incapable of continuing the functions of his office, some inconvenience might ensue to suitors owing to the necessary delay in appointing his successor. Whereas, if every court consisted of two or more judges, they would not only be enabled to relieve one another on ordinary occasions, but in the case of the sudden removal or incapacity of one of them, the cases which would otherwise have come before him, would be at once transferred to one of the other judges, and no inconvenience to suitors would arise. The

systematic trial of ordinary cases before more than a single judge would be a manifest waste of judicial force. For some reasons we should prefer the system of two or more judges holding their courts in the same or adjacent buildings, as the Vice-Chancellors do under the present system. Under such a system, a case marked for trial before Judge A. might, in case Judge A.'s court happened to be overloaded with work, be transferred to the adjacent court of Judge B., whereas, if there were no other judge within twenty miles, then, in the case supposed, the business of the court must get into arrear, or some cases must be removed twenty miles for trial elsewhere. This might perhaps be avoided by the appointment of a staff of supernumerary judges or commissioners, to visit any place where there might be excess of business for the courts, such judges or commissioners to be of the same rank and jurisdiction as ordinary judges of the superior courts, but differing from them only in so far as they are not attached to any fixed court. But the circuit system, with the necessary expense which it entails, should, we think, be as much as possible avoided. Such commissioners as we have mentioned would be necessary only where the stress of business might be purely accidental; the ordinary judicial staff should be made sufficient for the transaction of the ordinary business. Two judges for each court, with six judges unattached, whose business it would be, on the requisition of the Lord Chancellor, to visit any court which might be overloaded with business, would perhaps be sufficient for the purpose. With regard to the *number* of the superior courts, we think there ought to be an average of one in every county. Above all things, it is desirable to bring justice as far as possible home to the doors of the suitors; and we think that six or seven courts only, spread throughout the country, would not be at all sufficient for this purpose. Indeed, under such a system, it might be necessary that cases arising at York, which, under the present system would be tried at York, would have to be removed to Leeds for trial. In Wales it would not be at all

necessary that there should be one court for every county. The very small amount of business arising in Wales would, we think, outweigh any considerations of the importance of local justice. Or the alternative might be adopted of a court in every county, but in some cases without any fixed judge attached to it. Any cause which might be marked for such court would then be tried before one of the judges unattached. Other solutions of the difficulty will readily present themselves to the reader. These questions, however, need not be settled by the Legislature, but might be settled, and the settlement from time to time varied, by judicial authority, acting through General Orders. Parliament might even content itself with laying down a few broad rules and voting a certain sum of money for judicial purposes, leaving all details to be settled by General Orders. The question how far any number of inferior courts should stand in any definite relation to one particular superior court, is one which it would be highly expedient to leave to be settled and varied from time to time by General Orders, as occasion might serve. In any case it would probably be desirable to empower provincial magistrates, in cases above a certain amount, to commit cases for trial to the superior courts of the metropolis.

The next point to be considered is, should the principle of territorial jurisdiction be to any extent admitted? or should a plaintiff, or a crown prosecutor, be at liberty to institute an action or prosecution in any court, wherever the grounds of the action or prosecution may have arisen; subject in general to payment of costs occasioned by any unreasonable exercise of this power, and subject to the right on the part of the defendant to change the venue for cause shown?

By the common law all crimes were considered local, and were justiciable only in the county in which they were committed. To such an extent was this rule carried, that, before the Statute 2 & 3 Edw. VI. c. 24., a murder, committed by a stroke in one county, of which the person struck died in another, was not triable in either.

Several exceptions to the common law rule have been introduced by statute. Smuggling, and all other offences against the customs, are triable in any county of that part of the United Kingdom in which they have been committed. The crime of endeavouring to seduce soldiers or sailors from their duty, if committed on the high seas, or in England, is triable anywhere in England. Forgery, committed in England or Ireland, may be tried anywhere in England or Ireland, where the accused person may be lawfully in custody. Bigamy by a British subject, wherever committed, may be tried anywhere in England or Ireland. Subject, however, to these and several other statutory exceptions, the common law principle prevails, that crimes are local, and triable exclusively in the county where committed, subject to removal by certiorari on application to the Court of Queen's Bench.

Civil actions, if local, were, by the common law, triable exclusively in the county where the cause of action arose; whereas actions of a transitory nature might be tried anywhere. But, by a statute of Richard the Second, the venue in transitory actions must be laid where the cause of action arose. In practice, a plaintiff in a transitory action is at liberty to lay the venue where he pleases, subject to the right of the defendant to change the venue by a special order of the court or a judge. In local actions, by Statute 3 & 4 Will. IV. c. 42. s. 22, the court or any judge may, on the application of either party, order the issue to be tried in any other county than that in which the venue is laid.

In the county courts, by the 9 & 10 Vict. c. 95. s. 60, the summons may issue in any district in which the defendant or one of the defendants shall dwell or carry on his business at the time of the action brought; or, by leave of the court for the district in which the defendant or one of the defendants shall have dwelt or carried on his business, at some time within six calendar months next before the time of the action brought, or in which the cause of action arose, such summons may issue in either of such last-mentioned courts.

Thus we see that in criminal cases the jurisdiction of the court is, with few exceptions, strictly territorial; in civil actions, brought in the superior courts, the reverse is generally the case; but that in the county courts the jurisdiction is territorial, though not so strictly so as in criminal cases, and though depending in the first instance not so much on the place where the cause may have arisen as on the place of residence of the defendant, or one of the defendants.

The question, then, is which of these systems is the best, or generally what rules ought to be laid down on the subject? And, first, we think that no restraint on the territorial jurisdiction of the courts should be prescribed by parliamentary enactment. Whatever limitations it might be necessary to impose should be left to be imposed by General Orders; and under no consideration whatever should a trial be set aside as void merely on the ground that it did not take place in the proper county or district. To avoid abuse, on the part of the plaintiff, of the right of bringing his action anywhere, it might be provided by General Orders—first, that any party to a suit, whether plaintiff or defendant should be liable in costs for any proceeding in the conduct of the suit which might needlessly aggravate the expense; secondly, that if it should appear to the judge that neither the plaintiff's residence, nor the defendant's residence, nor the residence of the principal witnesses, nor any place in which the cause of action wholly or in part arose, were within a certain distance of the court to be specified in such General Order, the judge might remit the cause to any court in which it might more conveniently be tried, with costs against the plaintiff. The dangers we have to guard against are: On the one hand, the danger that the whole proceedings should be set aside for want of jurisdiction, which might lead to great difficulties in many cases, where, the facts being given, it might yet be uncertain in what district the cause of action should be held to have arisen; on the other hand, the danger of a plaintiff dragging a defendant into court at a remote and unreasonable part of the kingdom. To avoid

the first danger it should, as we have suggested, be provided that no judgment should be void on the mere ground that the trial had taken place in the wrong district. To avoid the second, judges might be restrained by General Orders from taking cognizance of cases which had arisen wholly beyond a certain distance from their respective courts, unless either the plaintiff or defendant or principal witness resided within such distance, or other distance named in such General Orders; or unless the defendant declined or neglected to raise the objection. Also, the Lord Chancellor might be empowered to transfer actions from one court to another in which they might more conveniently be tried, just as under the present system the Lord Chancellor frequently transfers Chancery causes from the paper of one Vice-Chancellor to another. It will be observed that, according to the plan which we suggest, a cause must be committed for trial by a judge or magistrate before it can be actually tried. If this should be thought objectionable as imposing too great a restraint on the bringing of actions, it will be observed that it is most desirable to place some check on the otherwise unlimited caprice of a would-be plaintiff. There are certain persons, as the judges of our common law courts are well aware, who are always bringing actions without a shadow of right. All that the magistrate would do in order to the trial of the action would be to certify the existence of a *primâ facie* case, and commit the case for a trial at such court as any General Order applicable to the case before him might direct. The magistrate should require the plaintiff to swear that the facts on which he grounded his action were true to the best of his knowledge and belief; but the magistrate should not be bound to hear any other evidence. If the facts sworn to by the plaintiff disclosed a clear *primâ facie* case, the magistrate would at once commit the case for trial, and require notice to be served on the defendant. If the statement sworn to by the plaintiff involved matters of law as well as of fact, *e.g.*, that the defendant was indebted to the plaintiff in such a sum, the magistrate might require the plaintiff to amend his plead-

ing, so that the *facts* on which the plaintiff rested his case might be at once apparent. The magistrate would then, at his discretion, have four courses open to him: 1. To commit the case for trial at some court to be specified in the order of committal. 2. To summon the defendant to show cause why the case should not be committed for trial. 3. To order the plaintiff to amend his pleading. 4. To dismiss the case. In committing the case for trial, the magistrate should, subject to General Orders, select any court which might be reasonably required by the plaintiff. As we have suggested that all functions exercised by inferior courts should be exerciseable by superior courts, it would be open to the plaintiff in the first instance to apply to a judge of a superior court to commit the case for trial; but in this case the judge who might hear the case should not be the same as the committing judge. Of course, a plaintiff whose case might be dismissed by one magistrate would not be precluded from making the same application to another. Nor do we think that any greater abuse could arise from the system which we advocate than from the present practice, in Chancery, of requiring bills and answers to be signed by counsel.

In case it were deemed wise to restrain the jurisdiction of the provincial superior courts within certain territorial limits, it would probably be desirable to exempt the metropolitan courts from any such restraints. In such case the metropolitan courts would differ from other courts of the same rank, only in the fact of their territorial jurisdiction being unlimited. It would often be a great convenience to suitors, particularly in suits for the administration of extensive estates, that action should be taken (as under the present system) in a court sitting in London.

Let us consider whether there would be any objection in applying the above rules to criminal cases. It might seem unfair that a magistrate should be empowered to send an accused to trial without hearing him in his defence, and so, no doubt, it would be under the present system, where a committal for trial

sometimes involves a detention for several months in prison. But if there is one thing which ought to be insisted on, it is that all courts, superior as well as inferior, should be almost continually in session, and not hold merely occasional sittings. No substantial improvement in the administration of justice can be looked for so long as the present vicious system of terms and assizes is allowed to continue. But, under the system we advocate, an accused person would be detained in prison just so long as might be necessary to enable the case to be fully prepared for trial. No greater hardship would then be inflicted than often is inflicted at present. Warrants of arrest must almost necessarily be granted on *ex parte* statements; and it frequently happens that a prisoner is remanded from week to week for the completion of the depositions against him. Under the system we propose, a magistrate would always, if he thought the state of the case required it, have it in his power to hear an accused person in his defence, before committing him to trial. The law of venue in criminal cases should, we think, be entirely abrogated, and a Crown prosecutor should be at liberty to institute the prosecution in any court, subject to the same conditions and restrictions as might be imposed on plaintiffs in civil cases.*

With regard to the time of trial, we think that a plaintiff or prosecutor ought in general to be required to proceed to trial within a calendar month of the proceedings before the magistrate, exclusive of vacations; but the time might be enlarged by special order, on application of either party to the committing magistrate, or to the judge of the court appointed to try the case, or to the Lord Chancellor.

We now proceed to a very interesting and important inquiry; to what extent should trial by jury be admitted, and, in general, how far should the lay element be admitted in the administration of justice?

With regard to grand juries, it is difficult to conceive

* See Mr. J. F. Stephen's "General View of Criminal Law," p. 189.

what possible purpose they serve at the present day. Nothing would seem to be more absurd than to drag away a number of citizens from their ordinary duties in order to confirm or reverse the decision of a competent magistrate who has fully investigated the case. The grand jury either affirms the decision of a magistrate by bringing in true bills, in which case its action is superfluous; or it reverses that decision by throwing out the bill, in which case its action would generally be mischievous. Frequently have grand juries complained of being taken from their daily avocations to serve the office of grand jurors, or, as it has been pointedly expressed, "presented themselves as a nuisance." But it is said, that, however superfluous grand juries may be in ordinary cases, it would be necessary to retain them for political offences. To this we may reply:—First, that the argument in question can apply only to treason and treason-felony, because, as the law stands, political offences below the rank of felony may be prosecuted without a grand jury by *ex officio* information before the Court of Queen's Bench. Secondly, that, assuming a grand jury to be necessary for securing justice to the accused in trials for treason and treason-felony, this would not justify its retention in ordinary criminal cases. In special classes of cases, especially where the charge is necessarily of a rather vague character, special safeguards are necessary to guard against abuses. Thus, by the Fraudulent Trustees Act, now incorporated into the Criminal Law Consolidation Acts, no person can be prosecuted for fraudulent breach of trust without the sanction of the Attorney-General. It might be required, if it were thought desirable to keep up the present grand jury system, or something like it, for treason or treason-felony, to require that twelve magistrates should concur in committing to trial any person accused of such crimes. Or, a safeguard might be provided by an enactment that no prosecution for treason or treason-felony should be instituted without the permission of the majority of the Supreme Court of Appeal. It would, however, not be difficult to devise additional safeguards in such cases.

The question how far petty juries ought to be retained is somewhat more difficult. We think, however, that in all criminal cases involving, or which may involve, questions of life and death, or degrading or infamous punishment, or imprisonment for more than a year, or fine beyond a certain amount, either party ought to be at liberty to apply for a jury. An admixture, on every trial, of jurors of the higher class of society, would be most desirable. It might be a question how far the system of judicial assessors might be made a substitute for trial by jury. In civil cases, we cannot but think that the trial by jury is, under the present system, grossly abused. A tribunal which does not command general confidence is worse than useless. The frequent applications for new trials show that, at all events as at present constituted, trial by jury in civil cases does not command unmixed confidence. We think that, in ordinary civil cases, the trial should take place before the judge sitting alone, or, on the application of either party, with two or three assessors. It should be observed that since trial by jury is a manifest inconvenience to the jurors who are called away from their homes to attend the court, and is in any case an incumbrance upon the simplicity of judicial procedure, the burden clearly lies upon its defenders of proving its utility. Now, there are two classes of cases in which it would be desirable to allow either or any party to apply for a jury. These are: First, where the issues involved in the result of a trial are so grave, that, however competent a judge might be to form an opinion on the merits, yet the verdict of a jury commands more general confidence, especially in cases to which the Crown might be a party, whether as promoter or defendant. Secondly, where the case is of such a nature that a jury selected for the purpose would be a better tribunal than a judge. A commercial cause, for instance, would be properly triable by a jury of merchants; or a case of disputed handwriting would be properly triable by a jury of experts. In other words, cases which it would require a special training to understand or appreciate thoroughly, should be committed

for trial to a tribunal composed for the most part of persons who have received such special training. But the persons so summoned might sit either as assessors to the judge, or separately as juries do under the present system. It would, of course, be very difficult to draw the line between cases of the second class above enumerated, and ordinary civil cases. A person injured by a railway accident might demand a jury principally composed of medical men to assess the damages. We think that in such a case (assuming that the *amount* of damages were the only matter in issue) either party should be entitled to demand at least that the trial take place before a judge, assisted by medical assessors. We cannot but think the system of assessors far preferable to the jury system as it at present exists. But supposing a trial takes place by jury, should unanimity be required; and should the concurrence of the judge be ever necessary to give effect to the verdict? And, if so, in what cases? We think, first, that unanimity ought not to be required. Perhaps the best plan would be to require the concurrence of the judge only in those cases in which the verdict might be returned by a majority of less than two-thirds of the jury. The acceptance of a verdict of a simple majority is justified by the example of the Scotch Criminal System, which, we believe, gives general satisfaction.

We should, however, be glad to see juries dispensed with in all cases which might safely be tried before a single judge, or before a judge sitting with assessors. Since trial by jury was introduced into the Court of Chancery by Sir Hugh Cairns' Act, the occasions on which juries have actually been summoned have been so rare as to lead to the supposition that the civil cases in which juries would be desirable would form but a small minority of all the civil cases which might come before the courts. The main objection, we think, to juries in civil cases is, that their verdicts are so frequently set aside on applications for a new trial. "There is," say the Common Law Commissioners in their Report of 1853, "a corrective to the occasional mistakes of juries in the authority exercised by the courts

where the verdict is plainly against the weight of evidence, and the judge is dissatisfied with the result, to send the case to another jury for further trial." No doubt much of this might be avoided by a better system of selecting jurors. We should be glad, however, to see the system of judicial assessors substituted as far as possible for trial by jury. Under the system of judicial assessors, the unrestrained communication between the judge and the members of the tribunal of *fact*, would enable the latter to have a far clearer view of the merits of the case, than they generally acquire under the jury system. It would be desirable that the grounds of the judgment, so far at least as they might involve questions of law, should be clearly stated in the judgment, and form part of it.

With regard generally to the lay element in the administration of justice, we consider that even if no fundamental change were made in our judicial system, the appointment of barristers of a certain standing, with salaries, to preside at county quarter sessions, as in Ireland, would be a great improvement. We do not propose that none but barristers should be admitted to the commission of the peace. The powers, however, of the lay magistracy should be strictly defined by General Orders; and they should be forbidden to undertake the cognizance of cases of a more difficult nature. It is a monstrous thing that the question whether the act of Mr. Eyre in causing Mr. Gordon to be executed in Jamaica, was or was not murder, should be submitted to the consideration of a bench of country squires. But, subject to proper restrictions, the lay justices might form a valuable auxiliary to the judges and magistrates in the administration of justice.

Hitherto we have considered the constitution and functions of courts of original jurisdiction. Two important questions remain yet to be considered; the constitution and jurisdiction of a Court of Appeal, and the question of a Department of Justice.

With regard to the constitution of a Court of Appeal, the two following propositions appear to us to be sound.

1. A Court of Appeal whose moral weight is not decisively greater than the courts whose decision it reviews, is *pro tanto* worse than useless.

2. A Court of Appeal which is practically inaccessible is, *pro tanto*, worse than useless.

The acceptance of the first of these propositions will imply a condemnation of the Court of Exchequer Chamber, and the Courts of Appeal in Chancery, as appellate tribunals; the acceptance of the second will imply a general condemnation of what is called "the House of Lords," and probably to some extent of the Judicial Committee of the Privy Council, as tribunals of appellate jurisdiction. With regard to the Court of Exchequer Chamber and the Courts of Appeal in Chancery, we submit that an Act abolishing these courts as Courts of Appeal, even if it did nothing else, would effect a great improvement in the administration of justice. But it is said, that if the appellate jurisdiction of the Court of Exchequer Chamber be abolished, parties wishing to appeal from any one of the three Courts would have to incur the expense and trouble of going to the House of Lords. We answer, this may be a very good reason for amending the constitution of the Court of Final Appeal, so as to make it more accessible to suitors; but it can be no apology for the existence of an intermediate Court of Appeal. Suppose that, under the present system, an appeal is brought from the Court of Queen's Bench to the Court of Exchequer Chamber, and the decision of the Queen's Bench is affirmed; no moral weight is added to the effect of the original judgment, unless, perhaps, in the exceptional case in which the Queen's Bench might be nearly equally divided, and the Exchequer Chamber unanimous. But if the decision of the Queen's Bench be reversed, what is the result? Nothing is settled; everything is unsettled. In any case, there is the same appeal to the House of Lords, which would have been open had the appellate jurisdiction of the Exchequer Chamber never existed; the difference being, that the parties have been at the trouble

and expense, which otherwise would have been avoided, of having the case argued before the judges in the Exchequer Chamber; and the moral weight of the judgment in the Queen's Bench being neutralised by the judgment in the Exchequer Chamber, an appeal to the House of Lords on the part of the defeated suitor, unless prevented by want of means, or bought off by a compromise, would be inevitable. Nearly the same may be said of the Court of Appeal in Chancery; but, in Chancery, the Judges of Appeal are specially appointed for the purpose of hearing appeals, and are distinct as a class from the judges exercising original jurisdiction. Where, then, an Appeal Judge in Chancery differs in opinion from a Vice-Chancellor, or the Master of the Rolls, we should think, *à priori*, more moral weight would be attached to the opinion of the Appellate Judge. But in appeals and in writs of error at Common Law, not only is this not the case, but the very reverse may be the case. The Court of Error consists of judges of the two courts other than that from which the appeal is brought; supposing then, that from an unanimous decision of four judges in the Queen's Bench, an appeal is brought to five judges sitting in the Exchequer Chamber, and the decision of the Queen's Bench is reversed by a majority of three to two. Then the opinion of three judges will prevail over that of six judges of equal rank, unless an appeal be brought to the House of Lords. Can there be a grosser absurdity?

Let us further consider the constitution of the House of Lords as a Court of Appeal. Can it be said that the judgments of the House of Lords are decisively of greater moral weight than those of the courts whose judgments it revises? The "House of Lords" for this purpose consists of eminent judges and lawyers, who have been promoted to the House of Lords. Not one of them (except the Lord Chancellor) is bound by his duty to attend; hence it is utterly uncertain beforehand, of whom or of how many the court will consist. In *Money v. Jorden*,* a decree by the Master of the Rolls was affirmed on

* 15 Beavan, 372; 2 De Gex, Macn. and Gord. 318; 5 H. L. Cases 185.

appeal, by the Court of Appeal in Chancery; Lord Justice Knight Bruce being for an affirmation; and Lord Cranworth for a reversal. The decree, so affirmed, was reversed in the House of Lords by Lord Cranworth, Ch., and Lord Brougham; Lord St. Leonards dissenting. Thus the opinions of Lord St. Leonards, Lord Justice Knight Bruce, and the Master of the Rolls were over-ruled by those of Lord Cranworth and Lord Brougham. Commenting on this case, Mr. Haynes remarks: "It is difficult to be satisfied with a court of appeal so organized as to admit of such a result. And that the efforts lately made to obtain a more satisfactory constitution of the ultimate court of appeal of the kingdom, will be renewed, cannot, I conceive, be doubted."* Speaking of the inconvenience of the House of Lords as an appellate tribunal, Mr. Haynes remarks in another place:† "The power which an unsuccessful plaintiff has of carrying his appeal to the House of Lords direct, is one which, in the present state of the House of Lords' business, may be most vexatiously used. Thus, a plaintiff files a bill for specific performance, alleging himself to be purchaser. His bill his dismissed. He enrols his decree, and presents a petition of appeal to the House of Lords. The defendant is thus incapacitated from selling his property for about two years, the time required for the appeal to come on in its turn. The appeal comes on at the end of the two years; the appellant does not appear, and the appeal is simply dismissed. This case has, to my own knowledge, actually occurred in practice, and the hardship is increased by the circumstance that, instead of substantial security to ensure costs being required, as in the case of writs of error from the common law courts, the appellant, in an appeal from the Court of Chancery, simply enters into his own recognizances, which may be worth nothing." Mr. Haynes refers to the case of *Honeyman v. Marryat*, 4 Jur. N.S. 23., in which he was counsel for the defendant, and remarks that in that case

* "Outlines of Equity," p. 60. † p. 88.

no costs of the appeal were ever recovered from the appellant. Mr. Haynes, however, is speaking of the House of Lords as a tribunal of appeal from the Court of Chancery; in common law suits, he thinks that the appellate jurisdiction has, with the assistance of the Common Law judges, been not altogether unsatisfactorily exercised. This is cautious praise; and seems to imply that the House of Lords has, by the frequent practice of consulting the judges in Common Law cases, been preserved from many errors into which it might otherwise have fallen. Sometimes, however, the House rejects the opinion of the majority of the judges consulted, as in *Jeffreys v. Boosey*, 4 H. L. Cases, 815; and, of course, the House frequently decides without consulting the judges at all. In the *Free Fishers of Whitstable v. Gann*, 11 H. L. Cases, 192, a unanimous decision of three Judges in the Court of Common Pleas was, on appeal to the Exchequer Chamber, affirmed unanimously by five judges; these judgments were, on an appeal to the House of Lords, reversed by three Law Lords. Thus the unanimous opinion of eight judges was overruled by three Law Lords.

There is, however, not wanting high authority which seems to favour the opinion that it is for the advantage of suitors to have their cases heard over and over again in successive courts. The case of *Brown v. Higgs*, 8 Ves. 561, having been heard and re-heard before Lord Alvanley, Master of the Rolls, came on before Lord Eldon upon appeal. On the question whether the cause should be heard at all a third time before going to the House of Lords, or, if heard, whether the judgment should not be affirmed *pro formâ*, Lord Eldon remarked:—"The suitors have a right to the deliberate attention and deliberate judgment of every court, in every stage in which, according to the constitution, the case may proceed." He admits that the suitors would have to undergo the expense of four hearings in the one case, and of three only in the other. But he seems to have thought that they would, at all events, have their money's worth in the attention paid to their case by the judges.

This opinion seems to have been shared by the Common Law Commissioners of 1850. In their second report, issued in the year 1853, speaking of the mode of proceeding by special case, they remark (p. 27): "There can be no doubt of the great convenience of this mode of proceeding, but there is at present a drawback attached to it which materially interferes with its general adoption. The judgment on a special case, unlike the judgment on a special verdict, cannot be taken to a court of error; and as it is for the most part on questions of legal difficulty that it becomes necessary to resort to this proceeding, parties are unwilling to debar themselves of the opportunity of appealing against an adverse decision." And they go on to recommend that the proceeding by special case should, in this respect, be placed on the same footing as proceeding by special verdict, except where the parties agree to be bound by the decision of the court of first instance. This recommendation was carried into effect by the Common Law Procedure Act of 1854.

So, with reference to motions for new trials; the Common Law Commissioners in the same report (page 29) complain that "the decision of the court out of which the record issues is on such a proceeding final and without appeal; yet the most important and difficult questions of law arise upon such motions; and, if appeals are to be allowed at all, there can be no doubt that they ought, on principle, to be allowed in such cases. As the matter now stands, if the court upheld the ruling of the judge at the trial, and the court should be wrong, the losing party is without redress." But is not this the case with *every* court of final appeal? Suppose the Law Lords or the Judicial Committee of the Privy Council should give a wrong judgment on the case before them, is not the losing party without redress? The Commissioners seem to assume, that it is possible to find a court which will under no circumstances decide wrong; that a superhuman perfection of justice is attainable, if suitors will only go far enough to seek for it; that this justice is to be found, in all its fulness, in the House of Lords; that it is to

be found, though not quite in such a perfect form, in the Court of Exchequer Chamber; but that, in any one of the three courts at Westminster, the justice administered is comparatively very imperfect, and at ordinary Nisi Prius trials it is more imperfect still. The argument, then, which we have just quoted, would apply to any court of final appeal which was ever constituted; but with this difference: If the judgments of the courts of Queen's Bench and Exchequer Chamber are reversed by the House of Lords, or the judgments of a succession of Colonial Courts reversed by the Privy Council, the losing party will probably feel himself deeply injured. He will consider, not only that he had a very fair *primâ facie* case, but that, as a majority of all the judges before whom the case has come, have been on his side (which not unfrequently happens) the Court of Appeal has in all probability been in the wrong. And have the judgments of the House of Lords and the Privy Council invariably commanded general confidence? The *Wensleydale Peerage* case,* decided by the House of Lords, and *Bremer v. Freeman*,† decided by the Privy Council, are conspicuous instances to the contrary.

But we will go further, and maintain that, even if the court of first instance should decide wrongly, without power of appeal, this in many cases is not by any means the worst evil which may happen. In many cases, the question is one merely of money, where it is not a question of life, liberty, status, or principle. It is a question, say, whether A should pay B £100. The court of first instance decides, let us suppose wrongly, that A ought to pay the £100. A then will have to pay the £100, with costs. But if A appeals by successive stages to the House of Lords, the chances are that, even though ultimately successful, he will find that he has damaged his adversary without bettering himself; that he would have suffered

* 5 H. L. Cas. 958. Of the Law Lords whose opinions are recorded, four were in favour of, and one against, the decision ultimately arrived at in this case by the Committee of Privileges.

† 10 Moore P. C. 306.

less in his pocket had he acquiesced in the adverse judgment of the court of first instance. These remarks, of course, point to another blot in our judicial system, the great expense involved in appeals to our courts of last resort, which makes them practically courts for the rich, not for the poor.

There is, however, one considerable class of cases in which a right decision is of the utmost importance, but in which, by the singular perversity of English law, no appeal whatever is allowed on points of law; we allude to the generality of criminal cases. In these cases, though a man's life, liberty, or reputation be at stake, the judgment of the court of first instance is final and conclusive, except so far as any point of law may be reserved by the judge. But the "Court for the Consideration of Crown Cases reserved," is not, what it is often improperly called, a "Court of Criminal Appeal." A writ of error lies for any substantial defect appearing on the record, but only on the fiat of the Attorney-General. While, however, we think that some relaxation of the law would not be amiss with reference to criminal cases, we think that the present restrictions are at fault on the right side, and, that, where the prisoner has competent legal advisers, they work no practical injustice, though often not a little inconvenience.

We have spoken thus far on appeals on points of law; but, independently of any miscarriage in point of law, a new trial in civil cases may be granted on the ground of surprise or subsequent discovery of evidence, or if the verdict be against the weight of evidence. In the last instance it is almost uniformly required that the judge should declare himself dissatisfied with the verdict; "but this rule," the Common Law Commissioners observe in the Report quoted above (p. 31), "is very properly not inflexible. In the fallibility of human intelligence, a judge may sometimes take a wrong view on a question of fact, and by his observations lead the jury astray." But is the court out of which the record issued exempt from "the fallibility of human intelligence?" Which is the most likely to be in the right; one judge and twelve jurymen who

have heard the witnesses, or four judges who have not? If the former, why embark on the unsatisfactory experiment of a new trial? If the latter, how is it possible to justify trial by jury at all?

What, then, is the appellate system we would recommend? First, we think that the Judges of Appeal ought to be entirely distinct from the judges of original jurisdiction. Under the present system the judicial functions of the House of Lords and the Privy Council are almost exclusively appellate; those of Recorders and County Courts are almost, if not quite, exclusively original. But the functions of the judges of the courts at Westminster partake nearly equally of each character. A judge sitting at Nisi Prius, or on the Crown side at the assizes, exercises original jurisdiction; the same judge, sitting with his fellow judges at Westminster, exercises, generally, appellate jurisdiction. The judicial business of London is interfered with by the assizes, while the infrequent occurrence of the assizes, and the extreme hurry which often attends the [illegible], amounts in many cases to a practical denial of justice to country suitors. The Supreme Court of Appeal, then, should consist of at least twelve paid judges, besides a number of honorary judges, who, besides the occasions on which they might voluntarily attend, might, in case of an overflow of business, or other sufficient reason, be required to give their attendance and assist in hearing appeals. The judges, whether paid or honorary, should be appointed by the Lord Chancellor, subject to the approval of the full court, from the judicial staff of the "superior courts" (in the hypothetical sense of this expression) or courts of equivalent jurisdiction within the Queen's dominions; except that every retiring Chancellor should become, *ipso facto*, an honorary member of the Supreme Court. The paid members of the court should be forbidden to exercise at the same time any independent judicial functions, and the honorary members should do so, if at all, only under the control of the Chancellor. If the appellate business were not pressing, it might be convenient that one or more of the

honorary members should be specially commissioned by the Chancellor to relieve any local court which might be pressed with business. The person so commissioned would cease, *pro hâc vice*, to be a member of the Supreme Court. We think it would be in every way advantageous to allow a certain proportion of ex-colonial judges to take their places in the Supreme Court, whether as paid or as honorary judges. Our courts of final appeal are at present composed much too exclusively of English lawyers. Not only would an ex-colonial judge often be of great service in a question of colonial law, especially in the law of those colonies which are not governed by the common law of England; but his appointment would give great pleasure and satisfaction to the colony in which he had held office.

But should any restriction be allowed on the right of appealing to the Supreme Court? And how should appeals be heard? We think it important that there should be some restriction on the right of appeal, in order to prevent the Supreme Court being inundated with frivolous appeals. But the restrictions should not be such as to prevent any *bonâ fide* doubtful question of law being brought before the Supreme Court.

First. Every court of first instance should be competent to reserve questions of law for the consideration of the Supreme Court.

Secondly. The Lord Chancellor should be competent to submit any question of law for the consideration of the Supreme Court, and to stay execution in any case depending on the decision; and the like power should (under the control of the Chancellor) be exerciseable by the Attorney and Solicitor-General.

Thirdly. It should perhaps be competent for any member of the Supreme Court to raise any question of law for the consideration of the court, and to require the Chancellor to stay execution in any case or cases depending on the question of law so raised.

Fourthly. Appeals should not in general be permitted unless notice be given at the trial by the party intending to appeal, or his legal adviser, and the point of law stated on which it is desired to appeal. Supposing the judge on the trial refused to reserve the point, the party or his adviser might, by advertisement in an official gazette, or otherwise, bring his objection under the notice of the Lord Chancellor and members of the Supreme Court.

But how should appeals be heard? By the full court, or by a section of it? We think that ordinarily the Supreme Court should be divided into chambers of three judges each, to hear appeals. If the appeal be from an inferior court, one judge of the Supreme Court would be sufficient to decide it. If, however, the point were of sufficient importance, the Lord Chancellor might appoint two or more judges to decide it. But if the appeal be from a superior court, or from the colonies, not less than three judges should hear the appeal. And the judgment of the appellate chamber should be deemed to be the judgment of the Supreme Court, and should be final, and without appeal, except that it should be competent for any member of the appellate chamber to reserve any question for the consideration of the full court. And if the judgment appealed against were concurred in by three or more judges in the court below, the appeal ought, we think, to come before the full court; and the Lord Chancellor should be at liberty in his discretion to direct any case of appeal to be heard before the full court. The full court should be summoned by the Chancellor, not less frequently than once a quarter, for the hearing of appeals and the transaction of other business.

But should the Supreme Court, or any of the judges of the Supreme Court, exercise original jurisdiction in any case? In a few classes of cases, undoubtedly, it should be competent for them to exercise an original or quasi-original jurisdiction. As, if penalties have been inflicted, or judgment pronounced by a tribunal, or quasi-tribunal claiming jurisdiction; in such cases it should be competent to the person aggrieved, or any

person on his behalf, to apply at once to the Supreme Court to set aside the informal proceeding in the quasi-tribunal, and to prohibit all action upon it. But the general class of cases on which we think the Supreme Court might exercise an original jurisdiction are those where the controversy is one of pure law, where parties are entirely agreed as to the facts of the case, and the only question is, whether those facts make good in law a claim of A against B. In such a case we think that it should be competent to any party to insist that proceedings be taken, in the first instance, before the Supreme Court; but that, if this right were waived, and proceedings taken before a non-appellate court, the judgment of such court should be final and without appeal. For, seeing that, in general, there would be an appeal from the court below on a question of law, the proceedings in the court below in a case of this nature would, on appeal, be entirely thrown away, whether the judgment were affirmed or reversed. We cannot but think this a great evil, though it happens often enough under the present system. In all cases of appeal, the court of appeal should should have power to give the judgment which the court below ought to have given.

But ought any appeal to be allowed on matters of fact? Generally speaking, we think not. Right decisions on questions of fact should be (as far as possible) secured, not by the granting of new trials in cases of supposed mistake, but by providing the requisite machinery for making the court of first instance a thoroughly competent tribunal on matters of fact generally, as well as on the special questions which may be raised in any particular case. It should, however, be competent for a given proportion of the judges to reserve any question of fact, in like manner as a judge may now reserve a question of law; and a new trial would, as a matter of course, be granted on the question of fact so reserved. Under the system of trial by jury, as juries are selected at present, such a provision would be liable to great abuse. But, with a thoroughly efficient and responsible tribunal of questions of fact, we think

that no inconvenience would result. Again, a new trial should, under proper restrictions, be grantable on the subsequent discovery of evidence. Under what restrictions as to time or otherwise a new trial should be granted, and whether in the event of the second trial ending in the same result as the first, a third trial should ever be granted, are points which might be settled, either by General Orders, or by an exhaustive Statute of Limitations.

It remains to consider the question of costs on appeals. There are several ways in which questions of costs may be determined; even in the most simple case, in a court of first instance, the question of costs may be determined in three different ways. But there is one way of determining costs on appeals which, though sometimes resorted to, is, we think, quite indefensible, and should never be allowed. We allude to those cases in which the Court of Appeal reverses the judgment of the court below, and condemns the defeated party in the whole costs of the proceedings *ab initio*. The usual defence set up for this practice is, that as the defeated party is in the wrong, and as by his illegal conduct he has given rise to the litigation, it is fair that he should pay the entire expense of the proceedings. This reasoning implies the universal justice of the maxim, *Victus victori impensis condemnatur*. We think, however, that this maxim applies only in those cases where the defeated party had not a colour of right, or, at least, where there is no real doubt, on principle, as to what the judgment of a court of law should be. But if a judge give a deliberate decision in one sense, can it be that the party in whose favour the decision is has not a colour of right, and that there is no real doubt (from the point of view of the party) that the judgment ought to have been the other way? Can a private suitor be expected to know the law better than a judge? Again, it is not true to assert that the party who is ultimately defeated has "occasioned" the entire litigation; the proceedings on appeal, at least, have been occasioned quite as much by the judge of the court below. Is the party to blame

for declining to reverse, by his own act, a solemn judgment in his favour?

But is it necessary that either party should pay the whole costs of an appeal? In the great majority of suits the point at issue is of interest to nobody except the parties concerned. In general, then, it would tend unduly to encourage litigation if persons could unreasonably institute or defend suits without fear of being condemned in costs. But cases are occasionally brought into a court of justice which may involve principles of the greatest importance to the general public. A portion of the money devoted by Parliament for judicial purposes might be applied to the formation of a suitors' fund, to defray the expenses of those who might be instrumental in bringing points of great public interest for the decision of the courts of law. From this fund should be paid the expenses which might be incurred in procuring decisions on points of law from the full Court of Appeal. As we do not propose that any suitor should be entitled as of right to a hearing before the full Court of Appeal, no expense could be incurred in this way except by direction of the Lord Chancellor, or in consequence of a judge in one of the appellate chambers reserving a question for the consideration of the full court. The suitors' fund might also be applied to the reimbursement of any person who (as in the case quoted by Mr. Haynes) might, without any default on the part of himself, or his solicitors, be unable to recover costs justly due from his adversary. At present the House of Lords claims the right of putting questions of abstract law to the judges to be answered by them; which was done in Daniel M'Naghten's case. Why should not a similar course be followed in cases which, though of great public interest, are of comparatively little importance to the parties immediately concerned? It might, perhaps, be desirable to attach a staff of counsel to the Supreme Court, to argue such cases. They might either be paid with fixed salaries, or receive their fees, as occasion might arise, out of the suitors' fund.

One of the most important reforms which could be effected,

would be the establishment of a Department of Justice as a Department of State, at the head of which should be the Lord Chancellor, as Minister of Justice, and of which the Attorney and Solicitor General should be subordinate members. The functions of this Department would be: 1. To examine into the defects of the existing law, and submit measures to the Legislature from time to time for its amendment. 2. To frame General Orders from time to time, as occasion might serve, respecting the duties of judicial and other officers of courts, and the mode of conducting legal proceedings, subject to certain broad principles and rules laid down by the Legislature. General Orders should be framed by the Lord Chancellor, with the concurrence of the Attorney or Solicitor General. No general order should have any validity until submitted to the Supreme Court, and approved by at least half its members, exclusive of the Lord Chancellor. The Lord Chancellor should preside at the sittings of the Full Court, but otherwise should not undertake any purely judicial function. Nor should the Attorney or Solicitor General take any private practice. It would be the business of the Lord Chancellor, and, subject to his control, of the Attorney and Solicitor General respectively, to decide summarily on motions for new trials, and petitions for leave to appeal; to decide, in cases of dispute, in what court any particular case should be heard; (as, for instance, where two persons entitled under a will take proceedings in different courts to administer the deceased's estate); to remove cases from one court to another, either for the general convenience of judicial business, or on the application of one of the parties to the suit. The Lord Chancellor should have the appointment of all judicial officers, subject to the approval of the Supreme Court. He should also be empowered to dismiss any judicial officer for misconduct, subject to an appeal to the Supreme Court sitting as a full court of appeal. He should divide the Supreme Court into chambers for the discharge of the ordinary appellate business of the Court. And, as Minister of Justice, he should

(in concurrence with the Attorney and Solicitor General) exercise a general superintending control over the administration of justice throughout the country.

But assuming the changes we have advocated to be beneficial, how might they be introduced? We would suggest that the Law Lords and members of the Judicial Committee of the Privy Council, might become honorary members of the Supreme Court; of the Chancery judges and judges of the Courts of Westminster (exclusive of the Lord Chancellor) twelve might become paid members of the Supreme Court; the rest, with the Recorder of London, judges of metropolitan superior courts. Many of our Recorders might be turned into local judges of superior courts; the rest of our Recorders and all our County Court judges might be put into the same category with magistrates, as judges of inferior courts. Stipendiary magistrates, and, subject to certain restrictions, non-stipendiary magistrates, should be invested with plenary civil jurisdiction up to a certain amount. As it is, a certain class of civil cases fall under the cognizance of magistrates; as, for instance, summonses for cab fare, and for seamen's wages. Why should not this class be enlarged?

We have thus far given an outline of the judicial system of our country as we should wish to see it. It is, of course, very difficult to test a system fairly which we do not see in actual working, and we have felt great reluctance in suggesting points of detail. It cannot be denied that there is great and just dissatisfaction with our present judicial system throughout the country, and especially in the great towns of the north. Causes which have been waiting months for trial are, when the assize comes, shuffled over, referred to arbitration, or postponed to the next assize, because the judges have to be in such a town on such a day. Ruinous compromises are made in consequence of the impossibility of obtaining justice. The judicial staff is inadequate to the business which it has to perform: a new judge, it is suggested, must be added to each of the courts at Westminster. Against such piecemeal legislation we do most

earnestly protest. What we want is a system which shall give us an effective local administration of justice; a competent tribunal of matters of fact; a cheap and accessible court of appeal on points of law; and general simplification of our legal system. In furtherance of these objects we have advocated—

1. The entire fusion of suits with reference to the *nature* of their subject matter.
2. The partial separation between suits with reference to the *importance* of the issues involved.
3. Local courts permanently sitting.
4. A reform of the jury system.
5. The abolition of the system of terms and circuits.
6. The entire separation of courts of appellate from those of original jurisdiction.
7. The appointment of a department of justice.

H. N. M.

Art. II.—ANTIENT PARLIAMENTARY ELECTIONS.

Antient Parliamentary Elections.—A History showing how Parliaments were constituted and Representatives of the People elected in Antient Times. By Homersham Cox, M.A., Barrister-at-Law, Author of "The Institutions of the English Government," &c. London. 1868.

THE work of Mr. Cox is a valuable contribution to legal and historical learning. The study of our early constitutional history must always be a subject of great interest, and that interest is certainly not lessened by the circumstances in which this country is now placed. It is obvious that the tendency, both in legal and political institutions, is to something more resembling the earlier type than what has existed during

many centuries. In legal matters, the extension of local jurisdiction, and, in political matters, the extension of the electoral franchise, equally carry us back to the antient system which prevailed in this country. It is obvious, however, that this recurrence to old principles has not taken place from any design of restoring what has passed away, or from any conscious purpose to build again on the old foundations. In bringing about the present tendency the researches of antiquarians have been entirely without effect. Nothing, in fact, can be more futile than to bring learning of this sort to the solution of any practical question of legislation. If we are reverting in any degree to the old English polity, this is not to be ascribed to our better knowledge of history, far less to any sentimental notions, but to conclusions formed for ourselves, and derived from strict utilitarian views.

Mr. Cox's work, we are happy to say, is deformed by no absurd views as to the real value of the information he has laboriously collected. He makes no attempt to mix up a single question of the day with that portion of our early legal history on which he has thrown so much light. His sole object is to explore a past state of society as a matter of historical and philosophical interest, and he expressly repudiates the idea of founding any modern institution on ancient rights or ancient practices. The key-note of the whole work is furnished by the concluding paragraph of his preface, which we quote as at once showing the good sense of the author, and affording a guarantee for the fairness and impartiality of his investigations:—

"The subject has been regarded entirely in its historical aspects apart from all reference to existing controversies. The social and political condition of the country at the period here under examination, differed materially from that which at present prevails, and therefore extreme caution is necessary in deducing from the antient history of Parliament, lessons of modern application. At the first institution of the House of Commons, land was cultivated principally

by peasant proprietors; Members of Parliament were paid wages; the parliamentary franchise was a burden rather than a privilege; the polling of voters and a property qualification for the suffrage were unknown; and the relations of the Administrative Government to Parliament were utterly different from those established under the Hanoverian dynasty. These considerations are sufficient to show that a constitution which worked well in the fourteenth century would not necessarily be beneficial in the nineteenth." Preface, p. ix.

This is the language of a man who can fairly estimate the value of the studies to which he is devoted, and who is not likely to be led away by any foolish notions into speculations which serve no useful purpose. His sole object is to investigate, from the sources of information now open, how Parliaments were constituted and the representatives of the people elected in antient times; and to this object he has steadily adhered throughout his valuable and elaborate treatise. We must confess our high admiration of the calm and rigid manner in which this investigation has been conducted, and of the laborious research which has enabled the author to collect from various sources the interesting materials of which the work is composed. Nor are we less impressed with the lucid and intelligible manner in which these materials have been arranged, and the whole presented within a reasonable compass, and with due regard to the relative value of the different component parts. The investigations into which Mr. Cox has been led, have not, as is too often the case, induced him to presume on the patience of his readers, and to quote documents without discrimination, and without any regard for human infirmities. The opposite error, also, into which some writers on such subjects fall, has been equally avoided by Mr. Cox. Whatever he quotes from antient documents is clearly illustrative of the matter of which he treats, and if we have been occasionally inclined to demur on the ground of prolixity, we are on the whole constrained to confess that he has acted more wisely in such cases in giving the tenour of the records

which he has used, than in merely stating their legal effect. Having regard to readers, who cannot crave oyer, this is the fair and just course to adopt in such a work as the present, and it would have been well if it had been always followed in similar cases. It is certainly of importance for those who are not deeply learned in such matters, to know that the authorities referred to have not been strained or twisted, and that more has not been laid on them than they are able to bear.

Although we think Mr. Cox has done wisely in regarding the subject of his present work solely in its historical aspects, and although we are strongly of opinion that no direct results of any value can be obtained from such investigations as those which he has here pursued, yet we are far from thinking that useful lessons are not to be derived from such inquiries. The tyranny of existing things is always so powerful, that it is of great advantage to be able to understand in some measure a condition of society and government widely different from that to which we have been subdued by habit and association; and when the information thus conveyed is derived from a state of things at an earlier period of our own history, to which we are bound by the great law of continuity, the lesson is all the more forcible and impressive. The leading principles of the common law were fully established at a time when society presented a totally different aspect from what it has done for many centuries, and the mode in which that great system of jurisprudence was then administered, and the political institutions which it then upheld have undergone changes no less striking. But much light may be thrown on the inherent character of our legal system from a consideration of the earlier forms it assumed, and of the political rights of which it was the guardian when it first comes before us in distinguishable features. Such studies will at least lead to the conviction that a larger amount of popular influence than has for many generations prevailed does not necessarily involve the weakening of lawful authority, far less the introduction of anarchical turbulence. If they teach nothing else, they will still serve a

most useful and beneficial purpose, in showing how deeply our legal system is rooted in our history, and how firmly it is bound up and identified with those great principles of liberty, which have been the source of all our strength and greatness as a nation.

Of the importance, also, of such studies as a branch of the scholarship of the legal profession, there can be no question. To know the early history of the law of England may, perhaps, be of comparatively small use in ordinary practice, although cases occasionally arise where such knowledge is essentially necessary; but every member of a liberal profession ought to have some acquaintance with the origin and progress of the system in which he is supposed to be learned. It is impossible to understand our legal system thoroughly in its actual relations, without going back to its history, and taking into account the transformations to which it has been subject since it first came into existence, whilst the study of it in its existing condition is greatly enhanced in point of interest, by knowing the historical significance of the terms which it uses, and of the rules which it enunciates. To the man who looks on the law of England as if it had dropped from the clouds only a few centuries ago, many things must appear arbitrary, or even unintelligible, which, to one who knows its long and chequered history, are full of meaning, and suggest views which are generally interesting, and not seldom of much practical importance in the correct application of the law as it now exists. There are few subjects, indeed, of an intellectual character, of which any one can possess a thorough knowledge who is unacquainted with the history of their rise and progress, the changes they have undergone, and the causes of such changes; and no one who has deeply studied the law of England can have the smallest doubt as to the value of whatever tends to elucidate its early condition, as a means of rightly understanding the true nature of the vast and complex system which it now presents.

The field over which Mr. Cox carries us is one of great

interest, and affords material of much importance with respect to the early social, political, and legal state of England. Although his primary object was to show the early constitution of Parliaments, and the manner in which the representatives of the people were elected in antient times, it was impossible to elucidate these properly without discussing the state of society which was reflected in our Parliamentary institutions. He has accordingly investigated the social and legal status of the various agricultural classes who formed the great bulk of the population in the middle ages. It is, of course, impossible for us to follow him through all the various details into which he has entered in this inquiry, but we quote the following, as showing the general character of the condition of the rural population during the period embraced by the present work:—

"In the reign of Edward I., when representative government became regularly established, the general character of the rural population was as follows:—The country was for the most part divided into manors, the *lords* or owners of which constituted the country gentry. The lord of a manor of ordinary dimensions occupied the social position of a modern squire. He usually retained in his own hands a considerable part of his estate, which was cultivated by his bailiff. The remainder was occupied by three classes of persons: (1.) *Liberè tenentes*, freeholders who had small holdings for which they paid fixed rents; (2.) *Villans* (*villani*), or customary tenants, whose rent was paid partly in labour and partly in money or farm produce; (3.) *Coterelli* or *bordarii*, cottagers."—pp. 1, 2.

In the manor thus constituted a regular system of local self-government existed. The court was held in the manorial hall, presided over by the lord or his steward, and its usual jurisdiction extended only over petty misdemeanours and trespasses within the manor, and questions respecting the property of the tenants, although in some cases the court claimed, by prescription or charter, cognizance of capital felonies. The condition of the

freeholders, it appears, was not so different from that of the villans as has been commonly supposed. While the former were liable for annual payments for their holdings, they were frequently bound to render other services, not materially different from those of the villans. With respect to the villans, their condition differed widely in different places, and they were not necessarily in a state of serfdom, as there is sufficient evidence from Doomsday Book and the Hundred Rolls, to show that freedom was a personal right, independent of tenure, and that a freeman often held in pure villenage. Indeed, there is evidence, according to Mr. Cox, that "free tenants or freeholders did not become generally recognized as a distinct class until after the date of Doomsday."

It seems unquestionable that during the Saxon times the lowest class of the people of free condition were entitled to be present in the shire mote. But the right to attend that assembly remained in the Norman and Plantaganet times very much as it had been before.

"There is not," says Mr. Cox, "the slightest trace of any alteration of the laws in this respect, and the legislature after the Conquest proceeds evidently on the assumption that the old institution and its usages remained unimpaired. But the knights of the shire, when parliaments became established, were elected by all persons who had a right to be present in the county court. Hence it becomes indispensable, for the purposes of our inquiry, to ascertain who had that right before the Norman period." pp. 32-33.

The evidence adduced certainly goes to show that, prior to the Conquest, these assemblies, which were held in the open air, were attended by large numbers of persons, including those of the lowest class, who took part in the proceedings and expressed their opinions on the matters which came before them.

But, after the Conquest, whilst the great charters and enactments of the Norman and earlier Plantagenet kings prove that the spirit and general character of the popular Saxon

institutions were carefully preserved, there is strong positive evidence to show the right of all freemen to attend the county court. It is impossible for us to present to our readers even a general view of the case made out by Mr. Cox, but the following passage from the concluding paragraph of the chapter on "County Courts after the Conquest" will give some idea of the nature of the evidence on which he relies:—

"We have seen several instances in the preceding pages, in which particular vills, or the inhabitants of particular vills, are spoken of generally as suitors. The persons making presentments of the crown in the county courts included villans. In one case we find it made a special matter of complaint against a tenant 'in villenage,' that he neglects to attend the county court; in other cases such suits are said to be due from a 'whole feud,' or from the 'tenants,' the 'men,' or 'all the tenants' of particular estates. The generality of these expressions is quite inconsistent with the restriction of the liability in question to one class of tenantry exclusively. The theory which favours that restriction is of modern origin, and those who support it do not cite any authorities in support of their opinion. After patient examination, I have not discovered any warrant for it in our laws or antient documents. On the contrary, the evidence collected in this and the preceding chapter appears to amply justify the conclusion that the obligation of attendance in the county courts was not confined to freeholders, and that these tribunals were open assemblies, to which the whole of the free population had right of access." pp. 58, 59.

During the fifteenth century an important limitation was put on the county suffrage. In 8 Hen. VI. (A.D. 1429) the Act, with which we are all familiar, was passed, restricting the right of voting to the forty-shilling freeholders. Whatever may have been the rights in this respect which previously existed, there can be no doubt that the object of this change in the law was to give greater power to the higher orders. It is certain that the great body of the people took but little interest in the dispute between the rival houses of York and Lancaster,

which then formed the great question of the day. The two hostile factions were composed chiefly of the aristocracy; and it may be easily understood how desirable it appeared to the upper classes to exclude from the suffrage the common people, where interest and feelings alike were in favour of peace and social welfare. It is always a profitless task to speculate on what the results might have been if certain things in the past had been different from what they were; but it is impossible to consider the great change which the Statute of Henry VI. is on all hands admitted to have produced, without perceiving that it was one of the turning points in English history, and that it entailed difficulties and struggles on the people of this country, which, after more than four centuries, have not disappeared. But for the change then introduced and the modifications of the borough franchise which followed, our whole subsequent history might have worn a different aspect, and the ends might have been attained easily and directly to which we are now only painfully approaching *post longas ambages.*

With respect to the procedure at elections, Mr. Cox has furnished us with much interesting information, which not only illustrates the character of the times, but has an important bearing on the question of suffrage before the Statute of Henry VI. At the begining of his chapter on this subject Mr. Cox says:—

"For a long time after the first institution of the House of Commons, the only method of voting at a contested election was by the view or show of hands. What is now termed the 'nomination' was then only election. Until the passing of the Statute of Henry VI., limiting the county suffrage to forty-shilling freeholders, there is not the slightest trace of any practice of polling the electors or of scrutinizing their votes. And even after that period the old method was long retained at county elections. There is strong evidence that the right to a poll was not firmly established until the time of James I."—p. 121.

The right, however, to demand a poll even at this period, was not sanctioned by any legislative authority, but arose from the

practice which had been settled by certain resolutions of the House of Commons in cases which had been brought before it, and at a subsequent period it was enacted by the 7 & 8 Will. III. c. 25, that:—

"In case the said election be not determined upon the view, with the consent of the freeholders then present, but that a poll shall be required for the determination thereof, then the said sheriff, or in his absence his under-sheriff, with such others as shall be deputed by him, shall forthwith then proceed to take the said poll."

After quoting the authorities bearing on this point, Mr. Cox says:—

"But up to the time of Henry VI., when the law respecting the forty-shillings freeholders was passed, there is no trace whatever of any instance of polling; certainly there was no scrutiny of votes. In reference to this Act of Parliament, and the petition of the Commons on which it was founded, the learned Prynne says, in his *Brevia Parliamentaria Redivivia*:—'Before this Petition and Act every inhabitant and commoner in each county had a voyce in the election of knights, whether he were a freeholder or not, or had a freehold only of one peny, sixpence, or twelvepence by the year.'

"Thus, the opinion of that most learned antiquary, William Prynne, to whom we are indebted for the rescue of our most valuable Parliamentary records from oblivion, exactly confirms the conclusion of the preceding chapter, that, up to the time of Henry VI., elections, both of knights of the shire and burgesses, took place in open court, free to all comers, and that 'EVERY INHABITANT AND COMMONER *in each county had a voyce in the election of knights.*'"

Our remarks are only intended to be expository of the views of Mr. Cox, and we have no desire to enter upon any controversial matter. But there is one difficulty that suggests itself to our minds which is not explained in the present work. We refer to the election of coroners by the freeholders. It was enacted by 28 Edw. III. c. 6, "that all coroners of the counties shall be chosen in the full counties by the commons

of the same counties, of the most meet and lawful people that can be found in the same counties, to execute the said office." On this Statute, Hawkins, in his *Pleas of the Crown*, observes—

"That all elections are appointed by it to be made by the commons of the counties, without mentioning freeholders, and yet, inasmuch as the said statute was made in affirmation of the common law, and none but freeholders are suitors to the county court, and that usage hath always been, both before and since the said statute, for such only to vote, it is certain that none but freeholders have a voice at any such election."—Book II. c. 9 s. 10.

For the proposition that "none but freeholders are suitors to the county court," he refers to Lord Coke; 2 Inst. 99. Now, the authority of Lord Coke as an antiquarian is not great; and we are disposed to attach much more importance to what Prynne says; but it is difficult to understand, if the latter be correct, how the right of voting for coroners has been restricted in practice for a very long period, certainly to freeholders. The statute of Henry VI. has no reference to the right of the commoners to elect coroners, and if every inhabitant and commoner in each county had a voice in the election of knights before the passing of that statute, how came they to lose this right in the case of the election of coroners, of which they were certainly never deprived by any legislative enactment? If the election of coroners had, after the Statute of Henry VI., been in practice confined to the forty-shilling freeholders, the explanation would have been obvious. The right of electing knights having been confined to them, the other commoners might naturally have abandoned the right which had belonged to them, of electing the coroner. It is difficult, however, to understand how freeholders alone should have continued to claim the right, if other commoners were equally entitled to exercise it. Mr. Cox, may, perhaps, be able to explain this matter in a satisfactory manner; and, if he can do so, we think he will greatly add to the effect of the positive evidence which he has adduced in favour of his views.

On the subject of the representation of boroughs Mr. Cox supplies much valuable information; and enters at considerable length into the question as to whether all boroughs or only those of royal domain returned representatives to Parliament. He established, we think, on evidence entirely satisfactory, that all boroughs, whether of royal domain or in the hands of subjects of the Crown, were represented in the House of Commons, and that the opposite theory is destitute of any real foundation. The general result of his inquiry he has thus summed up:—

"In the time of the Plantagenet kings the legal rule was simply this—the sheriff was required to send his precept to *every* city and borough for the election of citizens and burgesses. The Parliamentary writs and the statutes are conclusive on this point—that they did not confer upon him any power of selection. Sometimes, indeed, he illegally omitted to send his requisition to poor boroughs, which were deemed unable to bear the expenses of representation. In some instances, burgesses were exempted by the Crown at their own request. Sometimes they simply disregarded the sheriff's mandate, and means were not taken to enforce it. But the old law undoubtedly was, that every borough should be represented in the House of Commons. The creation of boroughs was, until the end of the reign of Edward III., left to the discretion of the Crown; but, from that time to the present, the prerogative has been abandoned—excepting, in some instances, under the Stuarts—and the sole authority of Parliament to create new boroughs has been uniformly recognized."—p. 164.

The most interesting question, however, connected with the representation of the boroughs in antient times is that relating to the qualifications of the electors; and this has been discussed in a very satisfactory manner by Mr. Cox in his concluding chapter. The materials for the inquiry are much more copious and explicit than those which exist with reference to the county suffrage. There is no question that, in the earliest period of our Parliamentary history, the electors in boroughs

were the resident inhabitants liable to pay scot and lot. The liability was all that was required, as arrears could be recovered by ordinary legal process, and no instance can be found of any man being disfranchised for non-payment of these charges. Inmates or lodgers, not being householders, had no municipal privileges. The only exception to this was in the case of a few boroughs in the West of England, where potwallopers at one period enjoyed the right.

On the creation of municipal corporations, important changes were introduced.

"The first instance," says Mr. Cox, "of a municipal charter of incorporation is supposed to have occurred in the reign of Henry VI. Of the change then commenced in the form of borough charters the consequences were more extensive and pernicious than probably was at first foreseen. The system introduced in this reign led by degrees to the establishment of the *select or self-elected corporations*, and the manifold abuses of local institutions, which were abolished by Act of Parliament in 1835."—p. 186.

"It would be an almost interminable task to describe all the varieties of burgess right which became established in different towns after the practice of creating select corporations became general. The Committees of Privileges, in the time of James I., allowed that the general common law right of scot-and-lot might be overridden by established usage. This decision tended to confirm and increase local diversities from the general law."—pp. 192, 3.

In conclusion, Mr. Cox says:—

"The modern history of boroughs is not, however, within the scope of the present inquiry. The main object of this work has been to examine the parliamentary institutions of the Plantagenet period. If the investigation has been successful, it establishes this general conclusion—that, according to the primitive law of Parliament, all the free inhabitants of each county were entitled to vote for the rights of the shire, and that, in every city and borough, all the free resident householders had a right to participate in the choice

of representatives. In other words, the result of these researches is, that the House of Commons was originally what its name implies—a Council elected by and for the Commons of England."—p. 193.

The inquiry leading to these important results has been conducted by Mr. Cox with great ability, and with a thorough knowledge of all the bearings of the materials which he has collected. The account of his work, which we have presented to our readers, gives a most imperfect idea of the rich stores of information which he has amassed, and of the sound and just inferences which he has drawn from them. The profound learning, the clear views, and the good sense of the author, can only be fully estimated by those who have perused the work with the care and attention which its great merits demand. We know nothing of Mr. Cox, except from his writings, and we have no interest of a personal nature in any grievance of which he may have complained, or in any matter which may have injuriously affected his interests. But we think it only due to a man of great talent and great learning, to say that, after such a work as the present, following on his "Institutions of the English Government," it can scarcely be supposed that the Bar will acquiesce complacently in the manner in which appointments to the readerships in the Inns of Court are sometimes made by those who have the patronage. Of all men living Mr. Cox has shown the greatest knowledge of the subject to the readership to which he aspired; but those in whose hands the appointment lay, failed to appreciate his merits, although even then they were generally acknowledged in the profession. It is not Mr. Cox only who has reason to complain; but every man at the Bar who devotes himself to a special subject, which is not likely to advance him in the profession, although it tends directly to the honour of the profession itself, has just grounds for expressing dissatisfaction at the manner in which a gentleman of sound learning in the department in which he has successfully exerted his abilities, was treated, on the occasion referred to, by those from whom better things might have been expected.

ART. III.—THE AMERICANS AND THEIR PRISONS.*

EXPERIMENTUM *fiat in corpore vili* is an excellent rule among nations as well as among men; and those nations are very lucky who find subjects on whom to experimentalize. The Prussian needle-gun and the French *Chassepôts*, for instance, are the outcome of many experiments made on that most long suffering of *vilia corpora*, the British purse; and are only two of the many proofs that by England's mechanical errors the whole world profits. Every British taxpayer going to Shoeburyness, can walk by the hour amidst the shattered fragments of mis-spent income tax, the result of our gigantic experiments in weapons of war. But, however ready we may be to vote hundreds of thousands on mechanical experiments, whose practical lessons are always more readily seized by others than by ourselves; there are other matters of a less material nature, wherein red-tape and traditions have taught us to stand upon the ancient ways, until a more enterprising race has proved that their new ways are a thousand times better, and we are forced to change out of very shame. In such matters, the United States are generally the *vile corpus* out of which by dint of many an experiment, essay, and strange vagary, the good comes by which we tardily profit. The American loves to dabble in those subjects, which are somewhat vaguely known as "Social Science," and we believe that in one State or another of the Union, each of these subjects,—education, crime, legal reforms, sanitary improvement, and so on, has been further sifted than it has at home.

As a proof of what we have said, we have before us the result of many experiments, which have been made in the

* Official Report on the Prisons and Reformatories of the United States and Canada. Published by the Prison Association of New York.

various States of the Union in the treatment of criminals. The book is a Report upon the Prisons and Reformatories of the United States and Canada, made by the Chairman of the Executory Committee, and the Secretary of the Prison Association of New York. That Association is charged by law with the duty of seeking to improve the government and discipline of the prisons of the country; of annually visiting, inspecting, and examining their institutions, and reporting their state and condition to the Legislature. This report is the result of a Commission issued by that Association, and, to judge from results, these two gentlemen have accomplished a task of great labour in a most exhaustive and successful manner. An inquiry of this kind in the United States is the more useful because it is in a sense an inquiry into the prisons of some twenty different countries, all peopled by the same race, but each possessing a separate executive and an independent code of laws, differing more or less from those belonging to the others. Naturally, Messrs. Dwight and Wines have gone into detail concerning the New England States, as the oldest established and most populous, but they also furnish much valuable matter concerning the institutions of the Southern and Western States, and have even examined into the state of the prisons in Canada. The printed documents furnished them amount to seventy volumes, and they either personally visited all the prisons in the States, or examined into their condition by means of lengthy written interrogations. Their report is a goodly octavo, of over 500 pages, every page of which is of interest to those who make the subject their speciality, whilst much would be of interest to the general reader who usually gives as wide a berth to books upon crime as the Levite did to the man who fell among thieves.

The most curious part of the book to us is that which treats of the exercise of the pardoning power towards criminals. We in England frequently complain of the manner in which the royal prerogative is dispensed by the Home Secretary.

Let us see how they do these things in America. We will take Massachusetts, which has the fairest reputation of all the States of the Union, the statistics of the other states being much on a parallel. One out of every six convicts imprisoned in Massachusetts obtains his pardon before he has completed his sentence. Of those who are imprisoned for two years, or under, one in every fifty is pardoned; one in every fifteen of those whose sentence is for from two to three years; one in three of those whose sentence is for more than five years, and less than life; and one in every two of life sentences. It must especially be borne in mind that these pardons are not the result of reformation or good conduct of the prisoners; they are in the gift of the governor of the State, or, in some states, of the Legislature, and are dispensed as favours to political partizans, not as rewards of merit. The power is what gubernatorial candidates describe in their platform speeches as "a painful moral responsibility;" but, practically, in all, save one or two States, where the power has been delegated to a Board, which only moves on a report of good conduct from the head of the prison, pardons are used purely as a means of political bribery. The report urges reform in this profuse dispensation of pardon by executive clemency, on the ground that it nullifies the certainty of punishment and impedes reformation, and their opinion is endorsed by many letters from men high in office; but, as Mr. Lowe once said about another matter, "it is easier to throw a five-pound note to the mob than to persuade them to give it back again."

It is not only governors and legislatures who depend on popular favour. This commission, in the course of their investigations, instituted inquiries in various states as to the appointment of the various officers of the law, and it seems that, save in four of the New England States, all offices, from that of judge down to that of police magistrates, are elective, and for terms of years which vary in different States. In those four States where the judicial offices are at present matters of appointment by the executive, and not election by the people,

attempts have been made to introduce the latter system, and it appears to be the general impression that sooner or later the change must come. Democracy is as aggressive as the Monroe doctrine; like slavery, it constantly wants fresh country. But it must be a difficult matter to carry out plans and systems of criminal reform in a country where the qualifications for important officers are summed up thus, "good morals, good intelligence, and, at all events, vote the ticket and support the party."

The system which still obtains in England of making the labour of convicts unproductive, or at any rate such as would not be productive to an artizan earning his own bread, has been entirely exploded in the States. In fact, almost all State prisons are nearly, if not quite, self-supporting, whilst in one or two instances, Connecticut, New Hampshire, and Maine, for instance, they are actually a profit to the State. There are four systems of convict labour in action, but all recognize the fact that not only is work necessary to the reformation of a criminal, but the work must be such as will prove remunerative to the man when liberated, or he will fall back into his old ways, because he knows no trade which will enable him to earn an honest livelihood. No doubt, in England, where honest labour has hard work sometimes to win a weekly ten shillings, there is much more to be said against productive convict labour than in America, where a vast virgin country offers lucrative employment to all, both honest and dishonest. We must raise agricultural labour from its wretchedness before we think of giving better labour to the criminal class, ("revolvers," as the Yankees call them) who revolve from crime to oakum picking, and from oakum picking to crime. But, in the States, convict labour of a productive character is so systematized that there are four different kinds of it, which are adopted by different States. The first is that of working the convicts on account of the State; the second leases the prison for an annual sum; the third works the prison on the joint account of the State and the Warden, and the fourth

letsout the labour of the convicts to contractors at so much per day per man; and, at present prices, as high as eighty cents per day, or three and fourpence, are paid in some prisons for the labour of one convict! In one respect we think these systems of convict labour are not so good as those advocated by some of our reformers at home. They make no provision for a gratuity to the convict in the shape of a percentage on his labours, which both encourages work and makes a nest-egg for the man when liberated, to start life upon. Overwork is the only means by which an American can put by money, and overwork is next to impossible under the system of convict labour we have described. Where, as in four States is the case, the Government undertakes to aid discharged prisoners, this objection is, to a certain extent, removed.

The accounts given of the treatment in some prisons would startle those amongst us who believe that prisons are purely places of punishment and not of reformation. We read of libraries, newspapers, magazines, secular and religious instruction, letter-writing, arrangements for reading at night, and, in Charleston prison, there is actually a debating society. In fact, it is very evident that the reformatory rather than the deterrent theory of punishment obtains in the States. The steps commended by this report as likely to prevent crime clearly show the bent of public opinion. Compulsory education, State nurseries, and industrial schools, juvenile reformatories, separation of sex, intermediate prisons for those criminals who do not belong to the criminal class, long sentences, and State aid to discharged prisoners (already given in some States) are a few of the recommendations; and they all show how the wind sets towards the regeneration of criminals as the true mode of repressing crime. And these recommendations are not only *in nubibus*. In one State or another they are all at work, though no State is so fortunate as to possess them all combined. We find, too, that many innovations on time-honoured institutions, which in England have not got beyond being mooted questions at annual meetings of societies, such as the Social

Science Association—a society whose reforms, though generally adopted in the long run, are often proposed years before the public adopts them—are, in America, in actual and approved practice. For instance, it has often been said that in England the grand jury system might be abolished with advantage, but nobody cares to move in the matter. Now, in Connecticut, Indiana, and Michigan the system has actually been done away with, and a proceeding by information presented by the prosecuting attorney instituted with success. Again, very few people in England would maintain that the appointment of a Prosecutor-General in these days of trade outrages and mobocracy would not be advantageous, but we are still very far from appointing one. In several States of the Union the system has long been in working order. Again, most people in England think that there ought to be more or less criminal degrees of the crime of murder, so as to discriminate between cases which deserve and cases which do not deserve death; and a large, though perhaps not so large, a class hold that there ought to be no capital punishment at all; but, English-like, we have our opinions, and do not care to carry them out. Now, the first of these changes is in common operation in the States across the Atlantic, and the second reform has been carried out in at least one of the States. Again, all England cries for a code to take the place of our present unwieldly mass of case law, but the lawyers answer that a code is very desirable, but quite impossible. The Yankee has actually fulfilled his boast, and licked creation by proving the impossible possible, and producing a working code in six years.

Although there is much we might study with advantage in the American correctional institutions and modes of legal administration, we are very far from saying that they are objects of imitation. In theory they may in some respects be better; but taken as a whole in their practical working, they are very inferior. The difference, of course, between State and State is enormous, and while some gaols, *e.g.*, those of

Illinois and Missouri, where prison extension has by no means kept pace with the amazing increase of population, are such as existed in Europe before Howard lived; there are others, *e.g.*, those of Massachusetts, which will bear comparison with the best of our model prisons. Indeed, in one respect, Massachusetts surpasses us, and that is in the management of the Juvenile Reformatories in Boston. These reformatories resemble those of Liverpool, inasmuch as they are on board ship; but whilst the training ships in Liverpool lie always in the harbour, those of Boston make long and frequent voyages, and thus not only do the boys feel more interest in their work, and thereby become more likely to reform, but also a more complete and seaman-like education is given, and a valuable class of seamen prepared for the navy. But this is a bright exception; and on the whole our prisons are better managed than those in America.

The English and American characters seem to be complementary of each other. The Englishman, though defective in his theory, produces great effects by the thoroughness of his practice. The American, from an absence of that thoroughness, produces a much worse result, though his theory is much better. Nor does he seem likely to change. As long as all government offices are of temporary tenure, and bought and sold as they are in America, no matter whether in the gift of the President, or in the hands of the people, we do not see how the administration of prisons, or of any other government department, can be satisfactorily managed. The result of inquiry into all departments would, we think, be very like this report, which shows that whilst all their theories are excellent, their practical management is very defective. But this does not hinder the systems of various States being good subjects of study to European on-lookers who have not such opportunity of experiment. Some thirty years ago several European commissions visited the States, and examined the American prisons and their systems; but since then we do not think that sufficient use has been made of

that fertile field of inquiry which the transatlantic diversity of systems affords. In order to make proper use of the rule we mentioned in our opening, the experiment must be watched, and its results studied, and a little more attention to Yankee notions would not be thrown away. Indeed, were we not so very fond of leaps in the dark, we might find that, in other things as well as prisons, the great transatlantic workshop possesses models in working order of all our projected reforms. Some things we might avoid, some admire, some adopt; but, at any rate, a study of them would save us trouble, and possibly pain. In fact, we would recommend the adoption of this rule to young Members of Parliament, who would deserve well of their country. Whenever any novelty is proposed, let them at once inquire diligently—"Have they tried it in America? How does it work?"

Since the above was written there has been laid before us a Digest and Summary of Information respecting the prisons in the British colonies.* Such grave defects in our Colonial prisons are revealed by this report, that we must qualify our verdict as to the superiority of British over American prisons, and confine it to the prisons of the United Kingdom proper.

Some of the defects are, no doubt, defects inherent in all colonial institutions. It is natural that colonies, where labour is very scarce, should seek to employ all labour they possess, in a productive manner. It is also natural that young colonies with their virgin lands, their undeveloped resources, and wide future, should in their eager progress content themselves with punishing their criminals in a rough and ready fashion, without any laborious attempts at the prevention of crime by the reformatory processes adopted in older countries. Such pro-

* Digest and Summary of Information respecting Prisons in the Colonies; supplied by the Governors of Her Majesty's Colonial Possessions, in answer to Mr. Secretary Cardwell's Circular Despatches of the 16th and 17th January, 1865. 1867.

cesses have no obvious or immediate result, and work that is not directly productive has few attractions in a colony. This report, which contains the result of careful and minute inquiry into the condition of the central prisons and district gaols of thirty-three of our colonies, shows that these faults are at any rate common to the colonies of England. Penal labour, which is almost indispensable to the efficacy of short sentences, is scarcely ever imposed in our colonial prisons, and reformatory efforts are rarely, if ever, made. Stone breaking, road making, and other public works of the rougher kind, seem to be the chief labour enforced; whilst, in the tabular account given of the custom of the various colonies, oakum picking and shot drill are only conspicuous by their extreme rarity. So much for the amount of penal labour enforced. As regards reformatory efforts, the single fact that the separation of prisoners according to the nature of their crimes, or even their sex, is rather the exception than the rule, clearly shows that our colonies have not yet recognized how much the reformation of criminals assists in the prevention of future crime. We hope this report may both effect a change in the present labour system of our colonial prisons, and may stimulate the adoption of reformatory measures. It not only comments strongly on the present defective system, but it also points out very clearly that penal labour and a reformatory system both pay best in the long run, by keeping down the per-centage of re-committals, which at present is monstrously large.

But these are not the only shortcomings which are brought to light by this report. Overcrowding, that to a certain extent is sure to occur from time to time in the prisons of prosperous colonies, whose population always increases more rapidly than the size of its public buildings, seems to exist in many of our colonial prisons to a scandalous extent. In Jamaica some of the prisons are so overcrowded that many of the prisoners pass long nights of twelve hours in rooms that only give to each 200 cubic feet of air; and more than 300 cubic feet is an amount that is rarely enjoyed. In Mauritius they seem to be

even worse. In the nine prisons that island possesses there is room for 1,250 prisoners. The average number they contain is 2,450; and occasionally that number is swelled to nearly 4,000. As regards the conditions of these prisons the report says:—

"The general state of the prisons is this: Port Louis is not very secure; the others (except the new vagrant depot) have no pretension to security, and retain their prisoners, not by strength, but by what is to their prisoners comfort. Sanitarily they are all defective, some to an astonishing degree. Separation and strictly penal labour are unknown. Reformation is hardly, and in few cases, attempted. Labour is light, diet high, sleep long. The warders are too few, and not trustworthy. Inspection is generally rare and inefficient."

Again—

"Men lying on the floor packed closely head and feet alternately like wedges or fishes, take up from four square feet each, if they are small and lie on their sides, to eight if they are full sized and lie on their backs. At Grandport and Flacy, less space than the lesser of these amounts is given at times, and on an average at Grandport little more, at Flacy less, than the larger amount."

The prisoners at Grandport, the report adds, have, when very crowded, only a third more area and a half more space than was allotted to the inmates of the Black Hole of Calcutta, and, moreover, whilst the latter den had two small windows opening to the outer air, the former is only ventilated by two small apertures over the door opening on to the entrance passage. That hideous piece of Oriental barbarism perpetrated at Calcutta may not have been so unparalleled as we have been in the habit of thinking it, but we are astounded to find that England has come near to furnishing the parallel we thought was wanting.

Inefficient staffs of officers, and insecure prisons are too common faults. Scarcely a colony of any importance is exempt from them, and many of the prisons depend rather on a

system of high diet and light labour than secure prisons and able officers to keep their prisoners within the walls. As, for instance, in Canada, high diet and light labour are so prevalent, that we find the prison looked upon as a winter home by the vagrant class. This custom of light labour, high diet, and long sleep seems to be universal. It even extends to Australia, where otherwise the prisons, are by contrast with the others mentioned in the report, well conducted. Want of separation of sex, absence of classification of criminals according to their crime, and, above all, a deficiency in the inspection, either governmental or municipal, are other grave faults which the report points out. The last seems to us the most important. Remedy that, by increasing the number of inspectors and giving them sufficient authority, all other faults would soon be remedied, provided that fit men be appointed. But little will be effected otherwise. The present state of things is well exemplified by the case of Canada. Four inspectors are there supposed to inquire into the state and remedy all abuses of the prisons, contained in a district which extends over a distance of 1,200 miles by 600, and contains many populous cities, towns, and villages. Is it to be wondered at that Canadian prisons are not models of excellence? We must add, however, that crime has diminished of late years in Canada, an effect, which though partly due to the rush of bad characters to the American war, is still attributable to some extent to an improvement of system. How much more would it be diminished if all Canadian prisons were under sufficient and proper governmental inspection?

We have only spoken of this report in a very brief and general manner, but we have said enough to show that our colonial prisons are at present conducted in a manner very far from being in accordance with the principles that are adopted in this country. The report is divided into two parts; the first containing a vast number of facts, which all go to prove the existence of the glaring faults we have briefly pointed out; the second part being a summary for the benefit of colonial

authorities of the chief results of the experience of this country in the management of criminals. Colonies may be more prone to error, but they are also readier to reform than older countries, and we trust that the chief principles of prison discipline, so clearly stated in the second part of the report, will soon be generally adopted in our colonies, as far as the different conditions of race, climate, and social life will admit of. Their adoption will soon lead to the increase of prison accommodation, enlarged staffs of officials, more efficient inspection, and the introduction of reformatory measures and penal labour; and, before long, we shall have prisons in our colonies whose condition will be an honour instead of a disgrace to themselves and their mother country.

Art. IV.—INDIAN LAW.

A Treatise on the Hindoo Law of Inheritance, &c. By Standish Grove Grady, Barrister-at-Law, Recorder of Gravesend, &c. London: Wildy & Sons. 1868.

Reform of the Hindu Marriage Laws. By W. C. Bonnerjee, Barrister-at-Law. London: Macmillan. 1868.

A Chart of Family Inheritance according to Orthodox Moohummudan Law. By Almaric Rumsey, of Lincoln's Inn, Barrister-at-Law. London: Amer. 1868.

At the present time, when so many members of the English Bar are turning their attention to Indian practice, it is becoming most necessary that a sufficiency of texts-books of reference should be provided, from which, without being obliged to devote too much of their time to wading through a mass of authorities—without, in fact, having to begin their legal education over again—they may be enabled as quickly as possible to apply their general stock of legal principles to a

new and strange field. Without very peculiar advantages it is impossible for a European to become a really learned Hindoo or Mohammedan lawyer. The actual condition of the system, or rather systems, of the law to which the inhabitants of the great empire of India are subject is one of the most intricate subjects to which the European lawyer or statesman can turn his attention, even if he were, as few, if any, are, thoroughly well versed in the customs and traditions, for the most part but half intelligible to learned Hindoos themselves, upon which those systems are founded. In fact, it may be laid down broadly that between the Eastern and the Western mind there is a great gulf fixed; so great, in fact, as to be practically impassable. An Englishman can no more really comprehend the Eastern mind, and its theological and metaphysical ideas, than the Hindoo or Arab can comprehend the theology or metaphysics of the West. Though, however, this fact is completely obvious, it is constantly lost sight of by every one whom even a few months' residence in India has elevated, in his own eyes, into the position of a man of experience in the matter. Worse than this, the longer, as a rule, a man remains in India, the more he becomes cut off from any chance that was ever open to him of observing fairly and philosophically. The tone of Anglo-Indian society is fatal, in spite of all the exceptions which might be brought forward, to anything like breadth of view and sympathies outside the service. Probably this is not altogether the fault of our own countrymen; the really intelligent classes among our fellow subjects, are, no doubt, more exclusive in their own way than we are in ours. But this strange and one-sided communication that we hold with grooms and servants, with the hewers of wood and drawers of water, is one of the greatest causes of the changelessly hostile position in which we stand to the Indian empire considered as a whole. How can we thus expect to understand the spirit of the laws of a nation whose tone of thought is to us an apparently insoluble mystery?

But still, in darkness or in light, we have to govern India

somehow. Our courts must proceed upon some system, and if they do not always rightly understand what they are about, they must act upon some consistent system, whether it be really right or wrong. Thus one branch of the Hindoo law, not necessarily as it is understood by the pundits, but as it is practised in our own courts, consists of a somewhat strange mixture of the Eastern letter, read, as it were, with Western eyes; an attempt, often most ingenious and practically, according, at least, to our own notions, just, to force into old bottles a wine which is often-times far too new. Instances will occur to the minds of all who have made any attempt to enter into the philosophy and history of Indian law for other purposes than merely with a view to practice. We do not here speak of gross importations of purely English ideas in the formation of new laws or the abrogation of old, such as the abolition of suttee, but of the interpretation of rules of Hindoo laws by our notions of what they ought to mean, or rather what they would mean if they prevailed among ourselves. Great, it is to be feared, have been the miseries, none the less real because they have not touched property or life—none the less hard to bear because they have been mental and not physical—that English rulers have inflicted simply because they were and are alien to those they governed in tone of thought and feeling.

That there are two ways in which the laws of India may be administered appears from the following passage extracted from the introduction to Mr. Grady's work, in which, speaking of Mr. Justice Strange, he duly appreciates the distinction between the laws of India as they are, or rather were, in themselves and the laws of India as affected by our own judicial decisions:—

"From Mr. Justice Strange's writings we are led to infer that he was deeply imbued with the principles of Hindoo law, derived from their original source, as they would be administered in a primeval state of Hindoo society, uncontaminated by the admixture of foreign influence, whether pretending to be actuated by construction of what

the law should be or with reference to modern progression. It is in this spirit, we think, that the Legislature intended, when securing to the Hindoos the enjoyment of their laws, that the law should be administered. Doubtless, in many respects, the Hindoo law, like other systems, is childish, senseless, or purposeless; but where these defects exist, reformation should come from the Legislature, not from the Bench. When the Bench arrogates to itself the power of setting aside the law, we consider it then assumes a jurisdiction which was not conferred upon it. It may be very well, in objection to Mr. Strange's views, to observe that they are opposed to the existing state of things. Such an observation may be just, but if the law says otherwise surely the writer who enunciates the law is not in error. The Legislature may be called upon to interfere, and, perhaps, if the whole Hindoo law were placed in the legislative crueible and re-cast, a more satisfactory result might ensue than the uncertainty which exists at present. Whatever may have been the demerits of Mr. J. Strange and his system, the public have the satisfaction of knowing that the principles of the Hindoo law, whether rightly or wrongly enunciated, had a chance of being uniformly administered. But at present the public know not upon what principles to proceed; change of administration has produced such a desire to demolish old things and to build up new, that they know not what image to worship."

It is just this desire to demolish old things and to build up new, which, to the Hindu mind, is the hardest thing to understand of all. How, therefore, can the natives of India submit to our tribunals with anything like real satisfaction to themselves when their notions of what law is, and ought to be—perhaps it would not be too much to say their notions of justice—also differ radically from our own?

Unhappy as this state of matters must necessarily be to all who look upon the natives of India as fellow-subjects, and who are able to appreciate their real character and position intellectually and morally, it is, we more than fear, irremediable. It is not that it is too late to make a change in our method of procedure, but because the East and West can never really combine in one. Still, something can be done; and the best

way to begin—as yet the beginning has scarcely been made—is to discover what the Hindu law really is, independently of English glosses and judicial decisions.

This, however, is not the work of the practical lawyer, for whose use the elaborate work, whose title stands at the head of this article, has been prepared. Here, and in books of the same class, we find anything but the laws of India, pure and simple. The latter forms the basis; but the history of Indian law, since the East India Company first became a great legislative and judicial body, has been the history of change applied to what theoretically is, as were the laws of the Medes and Persians of old. These fundamental laws themselves are divided into many systems, which may be grouped, as Mr. Grady explains them, in five principal divisions, and the Mahommedan invaders have left their sign upon them even more distinctly than ourselves. Upon these systems, which consist to a great extent of tradition and religious dogmas, are overlaid, as with us, the unnumerable authoritative decisions of the courts, the no less innumerable opinions of learned men, and all the text-books of the Sages, with their multitude of digests, glosses, and commentaries, from the days of Menu downwards.

This being the case, it may well be supposed, as Mr. Grady says, that the young barrister who, without any acquaintance with the Eastern language or character, intends to carry his legal knowledge acquired in England to the Indian market, will not only find that very much of what he has learned in this country will prove entirely useless to him, but that he will have to commence an entirely fresh course of study before he can feel the least confidence in himself when conducting a case connected with local law. Once embarked in practice, however, it will be altogether impossible for him to find the time or power to read the wide-spread reservoirs of most difficult and intricate learning from which Hindu and Mahommedan law are drawn. He must content himself, as, we fear, too many practitioners of English law content themselves, with analysis and treatises intended to do away with all necessity for profundity of study.

With regard to the work which is the subject of our notice, we need say little more than that it is extremely well adapted for acquiring a practical knowledge of the Hindu Law of Inheritance, and would be found in practice an admirable book of reference, both for the lawyer and for the civilian. But it is not a philosophical treatise; nor, in fact, does it pretend to be such. We make this remark principally because a reviewer of the book in the *Solicitor's Journal*, for the 29th of February for the present year, seems to have fallen into some errors which are so very common when the subject of Hindu law is under consideration; the error of confusing the fundamental and original system of Hindu law in its now historical phase with its actual condition as administered by ourselves. He labours under the impression that the Legislature of India, when ordaining that the Hindu and Mahommedan law should be administered when Hindus and Mahommedans are concerned, made no provision for the interpretation of these laws. Surely the reviewer could not have been ignorant that when the Bengal Regulations of 1793, and the Madras Regulations of 1802, were promulgated, Hindu pundits and Mahommedan mooftis were appointed and empowered by express enactment to expound the Hindu and Mahommedan laws. These interpretations of their laws continued in existence for more than half a century, and, notwithstanding all that has been said and written against them, have, we believe, given, in the majority of instances, faithful answers to the questions propounded for their solution.

The reviewer likewise appears to consider that the judges in India, from their ignorance of Sanscrit, and inability to refer to original sources, are incompetent to interpret or understand the Hindu law, but he forgets that translations have been prepared by eminent Sanscrit scholars (the accuracy of whose labours has not been called in question), of the leading works of the various schools of Hindu law, and of the original texts on which the founders of these schools based their systems. The judges are, therefore, as competent to refer to the

doctrines of the various schools as any Sanscrit scholar of the present day. When the translations referred to were prepared, Sanscrit was a language studied by Europeans and natives in India, with greater zeal than it has ever since been. In fact, day by day, the study of the language in India has gradually decreased, and we believe that, at present, there are very few Europeans or natives in India who are possessed of more than the slightest smattering of the language. In Europe, Sanscrit appears to be studied with greater assiduity than in India, and if we were in want of a Sanscrit scholar to interpret a difficult passage of Hindu law, we would be inclined to seek him in the colleges of Europe, rather than in the universities of India. Such being the state of the knowledge of this dead language in India, we are far from concurring in the opinion of the reviewer, and are fully convinced that the judges of India are as competent to obtain a knowledge of the Hindu law, from the translations of the works of standard writers as any Hindu possessed of an elementary and superficial smattering of Sanscrit. Certain works, namely, the "Jimuta Vohana" in Bengal; the "Mitacshara" in Benares and Madras; the "Vyavahara Mayukha" in Bombay; the "Vivida Chintamani" in Mithila, and the "Smriti Chandrica" in Dravida, having been received by the courts as works of authority, and all, with the exception, perhaps, of the latter, having been accurately translated, may be regarded as codes recognized by the courts and the Hindus themselves, and as such the judges are at liberty to place their construction on the text. With reference to the "Institutes of Menu," translated by Sir William Jones, and the gloss of the Sages, collected by Jagganadha, in which, if the reviewer ever read his digest, he would have known its chief merit consisted in the translation by Colebrooke, one of the most celebrated Sanscrit scholars of his day. The very circumstance of certain standard works being recognized as authorities, tends to give certainty to the law. The interpretations placed by the native judges on the text are open to revision by the superior judges, and eventually by the Privy Council, assisted by the arguments of counsel.

The decisions pronounced by the higher courts become precedents, and, as such, are superior as expositions to any which a Sanscrit smatterer may consider himself competent to give. The Hindu law, thus reduced, so far as law can be reduced to certainty, consists of the doctrines of these standard works of the leading schools, the original institutes, the gloss of the Sages, and the interpretations of the court. If commentaries on the doctrines of the leading schools have not been translated, and are not available to the English judges or lawyer, we consider their loss as trifling. The judges are as competent as the commentators to place their own construction on the text, and are free from the suspicion of having been influenced by a bias from any particular dogma. The reviewer, while endeavouring to make a display of his own knowledge of Sanscrit, hints very clearly that Mr. Grady's ignorance of that language has detracted from the merits of his work. Probably, an apparently more learned work might have been written had Mr. Grady endeavoured to make a similar display, which might have easily been done, by quotations from Wilson's Glossary, or if he had even *bonâ fide* quoted from obscure commentators whose productions had never been rendered into English; in the latter event, instead of representing the law as it is, which was his object, he might have represented the law as it is not understood by the courts. We think Mr. Grady has acted wisely by confining himself to the standard works, and the decisions of the courts, and the value of his work over the labours of his predecessors consists in those complete digests of the authorities, combined with a digest of the decisions brought down to the date of publication.

The reviewer finds fault with Mr. Grady's observations on Act XXI of 1850 (pp. 26, 27). Had he given the whole passage the reader would find that Mr. Grady simply starts questions likely to arise, but which, to his knowledge, have never yet been decided. It is true he ventures with diffidence to offer an opinion; whether right or wrong must be decided by the courts, should the cases put ever occur. The reviewer,

however, in the plentitude of his wisdom, differs from Mr. Grady, and is perfectly satisfied that the opinion he has pronounced, *ex cathedrâ*, is correct.

There are certain other points touched upon by the same reviewer, which deserve an incidental notice. The reviewer's opinion *ex cathedrâ* differs from Mr. Grady's with respect to efficiency of funeral obsequies performed by a nephew, and pronounces the view entertained by the author of the passage cited at p. 37, from the "Dattaka Mimansey" to be erroneous. Here, also, he has omitted to give the passages, and no support of his opinion refers to certain mystic ceremonies which none but a son may perform in honour of the dead. It would have been more satisfactory had he described the ceremonies to be performed by the nephew for the benefit of the soul of his childless uncle, and showed in what respect they differ from the ceremonies the son is required to perform.

From allusion to these mystic ceremonies one would be led to conclude that the reviewer is a Hindu in religion for considering the mystery in which the Hindus envelope their religious ceremonies. No European can possibly be expected to understand the difference between one ceremony and the other, and we are therefore surprised that a Hindu (supposing our surmise to be correct) should have committed himself to the opinion that a boy may be adopted more than once by different individuals. He appears to consider that Mr. Grady intended to be jocular when he observed at p. 49 that, "as the virtue to deliver from *put* was expended on his first adoption, he could confer none by his second adoption." It is evident, from the great pains Mr. Grady has taken at pp. 43-49, in discussing the question of the adoption of an only son, and whether he can, after adoption, be regarded in the light of a dwyamushyana, that he was perfectly serious in expressing an opinion against the adoption of a boy who had been already adopted. This question, as well as the adoption of an only son, would have to be referred to the same principles. Had the reviewer referred to pp. 50 and 51 he would have found the subject

discussed with reference to the validity of an adoption of a boy on whom the ceremonies of tonsure and oopanayana had been performed, and as these ceremonies are generally performed by the adopter—and their performance renders an adoption illegal—these are the strongest reasons to conclude, in addition to the special reason given by Mr. Grady, and cavilled at by the reviewer, that one who has been adopted cannot be adopted a second time.

The reviewer is mistaken entirely in supposing that Mr. Grady's work is based on Morley's Digest, or Strange's Elements. The work bears evidence that the author must have consulted between 200 and 300 volumes. Each page shows that it is based on all the works published on the subject of Hindu law, and although Morley and Strange have been cited as well as other authorities, Mr. Grady's book is more complete than any of them, seeing that it is more copious as a digest, and the decisions have been brought down to the date of publication.

It is rather new for a reviewer to condemn a work of real value and utility for want of originality. A law book claiming to be original, would be a natural curiosity—a greater one even than the review in the *Solicitor's Journal*. The reviewer, in going out of his way to make this observation, seems to have done that which he charged our author with having done: he has fallen into *put* himself with a vengeance.

We have dwelt at what may perhaps appear an extreme length upon this subject; but we are unwilling that a work, which we consider to be one of real importance and value, should be injured by blame which is undeserved. All blame thrown upon a work of whose merits the public is, for the most part, incapable of judging, is necessarily dangerous to the reputation of that work, and the more so when special knowledge of its subject is shown by the reviewer who condemns.

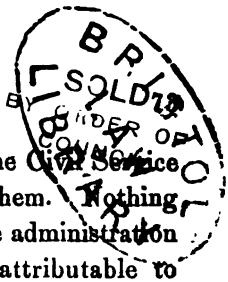
Mr. Rumsey's book is an elaborate summary of a very complex and difficult subject, and one, moreover, with which every practitioner and student of Mahommedan Law must,

descendants of these of former days, to show what prizes lie within their reach.

The four Inns of Court, viz., the Inner and Middle Temple, Lincoln's Inn, and Gray's Inn, have the sole and exclusive right, or in other words the monopoly, of admitting the outer world to the ranks of this profession. Each Inn is governed by a self-elected body, who are termed "benchers," composed chiefly of those members of the Inn who have attained the rank of Queen's Counsel. These benchers have the control and administration of all funds. "Calls to the Bar" are entirely in their hands, and, as the Inns of Court are voluntary societies, they could reject any man seeking to be called, and their decision would be without appeal, just as much as is the decision of the governing body of an Oxford college respecting the admission of any undergraduate.* The society of the Inner Temple has an annual income of about £21,000, three-fourths of which arises from rents, the rest being paid by the students and barristers; that of the Middle Temple, about £13,000, one third of which is paid by the students and barristers; that of Lincoln's Inn, £18,000, nearly one-half of which is paid by the students and barristers; that of Gray's Inn, about £8,300, about a half of which is paid by the students and barristers. The benchers have also the control over some £10,000, the amount of the deposits made by students on admission, and not repaid till their call or withdrawal. Finally each bencher pays £250 or £350 to his society on his appointment, the larger sum if he be a Queen's Counsel, the lesser if he is without the Bar, in other words, a stuff gownsman.

The Inner and Middle Temples hold what property they possess under a grant from James I., in 1609, of which the material part for our purpose runs thus "Which said Inns, messuages, &c., for Ourselves, Our heirs and successors, We strictly command shall serve for the entertainment and educa-

* The King *v.* Benchers of Lincoln's Inn, 4 B. and C. 855 (Wooley's Case).



native laws; and the gentlemen studying for the Civil Service ought also to have similar facilities afforded them. Nothing can prevent mutiny more effectually than a due administration of justice. The late rebellion was not solely attributable to greased cartridges; the real causes were allied with the maladministration of law, mainly from ignorance on the part of European officials. We should endeavour to prevent a recurrence of this calamity before it is too late.

ART. V.—THE INNS OF COURT.*

THERE are rather less than 5,000 names at present entered in the list annually published, of the members of the higher branch of the legal profession, commonly known as the Bar. These five thousand gentlemen have a monopoly of a most lucrative and highly honourable and responsible kind of business, from which a few gain enormous incomes, sometimes reaching £15,000, or even £20,000, a year, and very many acquire handsome competencies, whilst all, by the very fact that they are barristers, hold a position in society which no other trade, and only one other profession, obtains. In addition to this, each of these five thousand gentlemen, as he attains a certain limited standing in his profession in point of time, becomes eligible to very many offices and dignities of state, both honourable and lucrative, from which everyone outside the profession is excluded. These offices and dignities are so numerous that they cannot be particularized, but their number is such that it is said to be often difficult to fill them with men who are competent to perform the duties required. As regards those who follow the legitimate business of the profession, we need only point to the fact that half the House of Peers is filled with legal lords of the present day, or the

* Report of the Inns of Court Commission, 1855.

whether the Inns of Court fully perform their duty to society, and only send forth to the world as members of a learned profession, men qualified to perform its various functions.

First, as regards the duty of the Inn towards its members, whether students or barristers. It mainly relates to three things—the accommodation, the entertainment, the education of the members.

I. Few men now live in chambers. The prevailing fashion of living out of town has extended to the legal professions, and barristers now as a rule have business chambers in the Temple or Lincoln's Inn, but have their residence westward, or in one of the suburbs. The question of accommodation, therefore, only relates to the provision of chambers for business purposes. Such provision, we think, is sufficiently made, but at a somewhat high rate. It is true that the Inns provide insurance, night and day watchmen, gas-lamps in the courts and on the staircases, and they undertake all repairs; but, with all these exceptional advantages, which no private landlord would give, we think the rent somewhat high for the accommodation. The benchers would probably reply to this that any diminution of rents would not pay the current expense. That may be so, but it does not necessarily arise from the fact that the rents are at their lowest pitch. It may be that the system on which the expenses are conducted is an expensive, not to say extravagant one. There is no doubt that any capitalist would pay a very large sum to have the disposal of the chambers in the Inns on the terms that he should confine the tenancies to the class which now holds them, and should, at the same time, make a reduction in the amount of rent now charged; whilst that is so, we cannot believe that proper economy is practised. There is one matter we cannot refrain from mentioning as affording an opportunity of reasonable reform. At present there are in all the Inns a good many sets of chambers let to solicitors and a few to gentlemen not members of either legal profession; and these chambers are let at precisely the same rates as chambers which are occupied by members of the Bar.

Now, with the exception of Gray's Inn, where few barristers wish for rooms, we think a higher rent ought to be expected from members outside the profession to which the Inns are supposed to be devoted. The advantage of position which chambers in an Inn of Court gives to a solicitor, leaves no doubt that an extra charge would be readily paid, and such an arrangement would be more fair as long as any *bonâ fide* members of the profession are in want of chambers, which is said to be the case not unfrequently.

II. The only provision at present made for the entertainment of the members of the respective Inns, is that dinner is provided every day during term time. The dinner is plain but good, and the price is moderate, though more so at the other Inns than it is at the Inner Temple, where the student pays 3s., and the barrister 3s. 6d., for a plain dinner and half-a-pint of wine. But this dinner is so far from paying its own expenses, that the Inner Temple, for instance, used to spend a thousand a-year more than is received on the catering department. Several reasons at present exist why this department is not self-supporting. In the first place the benchers pay only a nominal sum for their dinner, which is a very expensive one, both from the variety of food and the amount and variety of wine supplied. Secondly, the salaries paid to servants are very high. Between two or three thousand pounds are paid away, for instance, at the Inner Temple in allowances and salaries; butlers, cooks, waiters, and other servants being paid on a scale that would be generous were they employed all the year round. Thirdly, the opportunities given by the possession of excellent kitchens, noble dining halls, and a large staff of servants, are not properly brought into play. Luncheon as well as dinner might be served, and both should be prepared daily, not only in term time, but whenever the profession is in London, and that is practically at all times, save during the long vacation. Regularity in the provision of dinner and luncheon would so much increase the numbers, that the arrangements would probably become

self-supporting. If the benchers are afraid such an experiment might prove a terrible financial failure, let them save the Inns from any risk by advertising for tenders to supply lunch and dinner, at certain fixed prices, from the kitchens and in the halls of the various Inns. As many *restaurateurs* make such a catering succeed with moderate prices, although they have to pay a ruinous rent for their establishment, there is little doubt that there would be a rush made for an opportunity of a large and fixed custom, without the terrible drawback of a heavy rent. It has also been often proposed, in addition to the daily serving of luncheon and dinner in the hall, that one set of chambers, or even two, should be devoted to the general use of members of the Inns, much on the plan of college combination rooms. It is suggested, also, that newspapers might be provided, and a lavatory attached to the rooms. The expense of such an arrangement would not exceed £150 a-year, and the comfort and convenience would be very great. At present the libraries are, much to the annoyance of students, very often used as places for friendly talk. A common-room (to use a college expression) would, by providing a recognized rendezvous, relieve the libraries from this serious drawback to their utility, and, by increasing the feeling of association among the members of each Inn, would give greater power to the public opinion of the profession, and contribute much towards maintaining a high standard of professional conduct. We can see no other objections to this proposal save the expense and the novelty, and, at any rate, it seems worthy of a trial.

III. We now have to consider the main duty of the Inns of Court, the education of their members, in its twofold aspect, as a duty to the students and a duty to society. That education, or opportunities of education, is a right to which all students are entitled, is a proposition that nobody will deny. Certain fees are exacted on entrance from every student for educational purposes, and there is also every reason to suppose that the Inns hold what property they possess in trust for those purposes. It is equally indubitable that society is

entitled to some guarantee that the men sent forth to the world by the various Inns as barristers-at-law, are more or less intellectually fit to perform the highly important duties of their profession, and to fill satisfactorily the many important offices for which the progress of time soon makes them eligible. We will, therefore, consider what educational opportunities are and have been afforded to the students, and what test of intellectual fitness is imposed at the time of their call to the Bar, in order that the world may not be deceived in its belief that the high sounding title of barrister-at-law implies the possession of considerable legal acquirements.

In the first place, the Inns of Court possess four noble law libraries. The Honourable Society of Lincoln's Inn has the opportunity of placing over 28,000 volumes at the disposal of their students; the Inner Temple over 16,000 volumes; the Middle Temple, we believe, nearly as many, and Gray's Inn over 7,000 volumes. Each library possesses a librarian, who admirably fills the post, and whose civility places great knowledge of the books at the disposal of any frequenter of the library who seeks information. There are assistants to fetch and carry; all materials for annotation are provided, and the libraries are furnished most comfortably. In fact, the libraries and all the appointments connected with them, are so admirably managed that they are as tempting as the grapes, which we are told Tantalus was always trying to seize, and, we are sorry to add, the enjoyment of them is almost as unattainable. For instance, if a student goes to the library of his Inn for a morning's reading at some text book, his study will be interrupted every few minutes by an application for the book from a barrister, who has run in from chambers to look up some small point which has arisen in practice; if he go in the evening, in the hope that he may be less interrupted, he will find the library closed; if, as a last resource. he apply to borrow the book for a time, he will find that the rules of the benchers, more unalterable than the laws of the Medes and Persians, forbid any book to be taken out of the library save by one of

themselves. If, as sometimes happens, the student cannot find a book in the library of his own Inn of Court, he cannot, as he would naturally be inclined to do, step over to the library of one of the other Inns. Again, in his desire for self improvement, baulked by a bencher's rule, he must first obtain an order from a bencher of the other Inn, before he can set foot in any library save his own. All these rules apply equally to barristers who are just in the same way the happy possessors of a library which they cannot use. In fact they are in a much worse condition than the students, for they are frequently engaged in court all day, in which case the library is practically of no use whatever to them. And not only are they deprived of the use of their library but they have the annoyance of knowing that it need not be so. There is no real reason why the libraries should not be opened in the evenings, as is shown by the fact that the attornies open their excellent library at the Law Institution up to ten o'clock at night. In fact, until the libraries are opened in the evening, until a separate library is established for the students of all the Inns, until books are allowed to be taken out for a limited time and under certain other restrictions, the libraries of the Inns of Courts, noble institutions as they are, will not be half the use they might be, for either educational or professional purposes. All reforms of this kind will no doubt induce expense. But while, for instance, at the Inner Temple about £500 is spent on the library, and £2,000 on the hall and kitchen department, in other words on eating and drinking, we cannot help thinking that expense on the one hand may be compensated by retrenchment on the other. Moreover, expenditure on the library would be of a character that is always justifiable, for at present much is spent to little purpose, whilst a slight expenditure would make the whole outlay of the greatest utility, and no better application could be made of some small portion of the surplus income which remains to each Inn, after the expenditure of the year.

So much for the libraries. Before considering what other

means are now adopted for the education of students, it may be as well to consider the various educational devices of former days, of which they are the outcome. As early as the reign of Henry III. we hear of "divers learned men in the law, who kept schools of the law in the City of London," and about that time it seems to have become a distinct profession, apart from the clergy, who previously had greatly monopolized it, so much so that it had passed into a proverb, *nullus clericus nisi causidicus*. About the same time the Inns of Court were encouraged by the suppression of all other rival schools, and henceforward they seem to have been the only law school, and to have had the exclusive right they now possess of conferring the degree of barrister-at-law. The ancient studies adopted for the improvement of the students, were readings, moots, and exercises. The readings were always upon some well-known statute, and were of much more importance than ordinary lectures. Lord Coke thus describes them:—

"First they declared what the common law was before the making of the statute; secondly they opened the true sense and meaning of the statute; thirdly their cases were brief, having at most one point at the common law and another upon the statute; fourthly, plain and perspicuous, for the honour of the reader was to excel others in authorities, arguments, and reasons for proof of his opinions and for confutation of the objection against it; fifthly, they read to suppress subtle inventions to creep out of the statute."

These readings were regarded as authorities and often cited as such in Westminster Hall, and some of them are still held very valuable expositions of the law at the present day. Sir Edward Coke's reading on "Fines," Bacon's reading on "The Statutes of Uses," Ruden on "Forcible Entry," Callis on "Sewers," are all very well known, and there are many others of almost equal celebrity. It appears from old writers, Stow in particular, that these readings differed very essentially from the ordinary lecture of the present day, inasmuch as the reader was always followed by another or some-

times two other barristers who attempted "by way of argument to prove the reader's opinion to be against the law." Then the reader endeavoured "to confute the objections laid against him and to confirm his own opinion. After which," Stow continues, "the judges and serjeants, if any there be, declare their opinions. Then the youngest utter barrister again rehearseth another case which is prosecuted as the former was. And this exercise continueth daily three or four hours." Every bencher was liable to be called on to be a reader, and the emoluments now enjoyed by the benchers, to wit, a set of chambers for life and a sumptuous dinner at a nominal cost, were assigned to them as a return for their readiness to perform the office. A custom, however, gradually crept in for the readers to give grand entertainments, and as the entertainment became the main duty, the cost of which sometimes amounted to £1,000, and the reading a very secondary one, it is not to be regretted that the practice of reading fell into disuse.

Moots or mootings were meetings for the discussion of points of law which were conducted in a more formal manner, though they were much of the same character as the discussions now conducted at the various legal debating societies. They were conducted before the benchers in the hall, and certain of the young men were chosen to argue for and against the point proposed for argument. Sir Symond d'Ewes describes the custom in the time of Charles I., in the following manner:—

"I had twice mooted in law French before I was called to the Bar, and several times after I was made an utter-barrister in our open hall. Thrice also before I was of the Bar I argued the readers' cases at the Inns of Chancery publicly and six times afterwards. And then, also being an utter-barrister, I had twice argued our Middle Temple reader's case at the Cupboard, and sat nine times in our hall at the bench, and argued such case, as had before been argued by young gentlemen or utter-barristers in law French, bareheaded."

Both in this account of the mootings and in that given by Stow of the readings it will be seen that not only students but also young barristers took part in these ingenious devices for the cultivation of the law. It is a question whether the present system of leaving men to educate themselves after their call is likely to be as successful. The mootings gradually fell into disuse like the readings, and the only remnant of them now left is the practice of discussing law points at some of the forensic societies held voluntarily by young students, where the absence of a learned and critical audience, such as the mootings afforded, leads to more prolix verbosity than clear succinct argument.

We have had some difficulty in discovering the exact nature of the ancient exercises. But, as far as we can learn, they seem to have been daily legal questions in writing, which were given to each of the students, and the answers to them were required to be handed in to the benchers at dinner. But, as far as their practical utility was concerned, they were discontinued long ago, although a kind of formal proceeding, no doubt arising from the exercise, continued to be gone through by the students at dinner until a comparatively recent period. Mr. Whateley, Q.C., in his evidence before the Inns of Court Commission says: "I may observe in Lincoln's Inn the exercises have dwindled away. When I was a student I used to be marched up to the barrister's table with a paper in my hand. I said, 'I hold the widow shall not——' the barrister made a bow, and I went away, and the next man said 'I hold the widow shall not——' and the barrister made a bow and he went off; and that was the remnant of performing the exercises." On the papers (which were distributed at the beginning of dinner) were printed law questions, but evidently no answer was expected.

The ancient system of study has thus passed away. At the beginning of this century, in the time of Mr. Justice Bullar, there arose a custom among students of placing themselves under the tuition of eminent pleaders, conveyancers, equity

draftsmen, and practising barristers. This custom has now become universally adopted, and every student must calculate among the expenses of his legal education one or two fees of a hundred guineas each, the price to be paid for a year's attendance at chambers as a pupil. Many attempts were made from time to time to restore the ancient readings in the form of the modern lecture, but they met with indifferent success until 1852, when the four Inns of Court commenced a system of united action for educational purposes, which has resulted in a regular system of lectures and examinations. A common fund was formed for the maintenance of readers or lecturers, amounting to about £1,800 a year, and the whole system placed under the control of a board, called the Council of Legal Education. These readers, in addition to the public lectures, have private classes, which all students can attend on payment of five guineas a year. Further regulations concerning legal education were made in Trinity Term, 1866, and as it is in accordance with them that students are now educated and called to the Bar, we will set out the important portions in detail:—

I. *No student shall be eligible to be called to the Bar who shall not have attended during one whole year the lectures and private classes of two of the readers; or have been a pupil during one whole year, or periods equal to one whole year, in the chambers of some barrister, certified special reader, conveyancer, or draftsman in equity, or two or more such persons; or have satisfactorily passed a general examination.*

II. Every one applying to be admitted as a student at an Inn of Court, must either have passed a public examination of a university, or must pass an examination in the English language, Latin language, and English History.

III. Five readers are appointed:—I. A reader on jurisprudence and international law.—II. A reader on the law of real property.—III. A reader on the common law.—IV. A reader on equity.—V. A reader on constitutional law and legal history.

Before proceeding to discuss the question whether this scheme provides sufficient opportunities to the student of learning his profession, and gives a guarantee to the public that every barrister is tolerably learned in the law, we must point out one defect in the system which stands in the way of its efficient working. It is possible, and is very generally the case, that a student at the same time is attending the lectures and the chambers of a barrister. As the lectures are delivered in the day time, he loses by attendance at them time for which he is paying some barrister at the rate of two guineas a week. But he not only loses time by his attendance, for, as the reading required for the two pursuits is wholly different in character, he must either lose more of his time at chambers, by preparation for the lectures, or must sacrifice much of the good the lectures would do him, from want of that preparation. In a proper system the lectures ought to precede the practical study, and certainly they ought not to be coincident in time. The lectures for articled clerks are, we believed, delivered in the evenings. This plan is, of course, better than that adopted by the Inns of Court; but in a really efficient scheme of legal education, a certain amount of theoretical knowledge ought, we take it, to be a condition precedent to practice. At present the first six months is said to be generally thrown away in a pleader's or barrister's chambers, from want of knowledge. The pupil feels much in the position of the man who could not kill, cut up, or cook, and who was given a cow grazing in a field for his week's victuals.

But we do not think this scheme of legal education an efficient one, nor will it be so until the three tests, the performance of any one of which is sufficient now, are all necessary before a student can become a barrister. It is an almost invariable custom for students to read in chambers as a pupil, and therefore it is by means of the certificate mentioned as the third alternative requirement, that most students are called to the Bar. A good many attend the lectures, but very few adopt the alternative of the examination. The first is no

test of fitness. A man may profit very much, or not at all, from chamber work. He is necessarily much left to himself, for the tutor generally is a man of large business, and greatly occupied, and has not time to see whether his pupils merely copy precedents all day long, or whether they go vigorously into the merits of every case, and are not satisfied until they have learnt the whole law relating to it. Even supposing the pupil to be a model man, of independent mind, and endowed with a taste for vigorous research and very hard work, the learning he acquires is of a very patch-work, piece-meal character, and to it must be superadded a knowledge of legal principles and of law as a science, to enable him to assort it in his mind and retain it for future use. The second alternative may also mean anything or nothing, according to the task of the student. A man may attend lectures all his life, and be never a whit the wiser, or he may, by preparation and taking notes, derive much benefit. But there is little chance of the latter, unless, as is not the case here, the attendants at the lectures are frequently examined on what they have heard. The third alternative is a less delusive test than the other two; but, as long as it is only optional, it will be chosen as it is now, by comparatively few students.

We do not even think this present system is as good as that we have described as in practice in former days. It has all the material required for a most elaborate system, in its lectures, readers, classes, and examination, but, as at present developed, it gives the student far too much opportunity of playing the part of a sieve, and letting all that comes in at one ear pass out at the other. There is no test of attention and diligence, such as that afforded by the mootings and exercises. But we do not consider the old system by any means a perfect one.

We look upon a true legal education as far too great a thing to be embraced by the former system, any more than it is by the present scheme which enables any man who can afford to waste a hundred guineas, or can spare time enough to attend a series of lectures for a year, to hold

himself out as a man learned in the law. We hold that law is not a mere mechanical art; that lawyers are not mere repositories of case law, with an aptitude acquired by long practice for producing from their stores the right precedent for each new case that comes before them. A true lawyer ought to be versed in the principles and theory of the law, as well as its practice. High scholarship, a logical method of thought, with a knowledge of the principles of jurisprudence, and the various systems of law which have obtained at different periods and in different countries, ought to be among the tools of his art, as well as a large assortment of leading cases, important statutes, and useful precedents. Such an education cannot be given without a more elaborate system than that which we have described as at present in vogue. A preliminary examination on general culture, compulsory lectures and private classes, with much catechetical teaching, for two years, subsequent study with a barrister for one year, and a final examination before the call, would approach our idea of a good system of education. As things are now, the student may, if he please, educate himself by means of the lectures, classes, and examinations; but all is left to his discretion, and society has practically no guarantee that barristers have any real knowledge of the law which they are popularly supposed to be capable of imparting and administering.

A compulsory examination as a *sine quâ non* is not without its opponents; many hold it to be both inexpedient and mischievous, and that it often affords a very slight test of the capacity to transact real business, and in many cases proves very delusive. Such is the case too frequently where cramming ensures success. But we hold it as a disgrace to an examiner if his questions are such as a cramming system can answer, and we believe that only happens where the examine are men so constantly engaged in catechetical and minute instruction that they have lost all mental breadth of view and power of looking at any subject as a whole. Moreover, in

the system we would see in practice an examination is not the Alpha and Omega. It is merely the crown of a long work of preliminary instruction, to which the examination itself is but a very secondary matter.

One of the most common reasons urged against preliminary examinations or other intellectual tests of fitness being made indispensable to admission to the Bar is that many are called with no intention of practising as barristers, and that such a preliminary would entirely deter them. The reasons why men go to the Bar are numerous. The main motive is of course a desire to practise, but it is by no means the sole one. Many choose the profession because it possesses a monopoly of lucrative offices; others because they look forward to a seat on the bench at county sessions, where a barrister is listened to with especial attention; others because it is deemed a useful step in a political career; others, finally, because the Bar is a gentlemanly profession, and "barrister-at-law" is an imposing and well-sounding title. It is only the last two classes who can in any way claim to be exempted from the test. A knowledge of the law is expected from the others, and they have no right to sail under false colours. Nor would we exempt the last two classes save on one condition—that is, that they would consent to the introduction of two degrees of barristers, to distinguish the practising barrister from him who does not hold himself out for practice.

It is worth while in cases of this kind to inquire what is done in parallel cases in our own country and elsewhere. The clergy, for instance, have long special training and compulsory examinations before they are considered qualified for their profession. In medicine, men go through years of preliminary training before they are allowed to practise. Young solicitors undergo five years of preparation and three examinations before they can begin life on their own account. Abroad there is no country that deems a man entitled to practise as an advocate or attorney until he has proved himself more or less qualified by passing through an examination. Why should the English

Bar be the only body that is not subjected to a similar test? It is all very well to say that by the principle of natural selection the inefficient and ignorant will be crowded out, but the public must suffer whilst that process is going on. In fine, the Inns of Court do not do all they might do either for students or the world outside the profession as long as men go forth to the world accredited by those learned societies as gentlemen learned in the law, whilst, in reality, all the law they may possess may have been, and very likely is, acquired by occasionally copying, during the course of one year, a certain amount of legal jargon which they have never tried to understand.

We have now examined into the performance of the duties of the Inns of Court. We have seen that the accommodation afforded might be made less expensive; that the entertainment might be very much increased, and that the education might be made more of a reality than it is at present. The governing bodies are so open to conviction, so ready to listen to complaint, and so eager to adopt any well-considered reform, that we do not doubt these defects in these otherwise well-managed institutions, will not long remain unremedied. Fortunately there is no trace of bumbledom or vestrydom about the benchers who form the governing bodies of the various Inns of Court. Although they are somewhat unwieldly bodies on account of their size, somewhat lazy bodies on account of the honorary and irresponsible nature of their office, and somewhat conservative bodies on account of the tendency of their profession, and the admirable comfort of their own present position, still they are formed of clever and active-minded gentlemen, quite as ready, no doubt, to remedy what is wrong in the constitution of the Inns of Court, as they are to detect a flaw in an opponent's argument or a misstatement in the evidence of an adverse witness. We, therefore, look forward with confidence to a speedy reform in the Inns of Court, initiated and carried through by the present governing bodies, without the assistance of a Parliamentary Commission, or other repre-

sentative of a public, which is becoming more and more impatient of self-elected boards enjoying great privileges and neglecting the duties those privileges imply.

ART. VI.—THE LIBEL BILL, 1868.

A MEASURE of great importance is now passing through the House of Commons, almost unknown to the public. It proposes to revolutionize that branch of the law on which depends both the security for free discussion and the safety of individual reputation. Surely, such a change in our system ought not to be made without a full and intelligent investigation of the question, not only in Parliament, but by the public in general—such as is the practice in this free country to make, before important changes are effected! Unfortunately, however, in the present case, the usual medium of discussion is closed, or rather is open to one side only. For the measure is so obviously calculated to benefit the immediate interests of the newspaper press—the desire for ease of indolent or over-wrought editors, and the pockets of proprietors—that, to look to them for an impartial criticism or a fair discussion of the subject, is to expect that valuable class of the community to be something more than human. Indeed, by them is the measure evidently concocted. The name of an eminent proprietor is on the back of the Bill; and the principal clauses refer only to newspapers.

The impressions of the public concerning the law of libel are of a vague character; and the traditions of old prosecutions—when the truth was held to be a libel, and defendants were severely punished for speaking their minds upon the conduct of persons profiting by flagrant abuses—no doubt enter into the general conception of this branch of the law. In such a publication as the "Law Magazine," however, it is perhaps hardly necessary to state that great improvements have been

made since those days—mainly by Lord Campbell's Act; and that, indeed, although the English law of libel cannot be held to be perfect—for in some minor particulars it certainly might be improved—yet, on the whole, it now works very well, holding the balance fairly between the requirements of free discussion on the one hand, and the protection of the public peace and of private reputation on the other.

Mrs. Candour complains that it is hard that persons should be blamed as slanderers who merely repeat what they hear; and the concoctors of the Libel Bill seem to adopt her view, the main provision of their measure being to give full immunity to the Mrs. Candours of the press, so long as they stick "to what they hear." For, by Clauses 1st and 2nd of the Bill, a newspaper is relieved from the responsibility which now attaches to it on reporting a speech (when made at a public meeting) containing aspersions, which responsibility is professed to be laid on the speaker.

It is true that this immunity is subject to the provision that the newspaper does not refuse or omit to publish an explanation or contradiction ("not unreasonably long") of the aspersion, if asked. But this is a very unsatisfactory atonement. Many persons may have read the attack who will not read the contradiction. Besides, many, who read both attack and contradiction, will believe the former, although the latter is true. And it is well known how difficult, or impossible, it is for a man to get rid of the evil effects of a calumny once widely spread, however clear may be his proof of innocence. A mere power of contradiction, therefore, is a poor substitute for the right, which the aspersed person now has, to compel his accuser to prove his charges to the satisfaction of a jury in an open trial,—when the truth is made manifest to the world.

It must be remembered, too, that a contradiction by the person aspersed is a very different thing from a *retractation or apology by the newspaper*, which may now be made (under Lord Campbell's Act) so as, in many instances, to prevent the complainant from recovering in an action.

But it will be said that these clauses give the libelled man a remedy against the speaker. This, however, is by no means really the case; for there is no provision in the Bill compelling the newspaper on behalf of the plaintiff to prove the speech in the action against the speaker. Now the proof of publication against a newspaper is very easy, merely to put in evidence the Stamp Office copy, or a copy shown to have been bought at the office of the newspaper. Not so the proof of *words spoken*. In most cases the plaintiff would not be able to find a person who had been present at the meeting, and who had a sufficiently accurate remembrance of the words to prove them satisfactorily; for the witness would be subjected to a severe cross-examination, and, though telling the truth, might be disbelieved by the jury. The only person who could certainly prove the words, would be a reporter; but if the plaintiff went to the newspaper office to inquire who attended to report at the meeting, the information might be refused; and, even if given, the reporter might be dead, or gone away before the trial, or have destroyed his notes. Clearly, if the responsibility is to be shifted from the newspaper to the speaker, the former, before relieving itself, should be bound to prove the case against the latter in favour of the plaintiff, and not merely prove this at the trial of an action against itself, and so get a verdict, and throw the costs of that proceeding upon the plaintiff.

But would it be *just* thus to shift the responsibility?

The main part of the mischief done by a libellous speech reported, is occasioned by the report, not by the speech, which may have been heard but by a small number of persons, whereas the report may have spread the calumny over the world. Moreover, the character of the speaker is often known in the locality where the speech is made, and his assertions are there priced at something like their real value; but persons at a distance, reading the report, have no such means of knowledge; and newspapers are fond of extracting from each other highly spiced attacks.

Again, the speaker may be a man of straw, (and people who make slanderous speeches are often so) not able to pay damages, or even costs, and who, under the present Bankruptcy Law, may, if he has a judgment against him, pass at once through the Court, which has not the power to suspend his discharge a single day, or subject him to any punishment whatever on account of damages found against him, however flagitious may have been his conduct. Such a man will generally not trouble himself to defend an action, and, thus, will not give the plaintiff the means of vindication afforded by a well fought trial, and by the awarding of serious damages against a substantial party.

It might be just to enact that, when a speech alleged to be calumnious has been reported, the person aggrieved should be empowered to join the speaker as a co-defendant with the newspaper, and that the latter should be entitled to compel the joining of the speaker by means of a plea in abatement, as is done by a defendant sued solely on a contract which he made in conjunction with a joint contractor. At the trial, if the speech is proved, the jury should find against the speaker, as well as against the newspaper, and should apportion what part of the damages each defendant should pay.

If, however, the principle of these clauses is to be adopted, there should at any rate be some means provided for settling, before the action is brought, whether a contradiction is "unreasonably long"—perhaps it might be determined by a Judge in Chambers;—and a proviso should be inserted making it quite clear that the clause confers no immunity upon *comments* on the speech.

Any privilege should certainly be confined to matters of *public interest*. There can be no possible grounds for protecting mere private scandal, although spoken at a public meeting.

The sixth clause empowers the defendant in an action for libel to pay money into court, as in other personal actions. This provision would be a good one if the plaintiff were empowered to insist on the payment into court being accompanied

by the publication of a retractation or apology, which, in case of dispute, might be subject to the satisfaction of a Judge in Chambers. The usual motive for bringing an action for libel is, not the desire of obtaining damages, *but the vindication of the plaintiff's reputation*, as is shown by the frequency with which actions are compromised at the trial by consenting to a verdict for forty shillings, accompanied by the public withdrawal of the aspersions. This object would not be attained by the mere private paying into court of a few pounds.

A salutary provision of the 8th and 9th clauses, preventing an indictment for libel from being preferred behind the defendant's back, is accompanied by an enactment that the prosecutor shall give security for, and pay the defendant's costs in the event of the proceeding turning out to be groundless, while no corresponding liability is thrown upon the defendant. Some years ago it was considered that the ancient law, that the Crown neither paid nor received costs, was unjust; and an Act was passed placing the Crown in that respect in the same position as a private individual. But in favour of the newspapers, this obvious principle of justice is to be disregarded; and the defendant is to be authorized to cry, "heads I win, tails you lose." A man must be very sure of his ground who will have courage to prosecute under such a law.

One or two other clauses seem to be ill-considered, but they are of minor importance.

It is but fair to mention that the measure contains some good provisions, as, that, in prosecutions for libel, the defendant may put himself or his wife into the witness-box (a simple concession to justice which should be made in all prosecutions), and that a fair report of proceedings in Parliament is protected.

It is alleged that newspaper proprietors are harassed by trumpery and vexatious actions, often got up by attornies for the sake of costs. This evil, however, is probably remedied by the clause (10th) of the County Court Act of last session, which enables a judge to order a plaintiff to give security for

costs, in default of which the cause is removed to a County Court, where the profits are too low to excite the cupidity of pettyfogging attornies. If, however, further protection is necessary, a general power might be conferred on a judge to compel the defendant to find security for costs. But, on this ground, to give a *carte blanche* to every newspaper to publish whatever it thought proper, provided it had been uttered at a public meeting,—to print, for instance, with impunity, that Mr. A. beats his wife, starves his children, cheats his customers, and seduces his neighbour's daughters, however false it might be—in a word, to pull down the main safeguard of one's good name, the dearest possession of an honest man—would be as mad an act as to burn a house in order to dislodge a few rats that harboured in it.

We trust that the careful attention of Members of Parliament and of the public will be given to this measure, and that it will not be allowed to pass into law, unless thoroughly purged of its objectionable provisions.

ART. VII.—THE LAW RELATING TO CHARITABLE GIFTS.

IT is not many years since an eminent statesman, in the course of a debate in the House of Commons, alluded to the restrictions on charitable gifts as "a code of laws which existed from the time of Edward I. to the present day." The notion thus expressed is by no means uncommon, and indicates a confusion between the Mortmain Laws and the modern system which is often incorrectly designated by that name. The statutes, extending from the Charter of Henry III. to the 15th of Richard II., which are properly called the Mortmain Laws, were intended to prevent the acquisition of land by corporations, and probably owed their origin exclusively to

feudal reasons. Corporations never died, were never under age, never alienated their lands, and therefore paid no reliefs or fines, and were, moreover, unable to render any personal services. As tenants they were obviously in the highest degree unprofitable and inconvenient, and it is not wonderful that the feudal lords should deem it a matter of the first importance that no large quantity of the lands of the kingdom should find its way into the hands of these bodies. But no attempt was made by our early legislators to impose restrictions upon gifts or conveyances of land to *incorporated trustees* for charitable purposes, and though, by a Statute passed on the eve of the Reformation, such grants were forbidden, when made for superstitious purposes, the owners of landed property, up to the year 1736, possessed an unrestricted power of giving or selling their possessions to unincorporated trustees for any charitable purpose not superstitious. It is no easy matter to discover the causes which led to the enactment of the Statute 9 Geo. II. c. 36, which forms the basis of the modern law relating to charitable gifts. No sufficient reasons for the imposition on these gifts of the restrictions contained in the Act were alleged during its passage through Parliament; and though the preamble would lead us to suppose that a charitable epidemic had seized the landed proprietors of England, no record of any such event appears in the pages of contemporary chroniclers. Indeed the Select Committee on Mortmain, which sat in 1844, confess that "though they have endeavoured to make themselves acquainted with the causes which led to the enactment of the 9th Geo. II. c. 36, they have failed to arrive at any certain knowledge of the true grounds on which the Act was passed."

The provisions of the Statute will, doubtless, be familiar to many of our readers. As modified by subsequent enactments, their effect may be briefly stated as follows:—

No land, or money to be laid out in land, can be devoted to charitable purposes, whether by way of sale or of gift, except by deed, sealed and delivered in the presence of two or more

witnesses, and enrolled in Chancery within six months after its execution. The deed must contain no power of revocation, or reservation for the personal benefit of the grantor, and, unless made upon a *bonâ fide* purchase, will be invalidated by the death of the grantor, within twelve months after its execution.

In construing this Statute two points at once presented themselves for judicial determination. *First*, what objects were to be deemed charitable; and, *second*, what kinds of property were included under the term "land?" Upon both these questions a construction was adopted which has greatly extended the operation of the Statute. All gifts for any public purposes, either local or general, though not charitable at all in the ordinary sense of the word, have, nevertheless, been held to come within the scope of the Act. Gifts for the liquidation of the National Debt, or for the establishment of a house of correction, are placed in the same category with gifts for the relief of the poor, and it has even been matter of grave judicial doubt whether the maintenance and repair of a family vault is not also a charitable use within the Statute. The term "land" has been held to include not only money secured on land, or in any way connected therewith, but also money produced by the sale of land.

By the law of England, therefore, the owners of land are prohibited from giving it by will to charities, and are discouraged from devoting it by deed to those purposes; while, on the other hand, the owners of purely personal property are permitted to give it to charities to any amount, and either by deed or will. The first question which suggests itself is whether the distinction thus drawn between real and personal property is sound? Is there any reason why land should be more specially guarded than money or stock? Of course, we shall be reminded of the economical evils produced by "the locking up of land from commerce;" but it should be remembered that modern legislation has, to a considerable extent, obviated the objection that lands in the hands of charities are

prevented from coming into the market. Under the provisions of recent statutes, leases, sales, or exchanges of the landed estates of charities may be made, with the sanction of the Commissioners of Charities, who may also authorize improvements to be effected upon lands belonging to those institutions. It may, indeed, be said that charity lands, at the present day, are quite as likely to come into the market as are the estates of our English gentry; and as, under the system of entails, a very large proportion of the lands of the kingdom is already locked up from commerce, without giving rise to any very alarming economical results, we think it may be considered that the evil to which we have adverted is very much greater in theory than in practice.

But, if it is desirable that land should pass readily from hand to hand, and if it is supposed that this object is frustrated by devoting it to charitable uses, how is it that the law only prohibits gifts to such uses if made by *will*, and permits them to be made by deed, under certain restrictions? If the object of the law is to prevent *land* from being made inalienable, why should money secured on land, and money produced by the sale of land, be included within its provisions? Surely the true way to accomplish this object is *not* to forbid conveyances of lands to charities, *but to limit the time for which such lands can be held* by the charitable institutions, in analogy to the well-known rule which confirms the duration of an entail to a life or lives in being, and twenty-one years afterwards.

Lord Hardwicke, who was, we believe, the earliest judicial exponent of the Act, has told us that one great reason for its enactment was to prevent the exercise of undue influence on dying persons. And, indeed, the provisions of the Act itself would lead us to this conclusion, for they are obviously intended to render impossible gifts to charitable uses by persons *in articulo mortis*. But here again the inadequacy of the existing law to accomplish this purpose is at once apparent. Gifts to charities by dying persons, of land, and of money connected with land are, indeed, prohibited, but stocks, shares,

and cash are left open to the insidious designs apprehended by the framers of the Act. There is nothing to prevent a testator from completing, during his lifetime, the sale of a large estate, and thus bequeathing the purchase money, as so much cash, to a charity. After the charity has received the legacy it may (if not incorporated) invest it in the purchase of land, and so accomplish, by a circuitous process, the precise result which the Act was intended to prevent. But may it not be fairly asked whether, at the present day, there is any practical danger of the exercise of the undue influence apprehended by Lord Hardwicke? Out of the millions of pure personalty, on which probate duty is every year paid, how small a proportion finds its way into the hands of charitable institutions! Nor is it likely (if we may judge from actual experience) that a relaxation of the reductions, with respect to gifts of land to charities, would be followed by any great outburst of liberality. For, since the year 1704, testators have actually possessed the power to devise their lands for the benefit of the church. By special legislative provisions real estates may be given by deed or will to the governors of Queen Anne's Bounty. The object of that corporation, as every one knows, is to augment small benefices, and nearly all the donations it receives are made with a view to the increase of *specified livings*. Well, surely, there is here sufficient motive, and ample opportunity, for the exercise of undue influence. What is there to prevent poverty-stricken incumbents from persuading their dying parishioners to devote some portion of their wealth to this desirable object? But mark the result. The secretary of the corporation stated before the Mortmain Committee that, in the 22 years during which he had held his office, only two instances had occurred of gifts of land to the corporation by will, and that in the three years previous to his examination not one such gift had been made!

It is perhaps scarcely necessary to advert to another argument which is sometimes urged against the relaxation of the law of charitable gifts—we mean that drawn from "the unjust

disherison of heirs" which, it is said, would ensue from such a relaxation. Now, if the expectations of the heir are to be preferred to the wishes of the ancestor, it is obvious that the only way of securing this result is to deprive the ancestor of all testamentary power. For it is absurd to suppose that a man who had resolved to cut off his heir with a shilling will forego his purpose because he is not permitted to give his estates to a charity. It is more probable that, debarred from disposing of his property to purposes beneficial to the community at large, he will select from his bounty some unworthy object, and give to a spendthrift the estates which might have fed and clothed the poor. But whether this be so or not it is clear that the present law is quite inadequate to prevent testators, if so disposed, from depriving their children of property in order to bestow it on charities. For the very class of property which most needs protection in this respect is left altogether unprotected. The desire which is nearly always felt by the owners of land to keep their estates in their families is usually sufficient to prevent them from disinheriting their children, but no such wish accompanies the possession of purely personal property, such as money or stock, and yet testators are at liberty to bequeath the whole of their property of this kind to charitable purposes. "With respect to the operation of the Statute," say the Committee on Mortmain (1844) in their report, "your Committee find that, while many good and charitable purposes have been thereby defeated, litigation, and the unjust disherison of heirs have not been prevented."

If the object of the law is to discourage the creation of charitable endowments, it is no less inconsistent and ineffectual for accomplishing this purpose. For it is a well known rule of equity that charitable trusts shall receive a more liberal construction than is allowed in the case of ordinary trusts. A charitable legacy is never allowed to fail for want or default of trustees, nor from lapse of time. All defects in conveyances to charities are supplied where the vendor is capable of conveying; and however indefinite and uncertain may be the be-

quest, as if it be made simply for charitable uses *eo nomine*, the Court of Chancery will treat it as a valid charitable bequest, and will execute it for such charitable purposes as it shall think fit. And even though the donor has specified as the object of his gift a purpose contrary to the policy of the law, or which cannot be accomplished, the court, if a general intention of charity appears in the instrument of gift, will devote the property to some other charitable purpose. Thus, while "impediments are thrown in the way of devoting land to charitable uses, if those impediments are once overcome the land thus appropriated is never suffered to revert to the donor or his representative."

Let us now pass from this examination of the reasons alleged in favour of the existing law to a very brief consideration of the evils to which it gives rise. First among these may be mentioned the litigation occasioned by the restrictions imposed on charitable gifts. Lord Kingsdown deliberately stated before the Mortmain Committee of 1851 that "if the strict law were always administered, scarcely any property would be safely disposed of where legacies are given to charities, and the property is at all considerable, without a suit in Chancery." To this high authority nothing need be added, but we commend to the consideration of our legislators a remark made by Mr. Mill in his "Political Economy," and which we believe to be fully borne out by experience. "In England, whoever leaves anything beyond trifling legacies for public or beneficent objects when he has any near relations living, does so at the risk of being declared insane by a jury after his death, or, at the least, of having his property wasted in a Chancery suit to set aside his will."

The complexity of the provisions of the law, and the great number of exceptions which have from time to time been introduced in favour of particular institutions, are another source of grievous hardship to charitable donors. How is a man to know what kind of property he may, and what he may not give to a charity, or which charities are excepted from the

But it will be said that these clauses give the libelled man a remedy against the speaker. This, however, is by no means really the case; for there is no provision in the Bill compelling the newspaper on behalf of the plaintiff to prove the speech in the action against the speaker. Now the proof of publication against a newspaper is very easy, merely to put in evidence the Stamp Office copy, or a copy shown to have been bought at the office of the newspaper. Not so the proof of *words spoken*. In most cases the plaintiff would not be able to find a person who had been present at the meeting, and who had a sufficiently accurate remembrance of the words to prove them satisfactorily; for the witness would be subjected to a severe cross-examination, and, though telling the truth, might be disbelieved by the jury. The only person who could certainly prove the words, would be a reporter; but if the plaintiff went to the newspaper office to inquire who attended to report at the meeting, the information might be refused; and, even if given, the reporter might be dead, or gone away before the trial, or have destroyed his notes. Clearly, if the responsibility is to be shifted from the newspaper to the speaker, the former, before relieving itself, should be bound to prove the case against the latter in favour of the plaintiff, and not merely prove this at the trial of an action against itself, and so get a verdict, and throw the costs of that proceeding upon the plaintiff.

But would it be *just* thus to shift the responsibility?

The main part of the mischief done by a libellous speech reported, is occasioned by the report, not by the speech, which may have been heard but by a small number of persons, whereas the report may have spread the calumny over the world. Moreover, the character of the speaker is often known in the locality where the speech is made, and his assertions are there priced at something like their real value; but persons at a distance, reading the report, have no such means of knowledge; and newspapers are fond of extracting from each other highly spiced attacks.

Again, the speaker may be a man of straw, (and people who make slanderous speeches are often so) not able to pay damages, or even costs, and who, under the present Bankruptcy Law, may, if he has a judgment against him, pass at once through the Court, which has not the power to suspend his discharge a single day, or subject him to any punishment whatever on account of damages found against him, however flagitious may have been his conduct. Such a man will generally not trouble himself to defend an action, and, thus, will not give the plaintiff the means of vindication afforded by a well fought trial, and by the awarding of serious damages against a substantial party.

It might be just to enact that, when a speech alleged to be calumnious has been reported, the person aggrieved should be empowered to join the speaker as a co-defendant with the newspaper, and that the latter should be entitled to compel the joining of the speaker by means of a plea in abatement, as is done by a defendant sued solely on a contract which he made in conjunction with a joint contractor. At the trial, if the speech is proved, the jury should find against the speaker, as well as against the newspaper, and should apportion what part of the damages each defendant should pay.

If, however, the principle of these clauses is to be adopted, there should at any rate be some means provided for settling, before the action is brought, whether a contradiction is "unreasonably long"—perhaps it might be determined by a Judge in Chambers;—and a proviso should be inserted making it quite clear that the clause confers no immunity upon *comments* on the speech.

Any privilege should certainly be confined to matters of *public interest*. There can be no possible grounds for protecting mere private scandal, although spoken at a public meeting.

The sixth clause empowers the defendant in an action for libel to pay money into court, as in other personal actions. This provision would be a good one if the plaintiff were empowered to insist on the payment into court being accompanied

The failure of gifts, such as these, may be said to inflict a double wrong, for not only is violence done to the manifestation of a just and laudable sentiment on the part of the donor, but an injury is inflicted on the persons for whose benefit the gift is intended. Whether permanent endowments are the *best* means of providing for the relief and education of the poor, is a question as to which different opinions may be entertained. But that such endowments, when properly managed, do contribute to the alleviation of distress, and the diffusion of knowledge, cannot for a moment be disputed. Are we then justified in retaining on our Statute book a system of restrictions which, while it fully answers no conceivable good end, does operate as a heavy blow and sore discouragement to charitable gifts?

Art. VIII.—THE PATENT LAW.

AFTER the Patent Law, as limited and defined by the Statute of Monopolies, has been in operation for more than two centuries, and in later times has received elucidation from the innumerable decisions in the many litigations that the progress of the arts and sciences have occasioned, it might, perhaps, be regarded as a useless, if not a foolish question, aimless in purpose and valueless in practice, to inquire what the statute really intended should be granted when echoing and confirming the dicta of the Common Law on the subject. But so inconsistent and confusing are the interpretations which the words of the Statute have received from the highest legal authorities, and so utterly do they ignore the Common Law precedents which were its oracles, that the mind of the inquirer is not impressed with a respect which forbids any sceptical investigation into the grounds upon which this long series of judgments is professed to be based.

Before entering, however, upon this examination, it is well

to pay some attention to the motives which the Common Law served when originating such grants, and the framers of the Statute respected when they ratified their continuance.

It has been often observed that it was the wise policy of the Common Law to protect, encourage, and promote industry among the people, abhorring idleness, which the law regarded as *mater omnium vitiorum*—experience and customs which are the life-blood of this ancient code taught that the prosperity and wealth of a country springs not so much from the natural advantages of soil, as from the energy and practical intelligence of the inhabitants. Nothing therefore could tend so much to the development of the national resources, as the introduction of handicraft, by which the working classes were enabled to acquire an honest means of livelihood, and hand down the boon from generation to generation, while the product of this industry afforded at the same time an impetus to commerce, and was the root and branch of our mercantile success.

All legal authorities which allude to the grant of letters patent for inventions to ingenious persons, antecedent to the passing of the Statute of Monopolies, speak of the grant as one, which, at the Common Law, it was lawful for the Crown to make to any person who had invented a "trade,"* or a method by which a trade could be furthered.† With these commentators the word "trade" is always synonymous with handicraft, to which young men could be apprenticed, signifying that cunning of the hand by which all things before the introduction of machinery were wrought. Up to the time when the Act,‡ which terminated the evils of monopolies and sanctioned the old law of patents for inventions, passed the Legislature, no mention is made of the word "manufacture." Why then, it may be asked, did this powerful statute when recognizing the utility and leaving unchanged (except in a

* Nog. Rep: 182. † Godl: 252-254.

‡ 21 James I. c. 3.

minor point), a popular law that had enured for ages, avoid the phraseology of all the legal authorities and designedly substitute the word "manufacture" for that of "trade?"

The answer to this inquiry is obvious and easy. About twenty-five years before, the judges of Westminster had pronounced that it was unlawful for the Crown to grant the monopoly of trades, as it was contrary to the ancient laws of England.*

Notwithstanding this decision, however, it was still the practice of the sovereign to lay the most cruel and unjustifiable burdens upon the trading classes, and to suppress any resistance by the unconstitutional delegation of coercive means. To abolish such a system was the object of the statute, which is one of the most sweeping on the Parliamentary records of England.

The grant of a monopoly of a trade was to confer upon some person or persons the privilege of fixing the value of a commodity, and licensing its sale simply for the benefit of the individual on whom the indulgence was bestowed.

Having neither the capacity nor the inclination to exercise the trade himself, the monopoliser was a vulture who lived upon the produce of other men's labour, and trafficked in wares and merchandise without risk, let, or hindrance.

In the debate which arose in the Commons upon reading of the first Bill of Monopolies, Sir Edward Cook alludes to the definition that the judges, at the royal command, had given of monopolies, which he sums up in the words "buyeth all and selleth all."† Now this is quite a distinct privilege from that which gave the grantee protection while teaching publicly an art of great utility which had originated with himself alone.

In the former case, it was the sole right of regulating a trade by buying at one price and selling at another: or by means of licensing or taxing some important commodity. In

* Darcy v. Allen. Trin: 44 Eliz: Coke Rep. Nos. Rep.
† Jour. H. C.

the latter it was the sole right of putting in practice a handicraft or of exercising a trade which the grantee brought to the utility of the common weal.

In order therefore that there might exist no possible loophole by which a designing sovereign could escape from the stringent restraints of the law, and have recourse to the old abuse of making a grant of a trade; the originators of the Statute, while reserving to the Crown the privilege of making grants by Letters Patent to inventors sanctioned by the Common Law, cautiously substituted for the word "trade," which was that previously used by the common law authorities, the word "manufactures," first introduced into the Patent Law by the Statute of Monopolies; which, although synonymous with handicraft in one of the senses of "trade," does not allow of the other, viz.: to *buy and sell.* It must be borne in mind that the old law relative to Letters Patent for inventions, except a limitation of the period during which the grant was to inure, underwent, *by the express provisions of the Statute,* no change during the ordeal that resulted in the total abolition of all monopolies, and the final establishment of the Patent Law. In the words of Sir Edward Coke, when citing and commenting upon the Sixth and Saving Clause of the Statute, "yet this Act maketh them," [the grants of Letters Patent for Inventions] "no better than they should have been if this Act had never been made, but only exempts them out of the purview and penalty of this law."*

Now, the fact that this enactment was only declaratory, so far as it relates to the grants which the Common Law has permitted for so many ages to the inventors or importers of trades, gives us the clue by which we may be led to put a correct construction upon the terms employed by the Statute. As before remarked, the Common Law authorities state that a grant may be made of the sole use of a new trade, or of any engine tending to the furtherance of a trade, which was never

* Ch. Monop., 3 Inst. c. 85.

used before. Such grant may, therefore, be one of two things, either of a new trade *bonâ fide* invented, or of a new engine for the furtherance of a trade, which *existed before.*

The sixth section, from which alone since the passing of the statute has emanated the whole doctrine of the Patent Law, as interpreted by the courts, runs thus:—

"Provided also, and be it declared and enacted, that any declaration before mentioned shall not extend to any Letters Patent and grants of privilege for the term of fourteen years or under, hereafter to be made, *of the sole working or making of any manner of new manufacture within this realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such Letters Patent and grants shall not use,* so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient. The said fourteen years to be accounted from the first Letters Patent, or grants of privilege hereafter to be made, but the same shall be of *such force as they should be if this Act had never been made, and of none other.*"

The important words of this clause with reference to the point which we are now considering, are:—

A grant of Letters Patent—

First, "of the sole *working* of any manner of new *manufacture.*"

Secondly, "of the sole *making* of any manner of new *manufacture.*"

Thirdly, "which others at the time of making such Letters Patent and grants *shall not use.*"

The word "manufacture," as has been before explained, is here to be read in the same sense as attaches to the word trade for which it was substituted, not to work any change in the operation of the law, but from motives of policy.

But the signification of the word trade thus used is like to that of handicraft or art, and in this sense the court of King's

Bench in an early case relative to illegal restraints on trade, after, in conformity with the patent cases which preceded, the statute, consistently construed it.*

Now the word "manufacture" which the statute introduced in its stead, for reasons which have been already stated, taken in its etymological and primary sense, has a particular meaning identical with the word handicraft; namely, when signifying a manual process; but it has also the more comprehensive signification that attaches to the word trade, which includes every mode or method of fabricating, as well by machinery, as by the means employed before its introduction. Adopting such a method of interpreting the words of the statute, which would certainly be justified by the early rules and practice of the law, before the statute of James I. finally confirmed it; we shall, with little difficulty, arrive at the true construction to be put upon the language of the Act, which has been for ages a cause of doubt and perplexity.

The statute employs the word manufacture, which as we have endeavoured to show, when used in the Patent Law, is synonymous with trade or handicraft, to signify a method of fabricating. This method may originate a trade; or it may further a trade already existing.

Now, supposing the invention to originate a trade; the patent would be for a new trade or manufacture, and although such patent would only vest in the patentee a *method* of fabricating, yet the product or final cause of such a fabricating must, under such conditions, be absolutely in the grantee's power, and therefore he may be truly said in such a sense to patent a trade. But should the trade be in existence, the patent could only be for a new method or process, by which an impetus is given to such trade; it could not include any vendible article, which was the subject of a trade before, for this would be an appropriation of a trade in being and clearly illegal, because a monopoly of that which was public property.

* Mitchell v. Reynolds, 1 p. Wms. 181.

When, then, the Statute affirms that it was and is lawful for the Crown to grant Letters Patent, to the true and first inventor "of the sole *working* of any manner of new manufacture," the grant is for the sole use, for a limited period, of an engine or instrument invented for the furtherance of a trade. The privilege thus conferred on the grantee is the exclusive use of some mechanical means in the exercise of a trade; but as such trade *must have* existed before, the words "new manufactures" can only refer to the novel method of operation, by which the article is newly fabricated.

When the privilege is one of the sole making of any manner of new manufacture, the grant is one of the sole right of carrying on for a limited period any new art or trade in the sense of an art or handicraft.

With reference to the Patent Law, the invention of an engine, when considered as the subject of a patent, must be regarded in one or two ways, either as a new trade, when its construction is contemplated, and then the patent would be for the sole making; or, as an instrument for the furtherance of a trade, and then only its purpose is considered when the patent would be for its sole working and exclusive use for such purpose.

We therefore conclude that every art, device, contrivance, or method of whatever nature, that is capable of being applied for the purpose of forming, fabricating, or combining matter, or, in short, that can become or further a trade, may be conditionally the subject of a grant by Letters Patent.

But if it be necessary that a patentable invention should, when put in practice, create or advance a trade, it is obvious that, in order to ascertain whether or not it be a fit subject for a Patent privilege, we must inquire what such conditions are, and, next, whether the invention fulfils them.

Now, to become a trade, it is clear that the invention must possess two properties at least—namely, it ought to afford a means of employment to the people, and the produce of such labour must be some vendible article; but to do this it must

also supply a need, or create one and supply it. In the words of Sir Edward Coke there must be, "in every such new manufacture, *urgens necessitas* and *evidens utilitas*."

The sentence, "which others at the time of making such Letters Patent did not use," evidently indicates that the privilege intended to be granted could be only for the practice of a trade.

The view we have here taken is, we believe, supported by the cases cited by Sir E. Coke in his rambling chapter on monopolies. Of Briot's case we can learn little, except the important fact that the patent was for a process, or some slight modification of a process already in use.

In the example which he also alludes to, of an engine or mill that superseded a handicraft for fulling caps and bonnets, we again have an illustration of a patent for a mechanical process. Out of the three other cases to which we shall afterwards have occasion to allude, that arose antecedent to the passing of the Statute, and were for the "sole making," and the third for the "sole using" of an invention which had for this purpose the creation and promotion of trades.

We have now as succinctly as possible investigated the foundations on which the law of Letters Patent for inventions rests, and our proposition from the foregoing premises is this: That neither the Common nor the Statute Law ever vested, by a Patent privilege, any commodity in the grantee, either in connexion with a grant of the process or operation by which it is produced, or *per se*, when considered abstractly or apart from such a process or operation.

It will now be our task to examine these interpretations of the law which have received the stamp of authority, and become the recognized basis on which the courts decide and confirm their judgment. We will first fix our attention on the same word "manufacture" that has been the pivot on which so many important questions turn.

"The word manufacture in our language," says Mr. Hindmarsh, "as a noun, has two significations; firstly, the art or

practice of making or constructing any piece of workmanship. Secondly, anything made by art." "It is extraordinary," he observes, "that notwithstanding this double signification of the word, the Statute seems always to have been construed as if the word bore the latter only of these significations."*

Is it not equally remarkable that of these two significations the courts have generally selected the wrong?

The courts, with rare exception, till the important and leading case of *Boulton and Watt v. Bull*,† and the still more recent decision in *Crane v. Price*,‡ were in the practice of interpreting the word manufacture employed in the sixth section of the Statute of Monopolies as signifying a product, and not the artificial method by the operation of which it was produced, that could alone be the subject of such grant.

Let our inquiry now be whether the law favours such a construction.

Since the Statute, as far as it relates to patents for inventions, is only declaratory, the law, and the Statute which decloses the law, must be identical in sense. Therefore, the word "manufacture" can only receive the same construction as the word "trade," received by the courts before the passing of the enactment. But if the word "manufacture," construed as a noun, signifying something made by art, were to be the subject of the grant, it would no longer bear a construction as signifying a trade—and consequently the grant is very materially varied and extended, so that the Statute would be contradictory when it affirms in the fifth section that "these grants shall be of such force as they were," and in the sixth section, "as they should be, if this Act had never been made, and of none other."§

In the practical view of the question, supposing the article manufactured to be alone the subject of the grant, then such commodity must, to render the patent valid, possess novelty,

* Hind. P. L. 80.

† 1 Webs. Rap. 501.

‡ 2 H. Bl.—463 Dav., P.C. 162.

§ Statute Monp., 21 James I. c. 3.

must be "a new manufacture," but this condition would not affect the manufacturing operations by which it was produced. For, if the words "new manufactures," in such a patent, signify a valuable class of articles, then the working or making which wrought them, need not of necessity be new. Any known process of manufacturing, when applied to other materials than those hitherto employed that are also in common use, but to which it was never applied before, could produce a vendible article that fulfills the requisite conditions of the law. But on this point the courts have ruled otherwise, and decided that such a use of an old article could not be sustained, because the law demands a minute description of the working and making of the commodity, and that such working or making must of itself be new.*

"The subject of any privilege in an invention granted by patent," says Mr. Hindmarsh,† "is an art by which vendible articles may be manufactured; and when he says that an invention granted by patent must be new, the meaning is, that the subject of the privilege or the art must be new at the date of the patent."

The grant of Letters Patent for inventions is a sort of contract at Common Law, sanctioned by the Statute of Monopolies.‡ "The patentee," said Lord Eldon, "is a purchaser from the public and bound to communicate his secret to the public at the expiration of the patent." By the law of England no contract is valid, except on a valuable consideration. In the case of a Patent for Inventions, the consideration which the public receive, is the invention that the patentee pays to the public utility, when the period, during which his privilege incurs, terminates. This consideration, then, is the subject of the grant; therefore the public, at the expiration of the Patent receive that which they did not possess before, and which an enrolled legal instrument, termed the specification, is required by

* Key v. Marshall, Bing, N.C. 492.

† Hendle: P. Law 112.

‡ Myddleton v. Lord Kenyon, 2 Ves. Jr. 408.

the law to describe. But the purpose of the specification is to give a detailed explanation of the *mode* of manufacturing, not of the manufacture alone, in the signification of a vendible article. For suppose it to be otherwise; then, since this document is indispensable at law, in order to inform the public, with all possible accuracy, of the precise nature of the thing granted, should that which is granted be some novel and vendible *article* defined by the Statute to be a "new manufacture," the specification would have to describe minutely its nature, for the satisfaction and benefit of the public. But this would be superfluous, for no article of commerce at the disposal of all the world is a secret, for any one can buy and judge of it for themselves, which also negatives its use being absolutely vested in the patentee alone.

Again, if the valuable consideration which the patentee confers on the public is the subject of the grant, and the subject of the grant is a new article of trade, in what way is the public advantaged on the determination of the privilege? For, from the time that the patent was granted, and the new manufacture, which was its subject, was sold, the public have had it in their possession; how, then, can it be regarded as a valuable consideration received by them on the expiration of the patent?

Next, assuming that the grants of Letters Patent could vest an article of trade in the inventor, let us examine what is the effect of the grants and its limitations as made by Letters Patent.

The words of the 6th section of the Statute of Monopolies restrain the grant to the first and true inventor or inventors; consequently the privilege is only conferred on the consideration of purely personal merit, and is inalienable. The injustice, however, to the patentee of such a restriction, and the disadvantage it would work to the public, are obvious, and it has therefore been the practice in Letters Patent to make the grant to the patentee, his executors, administrators, and assignees. These words of limitation confer upon the grantee the power of assigning his privilege to others, or of granting them a licence

of its use. Supposing, then, that a patent privilege has been obtained by the inventor of a "new manufacture," not in the signification of a process, but of its product, and the grantee should, in the exercise of his right, license another to its use, what privilege does such a licence assume to convey? The patent which the inventor has taken out is for some vendible article, the subject of the grant; but what is it the licencee possesses, except it be a transferred privilege of "working" or "making" such an article? But this is a process, not a product, therefore such a patent must include both process and product, both patent and monopoly.

Thus it is evident that the courts have interpreted the words "working or making of any manner of new manufacture," even where that which has been granted was a production and not the working or making that wrought it, to include such process or method, which must, in order to fulfil the requirements of the Statute, be also novel.

The converse of this proposition, however, does not hold, for the courts have decided that there may be a valid patent for a "working or making" which is a novel process, although the result or product of such working or making is a well-known commodity. This was ruled in the case of *Losh v. Hague*, where the axiom was laid down, "that a new contrivance may be applied to an old object, but not an old contrivance to a new object." The construction therefore put by the courts upon the words "new manufacture," in the 6th section of the Statute of Monopolies, when distinguishing that which may become legally the subject of a grant by Letters Patent for invention, proves to be this—a patent may be granted either for a process or a product, or for both in one.

A process must always be novel whether the subject of the grant or not.

A product need not be novel except when the subject of the grant.

The result of our investigation leads to a somewhat different conclusion, which is—

A process must always be the subject of the grant, and therefore must always be novel.

A product can never be the subject of the grant, and therefore need not be novel.

ART. IX.—MARRIED WOMEN'S PROPERTY BILL.

AT the request of the Council of the Social Science Association, Mr. Shaw Lefevre is introducing into the House of Commons a Bill for the Amendment of the Law relating to the Property of Married Women.

The object of this Bill is to remedy the gross injustice inflicted by the present state of English Law upon women who marry without settlements. As the law at present stands, all the personal property of a woman by the act of marriage falls under the power of the husband. Her personal property in possession becomes, *ipso facto*, by the act of marriage, his property; but her choses in action he may at any time make his own by reducing them into possession. Nor is this all. All personal property that a woman may acquire after marriage, falls in like manner into the power of the husband, except her equitable choses in action, with respect to which she has an "equity to a settlement," or, in other words, may claim that a certain proportion, generally one-half, shall be settled upon herself and children, the remaining portion being given absolutely to the husband. The wealthier classes in general evade these monstrous effects by means of marriage settlements. But even among the wealthier classes, marriage settlements are not universal. Some persons have an unreasoning horror of settlements, as mere devices to put money into the pockets of lawyers; in other cases the intending wife looks upon a settlement as a mark of distrust towards her future husband, forgetting that a settlement is a security, not only against misconduct on his part, but against

unforeseen loss. Of this confiding temper there are many men unconscientious enough to take the fullest advantage. Not unfrequently the intending husband, on a proposition for a settlement being made by the lady's friends, assumes a tone of virtuous indignation, and asks "whether they cannot trust his honour?" And if those with whom he has to deal are weak enough to give way, he will then be at liberty to play ducks and drakes with his wife's fortune. Many of our readers will be able from their own experience to recall cases, where a man, having married a wife "with money," has squandered her fortune and left her penniless. But the hardships of the law fall principally upon the poorer classes, who cannot afford the luxury of marriage settlements. A man deserts his wife, and is not heard of for years. The wife does her best to support herself by honest labour, and puts her earnings into a savings bank. Suddenly she hears that her husband has discovered where she is living, gone to the bank where she has invested her earnings, swept them away, and gone off again, to return doubtless after a few more years and repeat the same course of conduct.

In order to remedy these crying evils, it is proposed by Mr. Shaw Lefevre's Bill to provide that a married woman's property shall in future belong to herself, and not to her husband. This is its main object. Whether any portion of a married woman's property should be liable for the support of her children, is a question we will consider presently.

Against this proposal it is objected:—1. That it makes a fundamental change in the laws affecting family relations. 2. That it will produce endless quarrels and heart-burnings in families. 3. That, as a husband is liable for his wife's debts, whether contracted before or after marriage, and is further bound to support herself and family, he ought in justice to have her property. 4. That, by taking away the disabilities of coverture, you will really confer no benefit upon the wife, but only enable the husband the more easily to wheedle her out of such property as she may possess. That, in order to prevent a

husband abusing his rights over his wife's property, a clause was introduced into the Divorce Act of 1857, enabling married women deserted by their husbands, to apply to a magistrate for an order of protection; that this legislative provision affords substantial protection to a wife against the selfishness of an unprincipled husband, and therefore ought to satisfy the most ardent reformer.

1. To the first of these objections we would reply, that, if a law is fundamentally bad, the sooner it is fundamentally changed the better. We may add that the law which empowers the husband to appropriate all his wife's personalty is very much the result of accident. The ancient Common Law contemplated, under the name of "personalty," little more than articles for household use. It is owing to the prodigious increase of personal property in the country, and the comprehension under that expression of kinds of property unknown to the ancient Common Law, that the exorbitant powers of the husband have mainly arisen. The Common Law was reasonable enough with regard to real property, giving the husband an interest in the rents and profits of his wife's lands for his life only.

2. There is no greater reason to expect family divisions and heart-burnings as the consequence of this Bill than where, under the present law, a wife has property settled to her separate use.

3. With regard to the husband's liability to his wife's debts, we may remark that it is a singular defence of English law against the charge of operating in many cases with extreme cruelty and injustice towards the wife, that in many others it operates with equal cruelty and injustice towards the husband. The liability of a husband for his wife's debts contracted before marriage, and for any wrongs she may commit, whether before or after marriage, is wholly indefensible on any reasonable principle. These liabilities the Bill we are considering proposes to remove.

Again, it is objected that, as a husband is bound to support

his family, it would be monstrous that a wife should selfishly accumulate property, leaving her husband to work hard for the support of himself and children. This objection applies, no doubt, equally to those cases under the present law where the wife has separate estate. But a Bill which makes these cases the rule and not the exception, ought to meet the objection in question. The force of this objection is considerably lessened by the fact that by law the husband is bound to give his children no more than the bare necessaries of life. Nor do we maintain that the wife should be bound to work for the support of the family. But we do think, that, so far as the wife has independent property, acquired otherwise than in the way of earnings, her liability to support the family should be co-extensive with that of her husband. Of course, where a wife has independent means of her own, her husband would not be bound to maintain her.

4. As to the objection that Mr. Shaw Lefevre's Bill will, in many cases, put married women's property even more under the power of their husbands than it is at present, inasmuch as her husband will be able to coax her out of it without difficulty, the answer is, that where under the present law a woman has married without any settlement, her husband can get her personal property without coaxing. The objection, however, is in many respects worthy of serious attention. As the law stands, a woman may, by marriage settlement, bind herself not to anticipate the income of property conveyed to trustees for her separate use. And the same restriction may be annexed by a donor or testator to a gift or bequest of property to a married woman. By no act of her own can she encumber this property, though she may encumber property settled to her separate use without any restraint or anticipation. A married woman, then, having, under the Bill we are considering, full power to contract as a *feme sole*, might, under the husband's influence, execute bonds and covenants. Assuming that the restraints against anticipation could be kept up under the changed state of the law, these bonds and covenants would not immediately

operate on the corpus of the property in respect of which the restraint existed, but they would operate, not only on the income of such property as fast as it fell in, but upon the rest of her property generally. And the restraint in question ceasing on the death of her husband, the corpus would immediately be subject to her debts and contracts. Even if it were practicable to introduce clauses into the Bill which might avoid such effect, it would be difficult, with any regard for theoretical consistency, to do so. It would, however, still be open to donors, testators, and settlors, to attain very nearly the same result by a gift over in the event of an attempt to assign or encumber the property in question.

5. The section in the Divorce Act, to which the last objection points, is as follows*:

"A wife deserted by her husband may at any time after such desertion, if resident within the Metropolitan District, apply to a police magistrate, or, if resident in the country, to justices in Petty Sessions, or in either case to the Court, for an order to protect any money or property she may acquire by her own lawful industry, and property which she may become possessed of, after such desertion, against her husband or his creditors, or any person claiming under him; and such magistrate or justices or Court, if satisfied of the fact of such desertion, and that the same was without reasonable cause, and that the wife is maintaining herself by her own industry or property, may make and give to the wife an order protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him, and such earnings and property shall belong to the wife as if she were a *feme sole*. Provided always, that every such order, if made by a police magistrate or justices at Petty Sessions, shall, within ten days after the making thereof, be entered with the Registrar of the County Court within whose jurisdiction the wife is resident; and that it shall be lawful for the husband, and any creditor or other person claiming under him, to apply to the court, or to the magis-

* 20 & 21 Vict. c. 85 s. 21.

trate or justices by whom such order was made, for the discharge thereof. Provided also, that if the husband or any creditor of or other person claiming under the husband, shall seize or continue to hold any property of the wife after notice of any such order, he shall be liable, at the suit of the wife (which she is hereby empowered to bring), to restore the specific property, and also for a sum equal to double the value of the property so seized or held after such notice as aforesaid. If any such order of protection be made, the wife shall, during the continuance thereof, be and be deemed to have been, during such desertion of her, in the like position in all respects, with regard to property and contracts, and suing and being sued, as she would be under this Act if she obtained a degree of judicial separation."

Upon this section it may be remarked:—

1. That, in order to avail herself of it, a wife must place herself in a position of public antagonism to her husband. This, of itself, is sufficient to stamp the provision as inadequate, even if it were free from exception on other grounds. It is not every wife who is aware of this provision in her favour; and, of those who are, many would be unwilling to accuse their husbands in a court of law. Nothing short of a provision declaring a wife's property to be her own, without any positive act on her part to make it so, will satisfy the demands of justice.

2. A protection order is, by the section we are considering, available only in those cases where a husband *deserts* his wife. But is desertion the only way in which a husband can ill-treat his wife? Is it not possible that a husband may, without deserting his wife, brutally ill-treat her, and sweep away her money, as often as she earns any, to spend at the gin palace? And is a woman to have no protection for her property in such cases?

3. The most objectionable provision of the section is that which gives power to a husband and his creditors, or persons claiming under him, power to apply for a *discharge* of the order of protection. It is only of a piece with the general vagueness of this section, that we are left wholly in the dark as to the grounds

on which an order of discharge is to be applied for. The subsequent language of the section concerning the "continuance" of such order at all events implies that it is not to be confined to those cases in which the original order of protection was, or is alleged to have been, improperly obtained. Now we maintain that if a husband's conduct has been such as to justify a magistrate in granting an order of protection, such order ought, under no circumstances whatever, to be discharged. For we may well ask what circumstances would justify such a discharge? That a husband should express himself truly sorry for what he had done, and promise amendment in future? And is a husband to be allowed a *locus pœnitentiæ* to enable him to indulge his rapacity at the expense of an innocent wife? And to whom is the power of judging in such a case confided? In London, it is confided to the metropolitan police magistrates, who are, in general, persons of sense and experience. But if the wife be living in a country district, her property will then become subject to the caprice of the local justices. By "the magistrate or justices by whom such order was made," is meant, we presume, not the individual magistrate or justices, but the same court. So that a wife may one day find a bench of justices favourable to the rights of women, and obtain an order of protection. Subsequently the husband or his representatives may go to the same court for a discharge for the order previously granted, and find the bench composed of squires of the old school, who consider the agitation for women's rights a mark of national degeneracy and subversive of society, and who would be anxious to give the narrowest possible scope to an Act which they deem to be mischievous and revolutionary. We do not, of course, impute any intentional unfairness to the country justices; but we know how men's habits of thought are apt unconsciously to bias their judgments, particularly in matters which are practically left to their uncontrolled discretion. Now, security is of the very essence of property; and a deserted wife who is subject to be deprived of her earnings, in case her husband should return, at

the caprice of a country bench, holds them by a very precarious tenure indeed.

There is no occasion to remark at length on the whimsical provision for enabling a wife to recover, in the event of the property being detained by a husband or his creditors after notice of the order of protection, not only the property itself, but twice its value besides.

It has often been remarked, that half measures of relief are often more injurious than none at all; because, while they fail to apply an effectual remedy for the evil complained of, they serve to lull the public conscience to sleep by the plea that something has at all events been done, and "agitators" ought to be satisfied with what they have got. So it is with the worthless provision we have been considering. The relief afforded to the wife is, in the great majority of cases, utterly nugatory; yet the insertion of this clause in the Divorce Act, eleven years ago, has been made the excuse for inaction up to the present time.

Up to the time at which we write, the Bill of Mr. Shaw Lefevre has not been given to the public; but we have reasons to believe that it will follow, with a few variations, the Bill introduced in 1857 by Sir Erskine Perry, and read a second time by the House of Commons. We earnestly hope that the measure in question will avoid the vice of obscurity, so scandalously frequent in English legislation, and not introduce any doubtful points of law to be settled by the judges. For a clear and intelligible Act which will remedy the abuses of the existing law, and effectually protect the wife against the selfishness or misfortunes of the husband, without subjecting the husband in his turn to any unfair liability, the member for Reading will deserve the cordial thanks of every lover of justice throughout England.

Art. X.—ON NATURALISATION AND EXPATRIATION; OR, ON CHANGE OF NATIONALITY.*

By John Westlake, Esq.

THE subject of the present paper has been prominently brought forward by the President of the United States, in the following passage of his Message to Congress, dated December 3, 1867:—

"Naturalised Citizens."

"The annexation of many small German states to Prussia, and the reorganisation of that country under a new and liberal constitution, have induced me to renew the effort to obtain a just and prompt settlement of the long vexed question concerning the claims of foreign states for military service from their subjects naturalised in the United States.

"In connexion with this subject the attention of Congress is respectfully called to a singular and embarrassing conflict of laws. The executive department of this government has hitherto uniformly held, as it now holds, that naturalisation in conformity with the constitution and laws of the United States absolves the recipient from his native allegiance. The courts of Great Britain hold that allegiance to the British crown is indefeasible, and is not absolved by our laws of naturalisation. British judges cite courts and law authorities of the United States in support of that theory, against the position held by the executive authority of the United States. This conflict perplexes the public mind concerning the rights of naturalised citizens, and impairs the national authority abroad. I called attention to this subject in my last annual message, and now again respectfully appeal to Congress to declare the national will unmistakably upon this important question."

* Paper read at a Meeting of the Jurisprudence Department of the Social Science Association, January 13, 1868. The Right Hon. Sir Robert Phillimore, in the Chair.

It also happens that various questions, arising out of the participation of naturalised Americans in the Fenian conspiracy give to the subject, so far as this country is concerned, an interest more pressing than that which President Johnson claims for it in connexion with the liability to military service. Hence the right of expatriation, that is of changing one's nationality, calls for an immediate examination: and for that purpose it seems to be necessary first to consider the rights of protection and control which give nationality its importance. To answer the questions whether and how the character ought to be changed, we must first be clear as to the significance of the character itself.

One of the fundamental conceptions, the postulates of international law is that of intercourse carried on under "international guarantee." To be absent from home during a considerable part of his life is the normal state of civilized man. The desire for gain allures him to a foreign port or seat of industry, that of health to a more genial climate; curiosity draws him to visit historical scenes, and the wonders of art or nature; even without a special interest, travelling is itself a recreation. Nor is this limited to any class, or to short periods of absence. The skilled workman and the unskilled labourer are attracted by foreign mines, railways, and other sources of employment, no less than the merchant by foreign business: gain, health, even a preference for the society of a particular place, lead to absences as long and of such a nature as to amount to a change of residence, though without any intention of changing the nationality: a British subject lives at Mexico, at Naples, or at Paris, not only with no desire to become a Mexican, an Italian, or a Frenchman, but with the strongest determination to remain a Briton. Why does he choose to remain a Briton? From the pride which most persons feel in the nation from which they spring. From a lingering attachment to the place of his birth, and the friends of his youth. Because he hopes one day to return, and therefore cherishes his native privileges as those which may be again of use to

him. Not rarely from a variance which may often be observed between the inclinations and the opinions. A residence in an agreeable circle may gratify his social inclinations, or one where he has a lucrative business or employment may gratify his inclination for gain: but to change his nationality would be to identify himself with another political system, often with another set of ideas on almost every subject, and the political system of his country is the one which commands his respect, the ideas of his own people are those which receive his assent.

But the foreigner, whether a resident or a passing traveller, and, if a resident, whatever may be his motives for retaining his nationality, looks to his own government for protection. And this he does in two respects: he looks to it for protection in the common concerns of life, in which nationality is not *in* question, and he more especially looks to it for protection against all such usage as might conflict with his position or sentiments as a member of a different nation from that in the territory of which he happens to be found; in neither point will he consent to throw himself unreservedly on the government of his actual locality. Without this protection from home, the habit of international intercourse could not have risen, or at least have assumed its present proportions. Englishmen resided in Spain when the fear of English cannon was their only safeguard against the Inquisition; they reside now in many countries where the fear of English cannon is their only safeguard against savage and uncompensated violence to person and property, in time of riot, revolution, or *coup d'état*. There are, no doubt, many states in which order and a spirit of fairness are so developed that the security of foreigners in them might be trusted to the sole care of the local government; but it would be impossible for international law to draw the line between those which are worthy of such trust and those which are not, or, if it were possible, the invidiousness of doing it would be a more fertile source of quarrel than the continuance of a theoretical right of protection, to be exercised within the territory of a fair and orderly state of which the dealings will

bear scrutiny. Considered generally, the right of foreigners to protection from their own state is an indispensable condition of that wide international intercourse which benefits the country where the foreigner travels or resides no less than that to which he belongs; and the burden must be taken with the benefit.

When one begins to inquire into the nature and limits of the protection which a foreigner is entitled to receive from his own government, we shall find it necessary, as I have already hinted, to distinguish two leading classes of cases, those of the common concerns of life, and those in which his nationalty is specially involved.

First, there are the cases in which the interests and relations of the foreigner are concerned merely as he is a man, and not as he is a member of a particular nation; that is, on the one hand, his rights of property, contract, personal security, reputation, and conscience; on the other hand, the duties which are incumbent on him for the maintenance of civil order, including universally that of a passive obedience to the government of the country which he has chosen to visit, and also that of an active obedience to it, so far as the commands which he is called on actively to fulfil do not conflict with the rights which we shall presently have to consider as belonging to him in his special character as a foreigner. By comprising the rights of conscience in this enumeration, I must not be understood to include that of public worship, which, however, in certain cases it may have been conceded, has never, beyond the case of ambassadors' chapels, been deemed to belong of right to foreigners whose religion is not tolerated in the country. But freedom from interference with private worship, or with belief privately entertained, is a condition without which intercourse could not be kept up; and to this extent the Protestant powers never failed to enforce the rights of conscience in favour of their subjects, even in the darkest times of the Spanish inquisition. Nor, again, in mentioning the rights of property, is it intended to claim for foreigners the right to acquire and own

land. As the feudal law connected allegiance with the tenure of land, it followed that those who were incapable of allegiance were equally incapable of such tenure. There is now no longer any country where the connexion of allegiance with tenure continues to fulfil any of the practical purposes which it served in the feudal system, but there are many in which the land law retains much of the impress of feudal times, and in these the disability of aliens to hold land continues to exist, an illiberal and purposeless blot, to which foreign states submit from ancient usage. But, with this exception, the rights of property and contract are *juris gentium* in the strictest sense. Variously modified in detail by local legislation or custom, their main outlines can everywhere be referred to that system which in the hands of the prætors supersede the civil law of Rome. On them the titles of states to their territories are acknowledged to rest, and they are as valid for a matter of £50 in favour of the foreigner within the territory, as they are in favour of the state for the territory itself.

With regard to this class of general, or merely human, rights, a distinction has been established in practice between two or three descriptions of states.

In the first place, there are the nations of Christian Europe, and the United States of America, in which the ordinary course of justice and administration is such as to inspire confidence abroad, or at least in such that the international disputes to be apprehended from an interference with it are deemed to be greater evils than those which foreigners would suffer from its being applied to them. Here, therefore, the protective function of the foreigner's own government is limited to seeing that the local courts of justice are open to him, and that they and the local government pursue towards him the principles which they avow in dealing with natives. It is rarely that this calls for any active interference.

In the next place, there are those states, as Turkey and China, in which the proper treatment of foreigners is only deemed to be sufficiently secured by treaties, in virtue of which

they are placed under the special jurisdiction of consuls of their own or of some other Christian nation. The special institutions and immunities thus established constitute a branch of international law known as exterritoriality.

Lastly, an intermediate case, of special protection without exterritoriality, is sometimes reckoned in the classification. Thus Mr. W. B. Lawrence, in his note, No. 59, to his Second Annotated Edition of Wheaton's Elements of International Law, 1863, p. 176, expresses himself thus:—

"The States of Spanish America, exposed as they have been from the very commencement of their existence to constant revolutionary movements, would seem, in reference to this subject, to occupy an intermediate place between those Christian states where life and property are deemed to be secure, and Turkey, China, and other countries where the principle of exterritoriality is maintained. In some cases, a right to interfere in favour of our citizens domiciled in other countries is to be found in the violation of the express stipulation of treaties. In those made with the Spanish American republics by the United States, beginning with the one with Columbia, October 3, 1824, there is an article by which 'both the contracting powers promise and engage formally to give their *special protection* to the persons and property of the citizens of each other, of all occupations, who may be in the territories subject to the jurisdiction of the one or the other, *transient or dwelling therein*,' &c. United States Statutes at Large, vol. viii. p. 310. And it will be recollected that the declared object of the recent tripartite treaty between Spain, France, and Great Britain, 'is not only a fulfilment of the obligations contracted towards their Majesties by Mexico,' but 'a more efficacious protection for the persons and properties of their subjects.'"

The italics are Mr. Lawrence's.

Such are the rights which belong to foreigners merely as men, and the nature of the protection which is extended to those rights in countries of different descriptions. But, secondly, there are the cases in which the nationality of the person claiming protection is specially involved. The most

obvious of these is that of compulsory military or naval service, which would directly touch a foreigner's duty towards his own nation, and his political sentiments as a member of it. War can only be justified as the last redress of an organized national society which believes itself to have been wronged. To compel a foreigner to bear arms would be to make him fight in a quarrel not his own, and therefore be inconsistent with the single moral ground of fighting. It might involve his being called to bear arms against his own country, a thing at once shocking in the last degree to his presumed feelings, and which might subject him to the penalties of treason if taken prisoner. It would also interfere with his liberty of quitting the country, which again must be reckoned as one of the essential conditions of international intercourse. For these, and perhaps for other reasons as well, no question is ever entertained but that foreigners are exempt from military, including naval, service. This immunity, however, does not extend to the payment of war taxes.

I have gone through the chief heads of the protection claimed by foreigners from their own governments. [*See Note A.*] But correlative to the duty of protecting its members abroad is the right of a nation to exercise some control over the acts of its members abroad. Such control cannot, indeed, while they remain abroad, be exercised otherwise than by the threat of punishment to be inflicted on their return, or by measures taken against such part of their property as may be within the power of their own government, for actual force cannot be used by one nation in the territory of another. These threats and measures might, however, be used for the purpose of enforcing the return of absentees, if their government should exercise its undoubted right of calling for their services; and the threat of future punishment is in fact held out by the laws of many countries, in the shape of statutes making acts done in foreign parts penal, upon which statutes the criminal may be tried and sentenced if afterwards found within their territory. An instance in our own legislation is the Statute

9 Geo. IV. c. 31 s. 7, which provides that if any of his Majesty's subjects shall be charged in England with any murder, or with being accessory before the fact to any murder, or after the fact to any murder or manslaughter, the same being respectively committed on land out of the United Kingdom, he may be committed for trial by any justice of the peace, and may be tried by Commissioners under the great seal.

Now penal laws of this sort can only be enforced against the members of the nation which enacts them. No claim of any nation can be more primary than that to be the sole judge of what is done on its own soil; there it alone can permit or prohibit, and, if it prohibits, it alone can avenge. Only this plea does not lie in favour of any person against the laws of his own nation, because against the laws of his own nation no plea at all lies in his favour. Municipally, he is bound by them; internationally, he is deemed to be a party to them; no wrong is deemed to be done to him by them, and neither can he complain, nor can any foreign government interfere in his behalf. But against any other litigant than his own nation the plea would be effectual. The infliction of punishment on a foreigner for an act done elsewhere than in the territory in which the punishment was inflicted, would be a wrong from which his own government might claim to protect him. [*See Note B.*]

Such are the rights of protection and control which turn on nationality, in the case of persons transient or dwelling in foreign countries. Add to them the right of control which every nation has over its own members on the high seas, and which may be exercised as well by trial and punishment after their return as by applying coercive force to them while at sea on board ships of their own nationality, and I believe that we shall have exhausted the cases in which nationality is important for the purposes of international law. It is of no international significance what civil or political rights the member of any nation may enjoy in his own country. He may be the subject of a monarchy or the citizen of a republic; or he may live under a republican government and yet not be a citizen, as formerly the

slaves in the United States, and still, I believe, the people of colour in many states of the Union; or, if called a citizen, his civil and political rights may yet admit of various degrees of modification, as in all countries has thus far been the case with the rights of women as compared with those of men. On this account I have avoided in the present paper the use of the term "citizen" and "subject," as belonging rather to municipal, as it is called, that is to national, than to international law; unless indeed the word "subject" were used in the general sense of subjection to a government, which would be quite grammatical, only it may be feared that the Americans would decline to adopt it for themselves, as being too closely associated with the idea of subjection to a monarchical government. Nor, again, is nationality really of importance with reference to the question of neutral or belligerent property in time of war; for, though the term is often used in such discussions, it is well settled that for this purpose the national character is determined by domicile, and not even always by the strict domicile of the person, such as would govern the distribution of his movable property if he died intestate, but by the locality of the trading establishment with which the property is connected.

Now I think it is an obvious result, from the review which we have made of the international rights and duties dependent on nationality, that they are exceedingly onerous to the nation to which the absentee belongs. No amount of prudence and delicacy on the part of its government can ensure that the duty of protecting him may not embroil it with foreign powers. The correlative right of control brings no advantage in return, for if the absentee feels disposed to take service with a foreign government against his own, the means of control which his own government possesses, and the chance that its threats can ever be put in force, will rarely be sufficient to check the indulgence of the disposition, but will always be sufficient to add bitterness to his enmity, to make him in fact the worst of all enemies, one, as it has been said, who fights with a halter

round his neck. The case, if any, in which advantage might have been looked for would be that of the present Fenian conspiracy, so far as Irishmen caught on this side of the Atlantic might be tried for treasonable acts done in the United States; but if the objects of the prisoner's return to the United Kingdom was connected with the conspiracy, it must be seldom that he has not done, since his return, some act connected with it for which he might be tried, more especially considering, as a New York paper has pointed out, that evidence of what he had done abroad might be given to illustrate the intention of his acts done at home. In short, this whole chapter of rights and duties exists for the accomplishment of an object of vast importance, the facilitation of a world-wide intercourse, and must be considered as a burden to which nations submit for that object. Without protection to absentees, commerce and travel would be seriously restricted; without the fear of that punishment which depends on the control of absentees, many a crime would be committed, not only in the uncivilized regions, but even in the less settled parts of civilized states. It would be disgraceful to shrink from the burden, where really necessary for these ends; but it seems equally indispensable that the burden, which results from the existence of any tie between an individual and a government foreign to the spot where he happens to be, should be confined within the narnowest limits consistent with the attainment of these ends.

The principle thus arrived at is that of free change of nationality at the will of the individual, a princple of the most ancient Roman law, and considered by Cicero as essential to civil liberty—*ne quis in civitate maneat invitus*—and adopted in the Code Napoleon—*la qualité de Français se perdra par la naturalisation acquise en pays étranger* (Art. XVII). The British government has also, during the recent American war, given its adhesion to the same principle, by refusing to interfere for their protection against compulsory military service, in favour of those who had even manifested a desire to expatriate themselves. And this point was reached by steps which seem

to show that the question was well considered, and that the government became increasingly awake to the necessity of limiting as far as possible the tie between it and its emigrated subjects. When the first military draft was proposed, in August, 1862, Mr. Seward informed Mr. Stuart, then in charge of the British legation at Washington, that all foreign-born persons would be exempt who had not been naturalized, or who were born in the United States of foreign parents who had not become citizens, and who had not voted or attempted to vote in any state or territory of the United States, also all persons who had only taken out their first papers: Lawrence's Wheaton, *ut supra.* p. 903. At this time Mr. Anderson, a member of the British Legation, was sent by Mr. Stuart into the Western States, to arrange with the governors the necessary details of procedure for the enjoyment by British subjects of their exemption; and in a report which he made under date September 28, 1862, Mr. Anderson, while accepting the exemption for those who had only taken out their first papers, further contended that it ought not to be lost even by having voted in those states where the franchise can be exercised by aliens: *Papers relating to North America*, No. 1, 1863, p. 27. But ultimately the British government declined to interfere in favour of any who had either declared their intentions to become citizens of the United States, or who had exercised the right of franchise anywhere in the United States. This is a fact of great importance. If any Irishman who fell within either of these categories should be put on his trial for acts done in the United States, it would be difficult to justify the attempt to exercise control where protection was refused.

It must then be taken that, whatever may have been the conduct of Great Britain in former times, it need not now be apprehended that this government will show any reluctance to join in considering what international arrangement may be the best for carrying into effect the principle of the free change of nationality, or in proposing to Parliament such alterations in British law as may be necessary for bringing it into harmony

with the arrangement so to be resolved on. But the particular arrangement to be recommended is a subject on which there remains much room for discussion, even after the principle of free expatriation has been admitted.

A leading authority, Sir Travers Twiss, has these words, "domicile the criterion of national character," as the marginal summary of one of his paragraphs: *Law of Nations, &c., Time of Peace*, p. 232; and although this would not be a strictly accurate statement of international law as it stands, nor of course was intended to be so, yet I collect it to be really his opinion that nationality should be merged in domicile. This would allow the fullest scope to free expatriation, by abolishing formal naturalisation, and leaving the nationality to be changed with the domicile, by an actual change of residence. It would also be extremely consonant to reason, for however necessary it may be to international intercourse that an absentee, who does not choose to identify himself with the people among whom he lives for the time, should be able to preserve a link of connexion with his own country, there can be no cause for preserving such a link where the identification is practically complete, and no better test of its completeness can perhaps be afforded than whether he accepts the identification for those purposes of private law which are governed by domicile. If he marries without settlement, it is the law of his domicile which will govern the effects of the marriage on his own and his wife's property. If he dies intestate, it is the law of his domicile which will govern the distribution of his goods. These matters involve some of the most important differences of opinion on social questions which exist among civilised nations. To decide that a man has changed his domicile is to decide that he has chosen for his affairs to be regulated, or to incur the chance of their being regulated, by a new law in these respects; and it seems impossible that, in that case, he can be any longer so identified in feeling with the nation of his origin as to have cause for complaint if he be deemed to have expatriated himself.

Nevertheless, there seem to be insuperable practical difficulties in the way of the proposal to merge nationality in domicile. One is that the country in which the new domicile is established might not choose to accept the immigrant on those terms without more. For instance, the United States require the foreigner seeking naturalisation to renounce all titles of nobility. Another difficulty is that in the not uncommon case of a person's changing his domicile more than once, the burden of his protection during absence would be thrown on the state in which he had last been domiciled, though his ever returning to it, or the existence of any real tie between him and it, might be very problematical. I may here remark in passing that the complaisance which the British Government has been accustomed to show in such cases of repeated migration is quite extraordinary. They are of especially frequent occurrence in Spanish and Portuguese America, where the fortunes of business or of employment lead many from state to state, and where there are various motives for which during even a short residence naturalisation is often desired. Now, if a British subject naturalises himself at Monte Video for instance, and then goes to Buenos Ayres, it has been the practice of our government to interfere at Buenos Ayres for his protection against the liability to military service. Since we have gone so far in our relations with the United States as to abandon even those who have only taken the first step to naturalisation, I trust that we shall not again undertake the care of those who have completed a foreign naturalisation until they have re-naturalised themselves in this country; let them look for succour to the nation to which they have chosen to belong. But, although, in the case supposed, a just claim for succour would exist against the authorities of Monte Video, yet, if we vary the case by supposing that there had been no express naturalisation there, it is difficult to see how those authorities could fairly be called on to protect at Buenos Ayres a person neither born within their jurisdiction, nor with whom they had ever by their own act entered into any relations, merely be-

cause Monte Video might be the last place where he could be legally proved to have been domiciled.

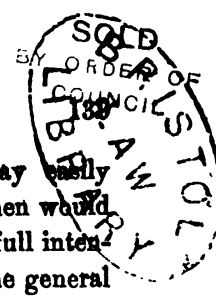
Finally, there is this, as it appears to me, conclusive reason against the merger of nationality in domicile, that a disputed domicile is one of the most difficult topics which are presented to the investigation of courts of justice, while the claims which are based on nationality demand immediate action from diplomatic agents, often at a distance from all such proofs as are alleged in cases of disputed domicile, and almost always without the time to investigate them if they were present. It is therefore essential, in my judgment, that questions of nationality should continue to admit of such simple investigation as is comprised in the questions—"Does the nationality you claim belong to you by birth?" "If not, where are your papers of naturalisation?"

At the same time I do not wish to detract from the force of the considerations which I have already suggested as to the natural connexion between nationality and domicile, only it would seem to me much more convenient to merge the latter in the former. Could sound rules as to the change of nationality be once established by international agreement, followed by such changes in our own legislation and in that of other countries as would be necessary to give full effect to such agreement, I should then be inclined to proceed a step further, and try whether domicile also might not be made to depend on the same rule, at least for certain important purposes, as intestate succession, the pecuniary effects of marriage, and its validity with reference to prohibited degrees of affinity, to the great curtailment of a very tedious and expensive class of law suits.

The rules for the change of nationality which it would be desirable to see established would include, first, a simple form of naturalisation, to which any state might add such further conditions as it might deem that its political system required, such as, in the case of the United States, the renunciation of titles of nobility; secondly, provisions for securing that none but permanent residents were naturalised, for which purpose

a certain number of years' residence might be made necessary, unless an actual acquisition of domicile in the country were proved to the satisfaction of a court of justice at an earlier date; thirdly, the renunciation of all claim by their original governments on persons so naturalised elsewhere; and fourthly, some provision for the case of the expatriated person returning to his original country.

The necessity of the provision last suggested will appear from the question, noticed by the President in the passage which I quoted from his Message, regarding Prussians who, having left home before being called on for military service, and naturalised themselves in America, afterwards return to their old country, and there claim American protection against the military service to which, not having performed it at its proper time, they remain liable in after life. The history of the controversy may be fully seen in Mr. Lawrence's valuable Appendix to his last edition of Wheaton, pp. 918, 919, 925-7. Mr. Wheaton, during his residence as American Minister at Berlin, held that "the native national character reverted so long as the person remained in the Prussian dominions, and that he was bound in all respects to obey the laws exactly as if he had never emigrated;" and Mr. Everett and Mr. Webster fully accepted this view. But Mr. Cass, under President Buchanan, would only admit it as against those who had escaped from Prussia after they had been actually enrolled in the army, and maintained the claim of the United States to protect, after their return, such as had left Prussia before the age of military service. The Prussian government has not admitted the distinction, and Mr. Lawrence "readily concedes that it cannot be maintained," pointing out that it "is scarcely consistent with the prohibition issued by the United States' government in 1862, against the emigration of American citizens liable to military draft." I think it must be agreed that as a matter of existing law, Mr. Lawrence's judgment is right; and if the full American claim were acceded to, or if Prussia were to sign a treaty permitting free expatriation



without some provision adapted to the point, it may easily be understood that a considerable number of young men would naturalise themselves in the United States with the full intention of returning quit of military duty, and thus the general obligation to service would be undermined, not so much by the actual number of exceptions, as by the difficulty of maintaining the law for the masses, when those who had the means could evade it by a few years sojourn in America. One the other hand, if free expatriation is to be a reality, it must not subject the expatriated person to a perpetual exclusion from his native soil, without the power of even paying it a temporary visit; and perhaps the best solution would be to fix a time which his stay on it could not exceed without causing him to forfeit the benefit of his expatriation as against his original government. [*See Note C.*]

Note A. It was denied in the course of the discussion on the paper that any right of protecting members of a nation abroad exists in international law, but the same speakers admitted that the practice was inveterate. On these terms, the question resolves itself into what we mean by international law. The general practice of nations, not disputed in principle by any, is the most certain document of that law which I know of. To reject it would be as much as if the entire series of reports were to be excluded from the sources of English law. It would be even more extraordinary, for the reported cases in English law at least profess to develop principles many of which are to be found in such text writers as Glanvil and Bracton, older than the series of reports, and therefore speaking to us with an original authority. But international history goes much further back than the oldest international text writers, and their only claim to authority is in fairly representing it, so far as it had taken shape in their time; their theories of what the law ought to be can bind only so far as they convince, though many of them are too much in the habit of introducing those theories, exceedingly valuable where kept properly distinct, in a way which reminds the reader of Blackstone's perpetual confusion between the fact of the law and the reasons for the law, so well exposed by Bentham.

There is no doubt that the practice of protection has been grossly abused against weak states, but it is far from correct to say that it is only exercised as against such, and it must be remembered, in estimating the generality of acquiescence, that there is seldom a lack of powerful states willing to take up the quarrels of weak ones. Nay, even where the demands made on weak states have been unfounded in fact, excessive in amount, or enforced with unnecessary harshness, the legal principle of the demands has often been admitted by the powerful friends who have intervened in their favour.

Note B. In the disscussion on this paper it was stated by one speaker that no maxim against punishing foreigners for crimes committed out of the jurisdiction exists in international law, or is at all known on the continent ; and that the notion of any such is an Anglo-American error, due to an illegitimate extension of the rules of the English common law about venue. For this Fœlix's *Droit International Privé* was referred to as an authority. The topic is discussed in sec. 574 of that most valuable work, where it will be found that the maxim is not only perfectly known on the continent, but that the opinions of Schmalz, Abegg, Feuerbach, Homan, Rolin, and Mittermaier are quoted in support of it, those of P. Voet, Boehmer, Martens, Saalfeld, and Pinheiro-Ferreira against it. Fœlix's editor, M. Demangeat, adds to the latter list the name of the gallant Captain Ortolan. As Feuerbach and Mittermaier are, perhaps, the two leading continental authorities on criminal law, it will be desirable to explain their views more at large.

The passage in Feuerbach is as follows :—"Since crime is transgression of law, which is impossible without legal obligation, he only can commit crime in relation to any state who is obliged by its criminal law ; therefore the state in which the fact takes place alone has authority to punish any one for crime committed out of his own country. On the other hand, crime can be committed, (1.) either by a foreigner, while in the territory of the state, except by those who fall within the principle of exterritoriality, (2.) or by a subject, even out of the territory of the state (but in that case only against a fellow-subject or against his state itself), because criminal laws oblige subjects as such, and that property of theirs is not taken away by transitory change of place."—*Lehrbuch des gemeinen in Deutschland gültigen peinlichen Rechts,* 10th edition, Giessen, 1828 ; sec. 31.

And he adds this note:—"Two different states have equal authority to punish crime committed by a subject against a fellow-subject abroad. For (1.) the person against whom the crime is committed is entitled to protection from his own state, on account of the continuing tie between him and it, and from the foreign state, because by the law of nations his being there gives him a title to its protection; (2.) the criminal is obliged by the criminal law of his own country, as continuing to be its subject, and by that of the foreign country, on account of the subjection which is founded on his being there. The accident of the criminal's discovery and capture alone decides between these competing authorities."

Mittermaier is only cited by Fœlix as not contradicting Feuerbach in his notes on the above passage. I have no access to any edition of the latter with annotations by the former, but I can give Mittermaier's views from his own classical work, *das Deutsche Strafverfahren*, ed. of 1827. In sec. 47, after showing that the fixity and appropriateness of the forum is even more important in criminal than in civil procedure, he says: "In German procedure there are three common forums, (1.) that where the crime was committed, (2.) that where the criminal is apprehended, (3.) that of his domicile; and none of these has by the common law any preference over the others. But it early became the opinion that the forum where the crime was committed ought to be preferred, because there its proofs lie nearest to the judge, and the traces can be best followed up by him, while many collateral ends of punishment can there be reached at the first possible moment; and then the legislations of the last century, and still more clearly the recent ones, laid it down that the *forum delicti commissi* was the peculiarly competent one for criminal process. If, however, this forum were declared to be the only permissible one for all crimes, accused persons would be subjected to many needless vexations and inconveniences, and costs would often be unnecessarily increased. There will, therefore, always be investigations for which the *forum deprehensionis* is indispensable." In sec. 48, Mittermaier shows that the *forum delicti commissi* was the exclusive one in the Roman law, except that the judge of the *forum deprehensionis* probably had to make "a sort of investigation" before delivering the accused to the judge of the other forum; then quotes the capitularies of the Frankish kings and the *Sachsenspiegel* for the proposition

that in German law the *forum delicti commissi* was the regular one, and attributes its not being there exclusively to the conflict which soon arose with the *forum domicilii* and the *forum deprehensionis*, and to the difficulty of extradition when Germany had become minutely subdivided. In sec. 49 Mittermaier shows that that subdivision, together with the influence of the maxim *actor sequitur forum rei*, established the *forum domicilii* as co-ordinate with the *forum delicti commissi*, but that the new laws which declare the latter to be exclusive (*sic*) have restricted the applicability of the former to small offences, or great ones committed by subjects abroad. In sec. 50 Mittermaier shows that the *forum deprehensionis* became co-ordinate, in the common law of Germany, with the other two, from these causes: A territorial feeling, creating jealousy of extradition; a fear lest criminals should otherwise go unpunished; the opinion of the gloss, that this forum was known to the Roman law; the canon law; and certain imperial laws of the sixteenth century. He concludes thus: "According to the new legislation, in which the preference given to the *forum delicti commissi* supplanted the others, the *forum deprehensionis* only continues available for the punishment of foreigners for crimes committed by them, or of subjects for their offences committed abroad." A note to this passage refers to the criminal code of Bavaria, by which foreigners are not punishable for the acts which they have done abroad, unless they were to the prejudice of the Bavarian state or of any of its subjects, except also any cases which may be provided for by treaty.

It thus appears that the ancient and general rule was against the trial of foreigners for acts done abroad, and that the variations from that rule were introduced in Germany, and are now discredited there. But since the same speaker before referred to in this note alleged that by almost all the modern continental codes foreigners are punishable for crimes committed abroad against the state or against subjects, and adduced that fact in proof of the non-existence of a maxim protecting foreigners from punishment, for any crimes committed abroad, it will be well to examine this part of the subject also with some care.

In the French code this provision does not extend beyond crimes committed abroad by foreigners against the French state. The discussion in the Council of State on the article in question will be

found in Locré, vol. 24, pp. 112-126 and 522-527; and it appears that the article was strongly opposed as being contrary to international law, and was carried, partly, perhaps, through a feeling that the safety of the state required it, but certainly in great measure because its advocates represented it as contemplating the case in which the foreign government might be willing to give up its subject. The Austrian code also does not punish a foreigner for any crimes which he has committed abroad, except those which are committed against the Austrian state, unless an offer of extradition be first made to the state in the territory of which the Act was done, and that state refuses to receive the criminal. The Prussian code admits the *forum deprehensionis* as against foreigners, without any restriction as to the nature of the crime, or the party against which it is committed; but it is older than the French code, and is plainly referable to the peculiarities of German law mentioned by Mittermaier. The Bavarian code, to which there has already been occasion to refer, appears to be the type of those legislations which admit the power of punishing foreigners for crimes committed abroad either against the state or against subjects; and it will be seen from the above that its origin was a compromise between the peculiarities of German law, and the true principles of the law of nations as expounded by Feuerbach.

The Anglo-American authorities on this point have not, then, been misled by their doctrine of *venue*, but they err, if they err, with the Roman law, and with the weight of continental opinion, including Feuerbach and Mittermaier.

Note C. I was asked in the course of the discussion to express myself distinctly on the rights of Irishmen naturalised in the United States to juries *de medietate linguæ* when tried in this country, and on the right of the United States to interfere in support of it. I answer that no such rights exists, for the same reasons for which the American claims on Prussia cannot be maintained as the law stands. The principle of free expatriation, however desirable, is not yet an admitted part of the law of nations; and the British courts are therefore justified, internationally as well as municipally, in treating the Irishmen supposed in the question as still British.

Notices of New Books.

[*** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

The Student's Guide to the Preliminary Examination for Attorneys and Solicitors; and the Oxford and Cambridge Local Examinations and the College of Preceptors: To which are added numerous suggestions and Examination Questions selected from those asked at the Law Institution. By James Erle Benham, Matriculated Student of King's College, London. Butterworths. 1868.

This work is intended as a guide to those who are desirous of preparing for the Preliminary Examination for Attorneys and Solicitors. It embraces the following variety of subjects:—Reading, Dictation, English Grammar, English Composition, Arithmetic, Geography, English History, Latin, and French, and is necessarily confined to the elementary portions of these several subjects. In the chapter on Reading, Mr. Benham says that "*heir*, *herb*, *hospital*, *hour*, *humour* are often aspirated, although considered soft." Does Mr. Benham mean that there is no better authority for pronouncing the *h* in "hospital" than in "hour"? We know there are clergymen who, on principle, speak of "the 'erb of the field" and an "'umble mind," but we never heard such pronunciation as "the London 'ospital" seriously defended on principle. The following passage in the chapter on Dictation is worthy the attention of examiners as well as students:—"The examiner dictates in a very low tone of voice, which sometimes prevents the student from catching every word, and thus places him in a dilemma. I have known many who, failing in this respect, have discontinued writing. Now, this is a most foolish plan, because the examiner cannot possibly ascertain from what cause the student discontinues writing. He may infer that he is either unable to continue because of his incapacity, or that he is too lazy, the former assumption frequently predominating in the examiner's mind. I would suggest that, in the event of a student being unable to hear every word, to introduce a dash and continue writing, and the examiner will at once see the cause of the omission—provided what he writes is correctly spelt and punctuated." In the chapter on English Grammar, Mr. Benham tells us that "many words, as

peace, justice, mercy are feminine, because they are feminine in the classical languages. And similarly *love, terror, fear* are masculine." How many Englishmen know this? We must protest against this attempt to introduce into English Grammar the senseless continental distinctions on the subject of Gender. Besides, what is meant when it is said that an English word is feminine in the classical languages? Are the classical equivalents of English words always uniform in their gender?

There are some useful hints in the chapter on English Composition, but neither in this nor in the subsequent chapters of the book is there anything which calls for special remark. The book is written in a clear and agreeable style, and, in spite of a few blemishes, will, no doubt, be found useful by the class of readers for whom it is intended.

The Principles and Practice of the Law of Evidence. By Edmund Powell, M.A., of the Inner Temple, Barrister-at-Law. Third Edition by John Cutler, B.A., of Lincoln's Inn, Barrister-at-Law, Professor of English Law, &c., at King's College, London, and Edmund Fuller Griffin, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworths. 1868.

This is a good edition of a very useful work. The book itself we have always considered as well adapted for the student, and convenient in form for the practitioner. It explains principles clearly, and illustrates without overloading them by the cases quoted. The work is more practical in its object than that of Mr. Best, and treats the subject in a more succinct manner than that of Mr. Pitt Taylor. There could be no better introduction to the study of the law of evidence than Mr. Powell's book, whilst it is perfectly suitable for ordinary reference; and the care which has been bestowed on it by the present editors will, we think, considerably enhance its value. The law has been brought down to the close of last year, the principles and practice of the law of evidence followed by the Court of Chancery have been incorporated with the work, and the rules of evidence adopted by the Anglo-Indian Courts have been referred to, the chief part of the Indian Evidence Act being added in the appendix. This last feature of the work will render it very valuable for those who are studying for the Indian Civil Service, and will not be without interest for all who wish to understand thoroughly the principles of the law of evidence.

A History of the Reform Bills of 1866 and 1867. By Homersham Cox, Esq., M.A., Barrister-at-Law, Author of 'The Institutions of the English Government,' 'Antient Parliamentary Elections,' &c. London. Longmans & Co. 1868.

Mr. Cox has given a very full account of all the proceedings in Parliament with respect to the Reform Bills of 1866 and 1867. He

has stated the facts correctly, without disguising his opinions as to the conduct of individuals or parties. The object of the work is thus stated by him :—

"Of the effects of the Reform of 1867, we can at present speak only in the language of conjecture or prediction. We know, indeed, that it increases largely the democratic influence in the Constitution, but cannot yet estimate with precision the effect of the change. With respect, however, to the manner in which this important measure was passed, and the methods adopted in order to mould it into its present shape, ample means already exist for arriving at just conclusions. All the data for a sound judgment upon these points are before us, and we possess the information necessary for a comparison of the statesmanship of the past session with other great political performances. The objects of the following pages are to present these materials in a connected form, and to explain the place which the New Reform Act occupies in English Electoral Law."—pp. 3-4.

The task thus proposed has been executed by the author with much ability. The events of last session must, on any view, occupy an important place in our Constitutional history, and Mr. Cox has done good service in putting them on record in a clear and accurate manner. Even those who may disagree with him in his views as to the policy of the Ministry, cannot fail to acknowledge the sincerity with which he states them, and the intelligible nature of the reasons by which he supports them.

The Master and Servant Act, 1867; with an Introduction, Notes and Forms, and Tables of Offences. By James Edward Davis, Esq., Barrister-at-Law, Stipendiary Magistrate for Stoke-upon-Trent. London. Butterworths. 1868.

No Statute ever passed the Legislature which more certainly required a commentary than the new Master and Servant Act, and no man was more clearly qualified to undertake such commentary than Mr. Davis. We can scarcely imagine a more objectionable style of legislation than has been adopted in the Act. It does not define the particular cases to which it applies, but these can only be ascertained by examining the seventeen statutes mentioned in the first schedule. It was no doubt thought that as the Act was merely experimental, it would be impolitic to consolidate all the statutes on the subject. But still this constitutes a great practical defect in the Act, which Mr. Davis has remedied, as far as possible, by a Table of Offences to which its provisions apply. The notes are full and to the point, and the forms will be found highly useful to those who have to administer the Act. The name of Mr. Davis is a sufficient guarantee that the work is done well. Not only his general reputation as a lawyer, but his magisterial experience in cases between employers and employed, and the fact that he was consulted during the progress of the Bill through Parliament, give unquestionable autho-

rity to the present publication. We have no hesitation in recommending it to all those who have to deal with the matters to which the Act relates.

Part I. and II. Account, Bankruptcy. Digest of Cases decided in the Supreme Courts of Scotland, from 1800 to 1867, and on appeal by the House of Lords from 1726 to 1867, being a New Edition of the Digest from 1800 to 1852 by Mr. Shaw, and from 1852 to 1862 by Messrs. Macpherson, Bell, and Lamond, Advocates: Revised, Consolidated, and Continued to 1867, by Andrew Beatson, Bell, and William Lamond, Advocates. Edinburgh: T. and T. Clark, Law Booksellers. 1868.

If England and Scotland had not so much to do with each other as they have in these times, this would be a difficult work for notice or review in an English legal periodical, for, with the exception of the title-page, and the obvious character of the contents, there is nothing to indicate its claims to the attention of the profession. But, even without the intermediary help of the House of Lords, commercial and legal buisness between the two countries has reached such a point, as to make a knowledge of what is going on in the legal press of Scotland essential to those lawyers here, particularly in London, who care to be thoroughly up in their reading.

The Digest, of which this part is the first instalment of a new edition, originally comprehended cases only from 1831 to 1837. A few years afterwards, however, Mr. Patrick Shaw, whose name is a household word amongst the Scotch lawyers, re-cast the work, and it appeared in a greatly improved form in two volumes, and embracing cases from 1800 to 1841. These volumes were followed by a third, published in 1852, bringing down the cases to the commencement of that year. These three volumes were published under the superintendence of Mr. Shaw himself, and to state that is enough to satisfy any one acquainted with the Scotch Courts that the work was well done. This new edition proposes to continue the cases to 1867, and, from such consideration as we have been able to bestow upon these two parts, we think it cannot be denied that Mr. Shaw's mantle has fallen upon worthy shoulders, and augurs well for Messrs. Bell and Lamond conducting and completing, with ability and skill, a digest for which their brethren, not only in Scotland, but in this country, will have every reason to thank them. Any faults which the practised eye of an English lawyer, accustomed to the precision which characterizes similar works here, may detect, are to be attributed rather to the system and procedure of the Scotch courts themselves than to any shortcomings on the part of the learned gentlemen we have named; and, in reference to this allusion, we may observe that, in our humble opinion, reform is sadly wanted, and that we wish Lord Westbury all success in the proceedings in Parliament which he has announced he is about to adopt. The Lord Advocate's

Bill is, in our judgment, altogether insufficient; and, until the Scotch come to know that the office of pleading is not merely to disclose the facts, but at the same time to discover the controversy between the contending parties, they will never place their legal administration on a sound basis. Their pleading is still *at large*, and Lord Abinger's "popular pamphlet" to this day rules the Court of Session. Hence the numerous cases in the digest before us which begin "Circumstances under which"—a form of expression than which in a digest nothing more could be more unsatisfactory or unlawyer-like. But Messrs. Bell and Lamond had to make the most of the materials at their disposal, and such and similar blemishes could not be avoided, with anything like fidelity on their part to their legal system.

The County Courts Act, 1867, and the Provisions of the Common Law Procedure Act, 1854: relating to discovery, attachments of debts, and equitable defences, together with the new County Court rules, orders, and forms. Edited, with notes and introduction, and a chapter on costs, by James Edward Davies, Esq., Barrister-at-Law. London: Butterworths. 1868.

It is almost impossible within the narrow limits of a review to do justice to this admirable work. Mr. Davis is known to the profession as a singularly learned, able, and clear writer, and although the present volume makes no claim to the same literary rank as the well-known "Manual," it will certainly add to the author's reputation.

The Act of 1867 has been the parent of several works, but, in our judgment, the one of Mr. Davis, for general purposes, certainly bears the palm.

We think that Mr. Davis deserves praise for the method he has adopted, either for the barrister who practises in the County Courts, or for the attorney advocate; for every reference and guidance the book is simply admirable.

In the "introductory chapter" the reader will find a clear statement of the scope and effect of the new Act, and at p. 8 some observations upon the all-important question of "costs." To this subject Mr. Davis devotes a whole chapter, which we earnestly recommend to the attention of both branches of the profession. At page 62, Mr. Davis calls attention to what he courteously terms a "mistake" in the heading of the columns of the new scale of costs and charges, which, under the 15th section of the statute, the Committee of County Court Judges was empowered to frame. We call attention to this *result* of the Committee's labours, merely adding that a mistake in such a matter is unpardonable, and might well deserve the severest censure. To quote Mr. Davis: "Dealing with the scale as it now stands, a plaintiff in an ordinary action of tort, say of assault or for negligence, who recovers £20 (or a sum above £10) damages, is entitled to his full costs if he recovers those

damages in a superior court, but he is not entitled even to County Court costs if he recovers £20 damages in a County Court; and, still more extraordinary, a defendant who succeeds in defeating a plaintiff's claim altogether in such an action cannot recover any costs in the County Court."

Returning to the statute itself, the notes are, without being diffuse or overdone, sufficient for all practical purposes. It is hardly possible to over-rate the value of a note appended to the 1st section of the statute.

Mr. Davis is a thorough workman; and so, to make a really good job of his work, he has not only added the provisions of the Common Law Procedure Act, 1854, relating to discovery, the attachment of debts, and equitable defences (applied by order in Council to the County Courts), but has appended several excellent notes, and notes doubtless based upon the materials ready to hand contained in Mr. Day's admirable work upon the Acts of 1852, 1854, and 1860. The "Rules, Orders, and Forms," and scale of costs and charges, &c., are added, so that the work is within itself a complete handy book to the County Court.

It has been said that a law-book without an index is worse than useless; we have taken the trouble to test the index to the present volume, and we have found it satisfactory.

There is a mass of information upon the growth and development of the County Court system contained in the volume, to which we can but call the attention of the profession. We agree with Mr. Davis, that a thorough knowledge of the jurisdiction of the County Courts is "absolutely essential for all lawyers;" and to all lawyers we heartily commend this last work of an able and erudite writer.

The 'Alabama' Claims and Arbitration, considered from a legal point of view, by Charles S. C. Bowen, late Fellow of Baliol College, Oxford, and Barrister-at-Law of the Western Circuit—London, Longmans, Green & Co. 1868.

A clear and able statement of the case in favour of arbitration. Mr. Bowen has given in a condensed form all the important information relating to this very serious question. Although the author is of opinion that the Government of Washington have but slight grounds of complaint with respect to the proclamation of neutrality, he yet thinks that they may fairly ask to have the whole controversy laid before the arbitrator. For the very cogent reasons by which this view is supported we must refer to the pamphlet itself.

The American Law Review. January, 1868. Boston, U.S. Little, Brown & Co. 1668.

This very excellent legal periodical contains several articles of much interest. The subject of "Anomalies in the Law of Bailments" is treated with great ability. The difficulty of reconciling

the obligations which arise under bailments with the principles of the common law, so long as bailments are called contracts, is well pointed out. There are interesting articles also on Liability as Partner, Marriages affected by the Conflict of Laws, Sunday Law, &c. Digests of English and American cases are given, and new legal works noticed.

Speech on Bankruptcy Legislation and other Commercial Subjects. By the Right Honourable George J. Goschen, M.P. Delivered before the Liverpool Chamber of Commerce, February 7th, 1868. London: Effingham Wilson. 1868.

Mr. GOSCHEN has brought forward many just and reasonable views on the subjects of limited liability and bankruptcy. The suggestions which he has offered for the amendment of the laws relating to both, are well deserving of consideration. He is strongly of opinion *that* the future acquired property of a bankrupt should be subject to the claims of creditors. He proposes that on its appearing to the court that there is sufficient property so acquired for a dividend, a percentage only of the new assets should be taken at one time for that purpose.

Judgment delivered by the Right Hon. Sir Robert Phillimore D.C.L., Official Principal of the Court of Arches in the cases of Martin v. Mackonochie and Flamank v. Simpson. Edited by Walter G. P. Phillimore, B.A., of the Middle Temple, Fellow of All Souls College, and Vinerian Scholar, Oxford. London: Butterworths. 1868.

ALTHOUGH we are satisfied with the results of this judgment, except in the matter of the lighted candles, there are several positions assumed by the learned judge to which we entirely object. Many of the views stated appear to us to proceed upon a fundamentally erroneous idea of the legal position of the Church of England. But as the case of *Martin v. Mackonochie* has been appealed to the Judicial Committee, it is unnecessary to say more on this matter at present. We have little doubt as to how the higher tribunal will deal with the points brought before them.

The Law Examination Reporter for Hilary Term. London: Butterworths. 1868.

This number of the Law Examination Reporter begins with a notice of a recent meeting of the proposed amalgamation of the Bar and the Attornies. We are glad to see this subject thoroughly ventilated, and fully agree with Mr. Shaen's remarks that "if a radical reform were called for in the organization of the profession, his conviction was that the result must be something more like a revolution than any

other thing which could be looked forward to in England. It would be found that the artificial division of the profession into two branches of advocates and solicitors was unnecessary and mischievous, both to clients and the administration of justice. The question as to the administration of labour, which was the only ground on which the distribution could be at all justified, was best left to find its own level. Questions of law might as well be argued by an attorney who had seen a brief grow up in his office as by a barrister who had spent only a few nights in its perusal." Writing from a barrister's point of view, however, we are inclined to agree with the *Reporter's* comment that "if the change be effected it will not be to the interests of attornies." The number also contains a notice of New Statutes and Rules of Court, and a review of Mr. W. J. Fitzpatrick's work on "Ireland before the Union." Then follows a notice on "Moot Points," and of Examination Question and Answers.

A Practical Handy-book of Elementary Law; designed for the use of Articled Clerks. With a Course of Study and Hints on Reading for the Intermediate and Final Examinations. By M. S. Mosely, Solicitor, Clifford's Inn Priseman, M.T. 1867. London: Butterworths. 1868.

This useful little book is intended for the use of articled clerks during the period of their articles. The author takes the several "years" separately in as many chapters. Each chapter is divided into two parts; the former treats of office work and of actual practice, the latter of reading. On the subject of reading law, the author remarks:—"You must bear in mind that to read a law book with *any* effect, you must recollect accurately the substance of *everything between* its two covers. Above all, in reading, apply these rules: first, never skip an (apparently) unimportant or uninteresting paragraph, but read steadily through; secondly, do not allow yourself to pass by a sentence without fully understanding its meaning, or, if that is for the moment impracticable, making some note of it for after reflection and elucidation."

The books recommended for perusal in the "first year" are Lord St. Leonard's "Handy-book," Stephens' "Blackstone," and Williams' "Real Property." In the second chapter the author has some forcible and common sense remarks on the importance of marriage settlements (p. 114):—

"A marriage settlement is a deed made in contemplation of marriage, by which the property of the contracting parties is settled upon them and their children as may be agreed on, thus obviating the possibility of the husband making 'ducks and drakes' of his own and his wife's money, and leaving his children destitute. No woman who has a penny of her own ought to marry without some settlement of this nature, because, inasmuch as in its absence the law gives all her *personal* property in possession absolutely, and a life interest in

her *real* property to her husband, the latter may possibly misappropriate it, or, even if perfectly honest, may become bankrupt, in which case the wife's property would be seized by his creditors. It is most surprising, under these circumstances, that so many young women, possessed of small fortunes, marry without any settlement."

It is not until the third year that the author recommends the reading of Equity subjects, which take up a good proportion of the fourth and fifth years' reading.

The last chapter is on the "Final Examination." Speaking of the subject of examination, the author remarks:—"Thanks to the system of examinations which now obtains, it is, as you well know, morally impossible for any man to enter the ranks of the profession without at least some rudimentary knowledge of the science he is about to practise."

Mr. Mosely, in speaking of attorneys, what he has said is, we are afraid, not yet true with regard to barristers, though we have little doubt that before long the system of compulsory examinations will be introduced into Lincoln's Inn. At present, it is possible for any one to obtain a call to the Bar without any real knowledge of law. Examinations doubtless there are, but these may be evaded by attendance at lectures, or reading for a year in a barrister's chambers; and if a student, in the first case, fails to give his attention to the lectures and "private classes," or, in the other, fails to attend regularly at chambers, he is not likely to be overburdened with legal knowledge when the time arrives for his being called. The author justly animadverts (p. 269) on the loose way in which examination questions are often framed.

The style of this book is peculiar; it is an exaggeration of the style adopted by Mr. Haynes in his admirable "Outlines of Equity." The author seems to think the adoption of such a style the only way to make the study of law popular, and we are not prepared to say he is wrong.

Debrett's Illustrated Heraldic and Biographical House of Commons and the Judicial Bench. Compiled and edited by Robert Henry Mair. London: Dean and Son. 1868.

The present edition of this work, which contains information corrected up to the 25th February, has more than the usual additions which fall to the purpose of annuals of this class. The judicial and political changes, some of them consequent on the change of ministry, have increased its bulk as well as its value and authority. Each succeeding year adds more to the already elaborate biographical notices of the Bench and Members of Parliament. The last two years have been rife in producing judicial and political changes, and no care has been wanting to place these characteristics in a concise and succinct form before the public. The present volume has been entirely rewritten, and upwards of one hundred and twenty heraldic illustrations have been added, besides numerous genealogical, historical, and

traditional anecdotes. The legal portion of the work has been greatly extended by the addition of biographies of the Irish Judges, the Scottish Lords of Session, the District Commissioners of Bankruptcy, the Recorders, and County Court Judges. In two or three instances gentlemen holding high offices have not volunteered the biographical information sought for, which, in one instance, we observe has led to an awkward mistake in the spelling of a name. Thus we have the name of a recently appointed puisne judge spelt Hannan instead of Hannen, an error we should have thought any casual observer could have rectified. But this slight and almost solitary mishap will not detract in the least from the general acceptance of a book so ably and skilfully compiled. A valuable appendix is also given explaining technical parliamentary expressions and practice, with brief descriptions of duties of some of the higher officers of State. As a work of reference of this particular class it abounds in every information concerning the pedigrees of the leading men of the age in the parliamentary and legal hemisphere, and cannot fail to interest all those who may have a desire to make themselves acquainted with the rise of all our great parliamentary and legal aspirants.

Events of the Quarter, &c.

TRIAL OF ELECTION PETITIONS.

The following copy of a Letter from the Lord Chief Justice of England to the Lord Chancellor respecting the trial of Election Petitions, has recently formed the subject of a Parliamentary Paper:—

"Court of Queen's Bench, Feb. 6, 1868.

"My Lord,—I have the honour to acknowledge the receipt of your Lordship's note of the 31st ult., calling my attention to the Bill 'for Amending the Law relating to Election Petitions, and providing more effectually for the Prevention of Corrupt Practices at Parliamentary Elections,' now pending in the House of Commons, and requesting me to consult the judges as to 'the best mode of providing assistance for the event of a general election, and the influx of petitions which always follows.'

"Since the receipt of your Lordship's communication I have procured a copy of the Bill, and find that, according to its provisions, election petitions are in future to be presented in the Court of Queen's Bench, and, having been so presented, are to be tried by one of the judges of the superior courts, without a jury, in the borough or county, as the case may be, to which the petition relates.

"In conformity with your Lordship's wishes, I have consulted the judges, and I am charged by them, one and all, to convey to you their strong and unanimous feeling of insuperable repugnance to having these new and objectionable duties thrust upon them.

"We are unanimously of opinion that the inevitable consequence of putting judges to try election petitions will be to lower and degrade the judicial office, and to destroy, or, at all events, materially impair, the confidence of the public in the thorough impartiality and inflexible integrity of the judges, when, in the course of their ordinary duties, political matters come incidentally before them. This confidence, which does so much to maintain the respect for the administration of justice, and to uphold the salutary influence of its ministers, has in great measure arisen from the judges being in no way mixed up with political matters, except when, as was just observed, such matters are unavoidably involved in ordinary trials. This confidence will speedily be destroyed, if, after the heat and excitement of a contested election, a judge is to proceed to the scene of recent conflict, while men's passions are still roused, and, in the midst of eager and violent partizans, is to go into all the details of electioneering practices, and to decide on questions of general or individual corruption, not unfrequently supported or resisted by evidence of the most questionable character. The decision of the judge given under such

circumstances will too often fail to secure the respect which judicial decisions command on other occasions. Angry and excited partizans will not be unlikely to question the motives which have led to the judgment. Their sentiments may be echoed by the press. Such is the influence of party conflict, that it is apt to inspire distrust and dislike of whatever interferes with party objects and party triumphs. Can it be expected that, if brought into contact with these strong prejudices and passions, the judicial office will not suffer in the public esteem? That its dignity will not be lowered, and the veneration which has hitherto attached it be materially diminished? Would it be worth while to incur the danger of such a result for the sake of creating a more efficient tribunal for the trial of election petitions, when this end can doubtless be attained by less objectionable means?

"In the next place it is to be observed that the functions which the judges are called upon to discharge are altogether beyond the scope of the duties which, on accepting the office of judges, we took on ourselves to fulfil. We are at a loss to see how Parliament can, with justice or propriety, impose on us labours wholly beyond the sphere of our constitutional duties, and which no one ever contemplated the possibility of our being called upon to perform.

"I have further to point out that we are thoroughly satisfied that the proposed scheme is impracticable, and that the performance by the judges of the onerous duties which this Bill proposes to cast on them is neither more nor less than a sheer impossibility. The first business of the judges is to perform those duties which by their oath of office they have bound themselves to discharge—viz., in their respective courts or on their circuits, to administer justice between the Crown and the subject, or between subject and subject. While this all important duty remains to be done, the judges can postpone it to no other. The time of the judges is known to be more than fully occupied. Attention has been of late directed towards devising means for relieving them from a portion of their labours, so as to enable them, without the addition of more judges, to perform their more important duties without the delays which the accumulation of unavoidable arrears entails upon the suitors. Whether even this will be accomplished remains extremely doubtful. Can it be wise, under such circumstances, to scatter the judges over the country to try election petitions?

"We would venture to ask which court is to be suspended in order to furnish judges even for occasional petitions, to say nothing of the trial of petitions after a general election, when, if any material portion of the work of trying petitions is to be done by the judges, Westminster Hall would have to be shut up altogether? Assuming even that a judge or two could be spared in term time, which, however, could not be done without exceeding inconvenience, what is to be done after term? Are the sittings in Error, or the post-terminal sittings of the different courts, to be suspended, or the *Nisi Prius* trials to be put off? And what as regards the circuits? Is a judge to set aside Her Majesty's commission, and leave the goals

undelivered and causes untried, while he is occupied in investigating the unclean doings of a corrupt borough? Your Lordship knows, from professional experience, as I do, the length of time the trial of an election petition, particularly if it involves a scrutiny, very often takes; and I perceive it is not only on questions affecting the seat of A. or B. that the judges are to be required to adjudicate, but where petitions allege general corruption, the judges are equally to be called into requisition. We know, by recent experience, the length of time which these inquiries frequently occupy; so that if the judges are to be engaged on them they will inevitably be withdrawn from their proper duties for considerable periods at a time. How can this possibly be consistent with the interests of the suitors or of the public?

"We entertain no doubt that the framers of the measure have had no other than the praiseworthy object of providing for the trial of election petitions a tribunal which shall command general confidence; but we cannot but think that they must have overlooked the important considerations to which we had adverted. We trust it is not too late to call attention to them now.

"Your Lordship suggests that assistance should be obtained after a general election. But if this be contemplated as the proper course on such an occasion, why have recourse to the judges at all? Why not employ those who would be resorted to on such an occasion, on all others? The only quarter in which assistance could properly be sought will probably have already suggested itself to your own mind. Every one knows that, owing to the accidents which determine professional success and business at the Bar, there are always a certain number of counsel whose business is not proportioned to their known abilities and learning, and whose sound judgment and judicial aptitude are recognized by the references which are frequently submitted to them as arbitrators. Many of these would probably be willing to undertake the employment in question, and it might safely and conveniently be entrusted to them, while, to put such duties on the judges would be a most fatal mistake.

"I will not longer detain your Lordship. I have only, in conclusion, to protest, in the name of all the judges, and my own, most earnestly and emphatically, against the proposed scheme, as one which, besides being unconstitutional and unjust towards the judges, is calculated to degrade the character of the Bench, to impair the confidence and esteem now happily entertained for the judges, as well as their influence and utility, and most seriously to interfere with the administration of justice.

"We trust to your Lordship to convey our sentiments to the Government, and, if necessary, to the Legislature; and we hope we may confidently rely on your influence, as the head of the profession, to protect us, if possible, against this, in every respect, most objectionable measure.

"I have, &c.,
"A. E. COCKBURN.

"The Right Hon. the Lord Chancellor, &c."

THE JURIDICAL SOCIETY.

The anniversary meeting of the Juridical Society was held on the 11th March, at which Lord Westbury presided, and delivered the annual address. As subjects to which the attention of the society might be usefully directed, he suggested the proposed digest of the law; the re-constitution of the legal tribunals, and especially of the appellate tribunals, on the present organization of which he animadverted with severity; the laws of neutrality; the condition of the law of marriage; and the law of debtor and creditor. In the course of a very powerful address, he advocated the need of discussion in order to bring about clear ideas on these several topics. The following is a summary of a portion of his Lordship's address:—

"In reference to the commission appointed to consider the practicability of framing a digest of the law, he observed that it was to be regretted that considerable delay must be the consequence of the difficulties attending the consideration of the subject, but he anticipated, as the result of the labours of the commission, a great improvement in the condition and shape of the law of the country. A still more important subject was the commission sitting upon the Courts of Justice, and upon the manner in which our judicature was henceforth to be arranged. A very few years ago the very thought of such a commission would have been deemed little short of profanation, but the question was now pressing for solution, whether it would not be necessary to have local courts of enlarged jurisdiction all over the kingdom, and to constitute the metropolitan courts as courts of appeal only from those local tribunals. When he was Lord Chancellor the constant complaint of the judges in Westminster Hall was that day after day was occupied by the trial of the most trivial and trumpery cases, insignificant in their results and immaterial in their details. The condition of our appellant tribunals, again, was most lamentable. The constitution of the Court of Exchequer Chamber was, in point of the judges, wholly haphazard, and it was also so constituted as that three judges could overrule the decision of seven. Nor was the House of Lords by any means a satisfactory Court of Appeal. The parties to an appeal never knew who were to be their judges. There might be two, or three, or four judges, but this state of uncertainty was not good for the parties to the suits, nor did it add to the dignity and responsibility of the administration of justice. The Judicial Committee of the Privy Council afforded still less ground for satisfaction. Before this tribunal came, in the last resort, cases from our whole empire. Decisions had to be reviewed that had been come to in accordance, perhaps, with the Spanish, Dutch, Portuguese, or modern colonial or ancient Hindoo laws, and yet it was uncertain whether appeals so complicated and so difficult would, when before the Judicial Committee, be heard by the Lord Chancellor, or by the Lords Justices for the time being, or before an *emeritus* judge, or before two *emeriti judicis*, with one or two assessors, and it was a chance whether the presiding judge was or was not completely ignorant of the special knowledge requisite for a sound decision.

Again, what greater anomaly could be imagined than that (in the case of ecclesiastical matters), there were four courts of appeal, each of them distinct and each of them final, and the sentences of each of which were wholly irreversible? The state of the law of marriage was an opprobrium and a reproach. It had happened to him repeatedly, while he was a law officer of the Crown, to find whole English communities abroad living in a state of concubinage, that was to say, they had been married or given in marriage, but some solemnity required by the law had not been observed, and, consequently, the marriage was good for nothing legally. He had always endeavoured to do what was necessary in these instances quietly, and without awakening public attention; for nothing could be more painful to a lady or gentleman, especially if they were nervous, or sensitive, or religious people, than to find that they had lived together for six, or ten, or twelve years, without having been married at all. He was obliged to marry them retrospectively, and in the most delicate and silent manner that could be managed, giving retrospectively the veil of religious sanctity to what had been done, legitimatising the children, and so making them again honest men and women in the face of the world. But such a state of things was a reproach to our law. The present condition of the law relating to debtors and creditors, in all its branches, including societies, joint-stock banks, limited liability, and railway companies, imperatively called for revision. It had proved itself to be utterly unequal to the task of grappling with the evils that existed. It was founded in great measure upon bad principles, and was also subjected to most imperfect administration. It was of the highest importance that this subject should be at once taken in hand, whether they regarded the law of bankruptcy, the control of the railway companies, of joint-stock banks, or of limited liability companies."

COST OF CRIMINAL PROSECUTIONS.

In a report made by the Finance Committee of the Buckinghamshire Quarter Sessions, on the 6th ult., the following observations occur in reference to costs of prosecutions in cases in which no committal takes place:—

"Your Committee having, at the last Quarter Sessions, drawn the attention of the Court to the provisions of the Statute whereby the law relating to the expenses of criminal prosecutions has been extended to the payment of expenses in attending before an examining magistrate, and to compensation for trouble and loss of time of witnesses on any charge of felony or misdemeanour, *bonâ fide* made, in any of the cases enumerated in section 23 of the Act 4 Geo. IV. c. 64, or of section 2 of the Act 14 & 15 Vict. c. 55, although no committal of the party charged with any of such offences should take place, the Court then requested your Committee to draw up regulations to guide examining magistrates in making such orders for payments, which your Committee submit as follow for the consideration of the Court:—

"1. That no allowance for fees to the justice's clerk should be allowed unless the depositions of each witness be regularly taken and signed by him in the presence of the examining magistrate, in the same manner as in the case of a committal for trial.

"2. The certificate in each case, signed by the examining magistrate, must be sent to the clerk of the peace prior to the next ensuing Quarter Sessions, together with the depositions of the witnesses, so taken as aforesaid, in order to a proper examination of the items in manner contemplated by section 2 of the Statute; and the provisions of the Statute 30 & 31 Vict. c. 35, authorizing allowances to be made to witnesses called by any party charged with any such offence, do not extend to a case in which no committal takes place.

"That no allowance should be made for the expenses of a prosecution in which no committal takes place under the provisions of the first-mentioned Act, in any case in which a certificate of dismissal, and an order of payment on the County Treasurer for costs of the prosecution, might have been granted under 'The Criminal Justice Act' [18 & 19 Vict. c. 126, s. 1, 2, 3, 14], or in any case in which a party is charged under 'The Juvenile Offenders Acts' [10 & 11 Vict. c. 82, and 13 & 14 Vict. c. 37]."

A PUBLIC PROSECUTOR.

At the last Sessions of the Central Criminal Court, the Recorder received from the petty jury a signed document recommending to the special consideration of the Court, as the result of their practical experience in the discharge of their duties, the institution of a public prosecutor, it being the opinion of the jurymen that important cases for the Crown would, by that means, be more carefully prepared, that the ends of justice would be more fully and satisfactorily met, and that eminent counsel, into whose hands depositions only were placed at a moment's notice, would thereby be relieved from the great anxiety and responsibility enforced upon them from want of proper opportunity to study the all-important interests committed to their charge. The Recorder, in reply to the jurymen, said that Mr. Justice Keating had also called his attention to the subject, and that the recommendation would be forwarded to the proper quarter.

THE ECCLESIASTICAL TITLES ACT.

The Select Committee appointed to inquire into and report upon the operation of the Act 14 & 15 Vict. c. 60 (the Ecclesiastical Titles Act), and so much of the Act 10 Geo. IV. c. 7 (the Roman Catholic Relief Act), as is contained in sect. 24, have agreed to the following report:—

"Your committee have examined several witnesses of high authority as to the legal effect of the Act and section in question, as to the extent to which they interfere with the Church discipline and religious freedom of Her Majesty's Roman Catholic subjects, and as to their general political and social operation.

"Your committee find that, until the Act of 1851 was proposed,

the Roman Catholics of Ireland seem to have disregarded the clause in the Act of 1829. No attempt had ever been made to enforce that clause, and a custom had gradually grown up which, without violating the letter of the Act of 1829, did distinctly recognize a certain status on the part of the Roman Catholic archbishops and bishops, and conduced to mutual good relations between them and the executive government. The Act of 1851 appears to have had the effect of interfering to a serious extent with those good relations which had previously prevailed.

"Your committee have received ample evidence to the effect that the government of the Roman Catholic Church is, under ordinary circumstances, conducted by means of episcopal hierarchies, constituted by briefs or other documents emanating from the See of Rome, and that such hierarchies have been so constituted in British America, Australia, India, and in other parts of the empire; and that the system of government by vicars apostolic, which had existed in England before the brief of 1850, was, in the view of the Roman Catholics, in the nature of a provisional and less constitutional form of government, in which the jurisdiction was of a more arbitrary character, and local rights less clearly defined. The Roman Catholic clergy and laity of England had long sought to obtain from Rome that regular form of government which can only exist under a duly constituted hierarchy; and substantial reasons have been urged by the English Roman Catholics why they should have considered this change desirable.

"Your committee are of opinion that the Act of 1851, which was passed at a period of considerable excitement, proceeded upon a misapprehension of what the brief of 1850 was intended to effect. The use of what are called territorial—that is, diocesan—titles, seems to be inseparable from the existence of a regular hierarchy in all episcopal communions; but it implies no greater claim to territorial jurisdiction than the existence of vicars apostolic or ecclesiastical superiors under other names. In both cases persons within territory, or territory containing persons, are necessarily referred to in order to give certainty to the jurisdiction; and in both cases the real question seems to be whether the jurisdiction claimed is of an external and coercive, or of a purely spiritual and voluntary kind; and your committee have ascertained by evidence that, whether exercised with, or exercised without, local designations, the claim made by the authorities of the Roman Catholic Church in the United Kingdom relates only to the latter, that is to say, a spiritual and voluntary kind of jurisdiction.

"Your committee are further of opinion that the Act of 1851, contrary to the professsions under which it was introduced, would, if enforced, seriously affect the rights of the Roman Catholic communion in matters purely spiritual and voluntary, for it declares void and attaches the character of illegality to all acts and documents relating to the episcopal government of the Roman Catholic Church in these countries, which, in evidence or otherwise, may come under the cognizance of the temporal courts, or be necessarily

employed in the relations which exist between the government and the Roman Catholic subjects of the realm.

"And your committee cannot consider that to be a satisfactory state of the law, in which violation of an Act of Parliament on one side, and connivance at that violation on the other, seem to be essential conditions for the enjoyment of religious freedom, such violation of the law, as it appears to your committee from the evidence laid before them, being frequently an absolute necessity on the part of Roman Catholic prelates in the discharge of their purely spiritual functions.

"In the foregoing remarks your committee more particularly refer to the Act of 1851, but the same principles appear to them to attach to the prohibition of the assumption of local designations in the section of the Act of 1829.

"On these grounds your committee recommend the repeal both of the Act 14 & 15 Vict. c. 60, and of s. 24 of the Act 10 Geo. IV. c. 7.

"Your committee submit for the consideration of the House whether, for purposes of legal description, certain modes of designation applicable to Roman Catholic bishops might not be adopted, whereby some inconveniences which have been pointed out to the committee might be avoided.

"Finally, upon a full review of the evidence, your committee are of opinion that the repeal of the Act and of the section referred to their consideration, will in no way enable the hierarchy of the Roman Catholic Church to assume any civil or temporal precedence or authority within the realm, or cause any detriment or inconvenience to the State, or to any class of Her Majesty's subjects, while it would tend to allay the irritation and remove the sense of wrong which that legislation undoubtedly excited among the Roman Catholics of the United Kingdom."

PROPOSED DRAFT MEMORIAL.

The following is a copy of a Memorial to be submitted to Her Majesty's Ministers and Members of Parliament, by a Joint Committee of the British Medical Association and the Social Science Association, appointed to promote a better administration of the laws relating to Registration, Medico-Legal, and the Improvement of Public Health.

"It seems natural and reasonable that the Imperial Parliament, which for many years has devoted much time and attention to the enactment of the laws, having reference to the amount, the causation, and the diminution of mortality in the United Kingdom, should take measures to ascertain how far its benevolent intentions have been appreciated, its laws obeyed, and its suggestions adopted; and how far, on the contrary, local regulations, customs, and prejudices, the parsimony of local authorities, the existence within the same districts of conflicting jurisdictions, and defects or obscurity in the laws

themselves, have tended to defeat, in whole or in part, the labours of the Legislature.

"It is affirmed by those whom large official experience entitles to speak with authority, that the REGISTRATION OF THE CAUSES OF DEATH, though much more satisfactory than it was, is still very imperfect—so much so that the registrar's certificate is not accepted as evidence of death in courts of law; and that under the present system, which has doubtless led to the discovery of some murders, but probably allows many to escape detection, scarcely any further improvement is possible; while it makes absolutely *no provision* for the REGISTRATION OF DISEASE.

"It is also felt by many, including coroners and others who know its working, that the present mode of conducting MEDICO-LEGAL INQUIRIES tends in numerous instances to defeat the ends of justice; that verdicts are often arrived at by coroners' juries on evidence that is insufficient, erroneous, or misinterpreted; without any *post-mortem* examinations, or after examinations made without the guidance of any fixed rules for the performance of them, and by persons unskilled in such investigations; while it is notorious that the appearance, in all courts of justice, of medical witnesses summoned *ex parte* to speak, not to matters of fact, but to matters of doubtful opinion, hinders or altogether prevents the discovery of truth, discredits scientific medicine, and it is a fruitful source of perplexity and misconception to bench, bar, and jury.

"It further appears, from extensive inquiries conducted by private individuals, in the entire absence of trustworthy official returns, that in many of the towns and districts of this country scarcely a semblance of SANITARY ORGANIZATION exists; that the majority of the large towns throughout the kingdom have no medical officers of health, and that, in most of those which have them, their remuneration is shamefully inadequate; while, on the other hand, many local boards have been established, and even officers of health appointed, in places which are by far too small and insignificant for separate statistical reports; and that, in general, their position of dependence on the local authorities renders those officers comparatively powerless for good. It appears, moreover, that inspectors of nuisances are often independent of the officers of health, instead of being under their control; that in many towns, where a single inspector—burdened, as is not unfrequently the case, with other and laborious duties—is appointed to populations of 30,000 or 40,000 or, as sometimes happens 130,000, and likewise in country districts, where such officers exist only in name, there is practically no inspection whatever; and that, owing to the want of public analysts, and of competent inspectors of food, the Acts for the prevention of adulteration of food and of the sale of diseased and unwholesome articles of food, are probably for the most part a dead letter.

"Yet it is believed by those who have directed their attention to the subject, that the amount actually disbursed under the present disjointed and very inefficient system, would, if otherwise distributed, (the districts and many of the duties, being consoli-

dated,) go far to maintain a sufficient staff of specially trained and highly qualified district medical officers, with inspectorial functions, without whom it is vain to expect any material improvement in this important department of the public service.

"For all these reasons, and for others set forth in the accompanying 'memorandum' (drawn up by Dr. Rumsey, we ask for a thorough, impartial, and comprehensive inquiry into the operation of the several laws, regulations, and customs, in virtue of which members of the medical profession are employed in the registration of the cause of sickness and mortality, in legal and forensic investigations, and in the execution of sanitary laws, throughout the United Kingdom of Great Britain and Ireland."

The following Memorandum is a copy of that referred to above for submission with the Memorial :—

"I. We ask for a thorough, impartial, and comprehensive Inquiry into the operation of the several Laws, Regulations, and Customs, under which Members of the Medical Profession are employed, constantly or occasionally, in the Towns and rural Parishes of England, Scotland, and Ireland, or in some of them,—by different departments of Government, by Public Bodies, by Local Authorities, or in Voluntary Societies ; or under which Medical Practitioners act as Witnesses in Courts of Law and Medico-legal Inquiries, or otherwise ;—for any of the following objects and purposes :

1. To give information concerning the CAUSE OF DEATH, by certificate to the Registrars of Deaths and by evidence at Coroners' Inquests.
2. To perform *post-mortem* examinations and analyses, in suspicious or obscure cases, for the information of Coroners and Courts of Law.
3. To record and report, periodically, the number and nature of all cases of SICKNESS (diseases and injuries) attended at the Public Expense, with their causes and results ; and more minutely and frequently during outbreaks of Epidemic disease ; to observe and record meteorological and other physical phenomena ; to note, investigate, and report outbreaks of Epizootic and Epiphytic diseases, and any exceptional and important local facts of animalcular, parasitic, fungic, or other like invasions.
4. To investigate and report, on particular occasions and in selected places, facts and circumstances relating to the prevalence of disease,—especially of Epidemics.
5. To inquire into the condition of Burial Grounds, and to superintend the execution of laws and regulations for the BURIAL OF THE DEAD.
6. To afford advice and aid to Local Authorities in matters relating to the Public Health ; especially as to the avoidance and removal of Causes of disease, and the condition and sanitary

regulation of Common Lodging Houses and the Dwellings of the Poor.

7. To inquire into and report upon the Local Administration of Laws for the prevention of disease and mortality; for instance, the extent and efficiency of proceedings under the Nuisances Removal Acts; the progress, performance, and results of Vaccination, &c.
8. To inquire into and report upon the sanitary condition and management of Workhouses; and to inquire into the administration of Medical Relief to the Poor, in Districts and Workhouse Infirmaries,—also in Medical Charities and other Public Institutions.
9. To inquire into and report upon the condition and management of Asylums, Hospitals, Licensed Houses, and lodgings, for the reception and treatment of the Insane.
10. To inquire into and report upon the sanitary condition and management of Prisons, Reformatories, and other corrective establishments.
11. To inquire into and report upon the sanitary condition and management of Elementary Schools and other places for the education and industrial training of the Young.
12. To examine and report on the Sanitary condition and the protective regulations of Mines, Factories, Potteries, Bake-houses, Dressmakers' Establishments, and all other Work Places, under various Enactments for the control and regulation of LABOUR.
13. To examine into the purity, genuineness, and wholesomeness of Articles of FOOD AND DRINK, supplied to the community, or to particular classes or public establishments; and to perform chemical analyses and microscopic examinations for the detection of Poisons and Adulterations.
14. To examine into and report upon the WATER SUPPLY of towns and villages, and the condition of rivers and streams.
15. To examine into and report upon the supplies of Gas, the management of Alkali (and other chemical) Works, and the prevention of Smoke and other Noxious Vapours, in towns and populous districts.
16. To inspect, with or without the aid of scientific Veterinarians, the ANIMALS intended for human food;—to report and advise upon the manner in which such animals are kept and fed, conveyed by land or sea, and imported; and to assist in carrying into effect any Government regulations on these matters;—and to examine into and report upon the condition of Slaughter-houses, Cow-houses, Stables, Pigsties, &c., &c.
17. To superintend and aid the execution of measures for preventing the Importation of Foreign Pestilence at Sea Ports; for regulating the sanitary condition of Ships; and for protecting the health of sailors and passengers.
18. To investigate and certify the condition—physical or mental—of persons accused of crime, or needing legal protection, or demanding compensation for personal injury,—or whose com-

petency to fulfil any social or family duty, or labour-contract becomes the subject of legal inquiry,—and to determine the fitness of children and young persons for work.

[Under this head would be included Certificates of Insanity, and the duties of Certifying Surgeons, under various Factory and Labour Enactments.]

19. To give medical or scientific evidence on any of the preceding matters in Courts of Law.

"II. We suggest that—while many of the Provisions and Arrangements, described under the preceding head, are of merely partial, occasional, and exceptional application—there are several other objects, at present wholly unaccomplished, as to which legislative action is urgently required, and for the proper fulfilment of which, as also for the purposes before mentioned, the appointment of skilled Medical Officers in Districts would be found necessary ;—for example :—

1. To examine and revise all Registers of Births and Deaths, in Registration Districts ; to verify the Fact of death in certain cases ; to investigate and record accurately, in all uncertified or doubtfully certified cases, the Cause of death.
2. To bring special knowledge and experience to the conduct, under authorized rules, of *post-mortem* examinations for Coroners's Inquests, or other Medico-legal Inquiries ; and to examine before burial the bodies of Infants alleged to be still-born.
3. To act as Medical Assessors or Referees in obscure or disputed cases—sanitary or medico-legal—which require Forsensic adjudication,
4. To advise and assist Local Authorities in carrying into effect regulations for the removal and burial of the dead, especially in crowded populations and in times of pestilence or great mortality ; and to inspect Mortuaries or other places for the reception of corpses before burial.
5. To advise and aid Local Authorities, Building Societies, and other public companies, in regulating the Site, Construction, and sanitary arrangements of Dwelling Houses, especially of those proposed to be erected for the Poor, and to certify the satisfactory completion of such undertakings.
6. In all populous districts, to direct and aid the execution of Measures concerning the health of Women, within the meaning of the Contagious Diseases Prevention Act, 1866,—when the main provisions of that Act shall be extended to the Civil Population of the Kingdom.
7. Aided by skilled Pharmacians or scientific Chemists, to inspect establishments for the sale and preparation of Medicines, and to detect Adulteration of Drugs.
8. When directed by a proper authority, to inquire into and report upon offences against the Medical Act, especially "infamous conduct in any professional respect" of medical practitioners, in their respective districts.

9. To inquire into the qualifications of Midwives and Nurses, in the same districts; and to aid in carrying into effect any Law which may be enacted for the Examination and Licence of Women intending to act in such capacities.

"III. We believe that abundant Evidence can be adduced to show:—

1. That the Laws and Regulations which relate to the appointment and action of medical men in the Statistical, Medico-legal, Supervisory, and Sanitary Departments of the Public Service, are for the most part defective, complicated, and incoherent,—that they differ considerably in different places and parts of the kingdom,—that they are often inefficient and fallacious in operation, and sometimes even found to be subversive of their professed objects;—
2. That there is no sufficient guarantee for the general competency or the special qualifications of the medical men appointed, no recognized plan of Education for Officers of Health and Medical Jurists, nor any Examining body for directing the standard of their acquirements and for testing them;
3. That these appointments are made without any proper conditions to secure the free, unbiassed, and unfettered exercise of judgment, delivery of opinion, and discharge of duty;
4. That the districts and areas of jurisdiction in which sanitary and other public medical duties are now performed, are not defined or settled on any sound or rational principle, that, except in the metropolis, they are rarely conterminous with other districts for local administration or record; and that they are not used for the performance of the same functions in all parts of the kingdom;
5. That the greater portion of the population is now excluded from the benefits which might result even from the present imperfect system of appointments;
6. That there is a total absence of and a great necessity for some authorized co-operation between the several medical persons officially employed in different public duties, within the same district;
7. That many sanitary enactments, protective regulations, and medico-legal investigations are imperfectly carried into effect, owing to the want of a scientific staff of Officers, appointed to act in districts of extent sufficient to engage the whole of their time and attention;—and
8. That, consequently, an improved organization of districts, and a consolidation of public medical duties therein, are indispensable to the Efficiency and Economy of Local Administration.

LORD WENSLEYDALE.

Lord Wensleydale died on the 25th of February, in his 86th year. Mr. Parke was born on March 22, 1782. In 1799 he entered Trinity College, Cambridge, of which society he became a fellow in 1804. He had taken his degree in 1803, having achieved the

honour of being fifth wrangler and senior Chancellor's medallist. He practised as a pleader below the bar for some years, and, in 1813, was called to the Bar and went the Northern Circuit. He was elevated to the Bench from a "stuff gown" in 1832, as a puisne judge in the Court of Queen's Bench. Two years later he was transferred to the Court of Exchequer, where he sat for twenty-two years. In 1856 he was raised to the peerage, under the administration of Lord Palmerston, as a life peer; but in consequence of the opposition shown by the House of Lords, a new patent was granted, under which Lord Wensleydale took the title of Baron Wensleydale, of Walton, in Yorkshire, with the usual remainders. Lord Wensleydale died without a son, and the barony has therefore become extinct.

We extract the following from *The Law Journal*:—

"Baron Parke, in addition to the ordinary effects of his training as a pleader below the Bar, and to the traditions and practice of his time, was affected by what may be termed an instinctive love of legal formalities as prescribed by authority. He had the science of pleading at his fingers' ends; and if the interests of justice did not coincide with the operation of its rules, it certainly did not strike him that the rules were to be sacrificed. In the present day lawyers who work under the Common Law Procedure Acts are apt to indulge in a sneer at the ancient rigidity, but it must be admitted that under the protection of 'amendments' the art of pleading is rapidly being forgotten, half the desire for its entire abolition originating in despair at learning its mysteries. Baron Parke was also aided in his efforts to enforce strict compliance with the rules of pleading by a memory which can only be described as stupendous. It was commonly said that he never forgot a thing which he had ever heard, seen, or read; and beyond all doubt a pleader who had been accustomed to appear before him at Chambers, or a barrister who had argued special demurrers in the Court of Exchequer, might well believe the statement. We cannot better conclude our notice of a man whose powers and excellence are traditionary with many members of the profession, than by citing what fell from Mr. Baron Martin last week, in the Court of Exchequer at Westminster. 'Having,' said Baron Martin, 'sat for many years with Baron Parke, and having practised before him for a much longer period, I think it is but becoming in me to state that in my opinion the country has lost by his death one of the most learned lawyers and one of the ablest judges who ever sat in Westminster Hall. No one who had not the advantage of sitting with him on the bench could thoroughly appreciate the qualities of his great mind, or his earnest wish at all times to do his duty. He never allowed anything to interfere with the conscientious discharge of those duties which he imposed upon himself, or felt belonged to him in connexion with his position as judge. He was without doubt the ablest and best public servant I have been personally acquainted with in the whole course of my life.'"

MR. JUSTICE SHEE.

It is with deep regret that we have to record the death of Mr. Justice Shee, who died February 19, at his residence, 5 Sussex Place, Hyde Park Gardens. Sir William Shee was the eldest son of Joseph Shee, Esq., of Thomastown, Kilkenny, and was born in 1804. He was educated at the Roman Catholic College, at Ushaw, near Durham. He was called to the Bar by the Society of Lincoln's Inn in 1828, and went the Home Circuit. In 1840 he was called to the degree of serjeant-at-law, received a patent of precedence in 1845, and was made Queen's Serjeant in the following year. He was elevated to the judicial bench in 1863. In the year 1847 he contested the borough of Marylebone unsuccessfully, but he sat in the House of Commons as member for his native county from 1852 till 1857.—*Law Journal.*

THE LATE JAMES ANDERTON, ESQ.

The following interesting letter on the death of an old and valued member of the legal profession by Mr. Butterworth of Fleet Street, we copy from the *City Press* :—

"I read the kindly, though only too brief, notice of the late Mr. James Anderton, in your impression of the 25th ult. Its brevity, I suppose, resulted somewhat from the necessary pressure incident to the rapid publication of your journal. I trust, however, that a carefully prepared memoir may hereafter be given by you of one who, during a long municipal career, had been identified with many incidents that are well worthy of remembrance. It is not my object, in thus addressing you, to enter now at any length on this subject, but as one or two circumstances with reference to the late Mr. Anderton came under my observation in my long acquaintance with him, and from my business association with the legal profession, I may be permitted to bring them under your notice. You mention the fact that Mr. Anderton entered the profession of the law as a solicitor, at the distant period of 1811, but the incident is unnoticed that, at an early stage in his career his active mind saw the defect and social disadvantage that his professional brethren laboured under of having no common social centre of resort, no club, no library, no meeting rooms for arbitrations, no society with which to become identified, and by association with which to acquire a known position and a status in the profession of an attorney or solicitor. He saw that the higher grade of the profession, the barrister, had every such advantage in the library of his Inn of Court, in his call to the Bar, and in his hall dinners with his brethren of the Bar. The result was that Mr. Anderton became the originator, or founder, of the Law Institution in Chancery Lane, which at once secured the support of all the leading members of the legal profession; it afterwards received a charter of incorporation, and subsequently, as the Incorporated Law Society of England and Wales, it became the college, or university, for the examination and admission of articled clerks to practise as solicitors and attorneys. Mr. Anderton became the first secretary to

the Law Institution, and, for his services in that capacity, bearing in mind that he was also its founder, on his retirement from the office he received from the members a handsome service of plate, which was presented to him at the time, under circumstances of singular honour to himself. It has been said that great things often have their origin from very small beginnings, and Mr. Anderton was always very willing to admit that the first idea which occurred to him, of founding the Law Institution resulted from the circumstance of my late father having originated, at the suggestion of some of the judges, a Law Subscription Library in Chancery Lane, for the accommodation of the members of the legal profession. The enterprize was not supported as he had been led to suppose it would have been, and the doors of the Law Supscription Library were finally closed, to be speedily followed by the opening of those which ultimately became the now successful and national institution, the Incorporated Law Society of England and Wales. Mr. Anderton was destined speedily again to render his professional brethren indebted to him by projecting for their special service a life assurance society, the first that had been originated with particular reference to the legal profession. The result was the establishment of the Law Life Assurance Society, next St. Dunstan's Church, in Fleet Street, now one of the most wealthy and prosperous institutions of the kind in the kingdom. Mr. Anderton for the third time proceeded anxiously to weigh the interests and the requirements of his professional brethren, and as his latest act in that respect he founded and lived to see the complete success of an institution which he humanely planned for the less fortunate members of his profession, namely, the Solicitors' Benevolent Institution. This latter institution he found both time and energy to place upon a firm and permanent footing, by holding the meetings in all the large towns in the kingdom of the attorneys and solicitors, and stimulating them in the benovolent object he had so much at heart. And this he did in addition to his ordinary duties as agent of the West of England Insurance Company, and to his municipal ones, as an active member of the Court of Common Council. To have successfully reared three such institutions as I have enumerated during a lifetime, and to have lived to see them take permanent root, from their ascertained utility, is something for one man to have achieved, and, be it remembered, each of them having a distinct reference to, and calculated to have a beneficial influence upon, the interests of that profession, of which, as a solicitor, to the last he remained so faithful a member. So much far-seeing sagacity, indomitable perseverance, and business tact as must have been necessary for such important results is the lot of but few. My task is done, as I do not purpose entering upon either the political or the municipal career of Mr. Anderton. There is a venerable deputy still living, a member of his own profession, and with literary and antiquarian proclivities, who, if disposed to undertake the task could do it justice. I cannot, however, help here drawing attention to the circumstance, that although Mr. Anderton had, as an intimate friend of Joseph Hume, early imbibed reforming tendencies ; still, as a corporator, was he

somewhat fond of the Conservative *antiquas vias*. He defended Temple Bar when it was in danger from the reforming iconoclast, and grew notorious in a leader in the *Times* for advocating the conservation, on its old site of Smithfield Market, which the *Times* so much opposed, and ultimately occasioned the removal of it to Islington. Again was Mr. Anderton conservative in defending the old vested interests of the City gas-works against the incursions of Mr. Charles Pearson and the gas consumers' reforming rival. Thirty years ago Mr. Anderton, on my late father's introduction to the constituency of St. Martin's, Ludgate, was elected its representative in the Ward of Farringdon Without, in the place of my late father, and, shortly before Mr. Anderton himself resigned, he called upon me to suggest my offering myself, in turn, to supply his place at St. Martin's, but I told him I had no desire for City honours, and for the first time in my long intercourse with him, he appeared disappointed with me for neglecting to avail myself of the opportunity. To have known him intimately for nearly forty years, is to have had frequent opportunity of appreciating the firm and manly independence as well as integrity of his character, and to be made constantly aware that, beneath his blunt, brusque, and somewhat eccentric manner, he abundantly possessed a kind and gentle heart.

"I am, &c.,

"JOSHUA W. BUTTERWORTH.

"*Fleet Street, Feb.* 6."

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Hilary Term, 1868.

AT the Final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinction:—Joseph Farmer Milne, John Jessop Milnes, Henry John Robinson, Alfred Powell, and William Simon Rackham, jun.

The Council of the Incorporated Law Society have accordingly awarded the following prizes of books:—To Mr. Milne, the Prize of the Honourable Society of Clifford's Inn; to Mr. Milnes, the Prize of the Honourable Society of Clement's Inn; to Mr. Robinson, Mr. Powell, and Mr. Rackham, Prizes of the Incorporated Law Society.

The Examiners also certify that the following candidates, under the age of twenty-six, passed examinations which entitle them to commendation:—Herbert Chamberlain, Edward Chesshyre Huntington, and James Kelly, jun. The Council have accordingly awarded them certificates of merit.

The number of Candidates examined in this Term was 95; of these 70 passed, and 25 were postponed.

APPOINTMENTS.

The Right Hon. Hugh MacCalmont Cairns has been appointed Lord Chancellor on the resignation of Lord Chelmsford.

The following have been appointed a Commission to inquire into the constitution and practice of courts-martial in the army, and the present system of punishment for military offences. Right Hon. Colonel Wilson Patten, M.P., Colonel of the 3rd Royal Lancashire Militia; the Marquis of Hartington, Right Hon. Viscount Eversley, Lieut.-Colonel Commandant in the Hampshire regiment of Yeomanry Cavalry; Right Hon. Jonathan Peel, M.P., Lieut.-General, Right Hon. John Robert Mowbray, Judge-Advocate-General of the Forces; Right Hon. T. E. Headlam, Q.C., M.P., Right Hon. Russell Gurney, Q.C., M.P., Recorder of the City of London; Sir James Yorke Scarlett, Sir Alfred Hastings Horsford, Lieut.-General Henry Eyre, and Mr. Samuel Whitbread, M.P. The Commissioners are empowered "to obtain information by the examination of all persons most competent by reason of their knowledge, habits, or experience to afford it; and also by calling for all documents, papers, and records which may appear calculated to assist your researches, and to promote the formation of a sound judgment on the subject." They are to report with all convenient speed their opinions "in what respects the administration of criminal justice in the army admits of improvement, either as regards the constitution or the practice of courts-martial, and what changes or modifications it may be desirable to make in the punishments now applicable to offences committed by the soldier, without danger to the paramount consideration of maintaining discipline and effectually repressing crime in the ranks of the British army throughout all the various contingencies of military service to which our troops are necessary liable." Mr. John Lloyd Wharton, Barrister-at-law is appointed Secretary to the Commission.

The Right Hon. the Lord Chancellor, the Right Hon. Spencer Horatio Walpole, and Sir Travers Twiss, Knight, D.C.L., Her Majesty's Advocate-General, have been appointed Her Majesty's Commissioners to visit the Royal Hospital of St. Catharine, now situate in the Regent's Park, and to inquire into the state, government, and revenues of the said hospital.

Vice-Chancellor Sir W. P. Wood, and Sir Charles Jasper Selwyn, Solicitor-General, have been appointed Lord Justices of Appeal in Chancery, and have been sworn of Her Majesty's Most Honourable Privy Council.

Mr. James Hannen, of the Home Circuit, has been appointed a Justice of the Queen's Bench in the room of the late Mr. Justice Shee.

Mr. G. M. Giffard, Q.C., has been appointed a Vice-Chancellor in the place of Sir W. Page Wood.

Mr. William Baliol Brett, Q.C., has been appointed Solicitor-General in the place of Sir C. J. Selwyn.

Dr. J. P. Deane, Q.C., has been appointed Admiralty Advocate in the place of Sir Travers Twiss, Queen's Advocate, also Chancellor and Official Principal of the Consistorial Court of the Diocese of Salisbury, in the room of the Right Hon. Sir R. J. Phillimore, resigned, and Mr. Maurice Charles Merttins Swabey, D.C.L., has been appointed Chancellor of the Diocese of Oxford, in succession to Sir Robert Phillimore, resigned.

Mr. George Ward Hunt, Barrister-at-Law, of the Inner Temple, has been appointed Her Majesty's Chancellor of the Exchequer.

Mr. J. R. Davison, Q.C., has been elected Chairman of the Durham Quarter Sessions in the place of Mr. W. S. Grey, resigned.

The Judgeship of County Courts' Circuit No. 15, vacant by the death of Mr. Serjeant Dowling, has been conferred on Edmund Robert Turner, Esq., of Lincoln's Inn.

Mr. George Sclater Booth, Barrister-at-Law, has been appointed Financial Secretary to the Treasury, in the place of Mr. Ward Hunt.

The following have been appointed Queen's Counsel:—Mr. John Clerk (of the Parliamentary Bar), Mr. M. A. Shee, and Mr. Vaughan Richards, of the Equity Bar; Mr. J. A. Russell, Dr. Kenealey, Mr. Higgin (Q.C. of the County Palatine of Lancaster), Mr. H. W. West, Mr. Henry Matthews, Mr. Staveley Hill, Mr. Horace Lloyd, Mr. Fitzjames Stephen, Mr. Holker, Mr. Robert Stuart, and Mr. W. W. Mackeson, of the Common Law Bar. Mr. Serjeant Simon has received a patent of precedence.

The office of Junior Counsel to the Treasury, vacated by the promotion of Mr. Hannen to the Bench, has been given by the Attorney-General to Mr. T. D. Archibald, of the Home Circuit.

Mr. Motteram, of the Oxford Circuit, has been appointed by the Attorney-General to be Standing Counsel for the Mint prosecutions at the Staffordshire Sessions, and also for the borough of Walsall.

Mr. K. E. Digby, M.A., Fellow of Corpus Christi College, and Barrister-at-Law, elected Reader of English Law under the new Vinerian Statute in the University of Oxford.

Mr. Bonham Carter, Barrister-at-Law, has been appointed one of the Referees of the House of Commons for the current Parliamentary Session.

Mr. Francis Henry Bacon, Barrister-at-Law, has been appointed secretary to Vice-Chancellor Giffard.

Mr. J. M. Davenport, Clerk of the Peace for the County of Oxford, has been appointed by the Vice-Chancellor a Proctor in the Chancellor's Court at that University.

Mr. Charles Frederick Lewns has been appointed High Bailiff of the County Court at Rye, upon the resignation of Mr. William Campbell Furner.

Mr. William Walker, Solicitor, of York, has been appointed Honorary Secretary of the Yorkshire Law Society, in the place of the late Mr. Thomas Hodgson.

Mr. Thomas Belk has been appointed Clerk to the Magistrates for the Borough of Middlesborough, in the room of the late Mr. Peacock.

Mr. Thomas Harland, Solicitor, has been elected Clerk to the Commissioners of Taxes for Bridlington.

IRELAND.—The Right Hon. Sir Joseph Napier, Bart., has been re-appointed by Lord Cairns to the office of Vice-Chancellor of the University of Dublin.

The Attorney-General has appointed Mr. W. H. Kisbey, Barrister-at-Law, to be one of the Supernumerary Crown Counsel for the County of Louth and for the County of the Town of Drogheda, in place of Mr. W. Gernon, resigned; and Mr. Aquilla M'Mahon to be Sessional Crown Solicitor for the county of Wicklow, in room of Mr. W. F. Rogers, resigned, and Mr. William Dobbin to be Clerk of the Crown for the County of Armagh, in the place of Mr. Leonard Dobbin, resigned.

Mr. T. L. Lefroy has been appointed Registrar to the Lord Chief Justice, in the place of Mr. Napier, resigned.

Mr. John Bagge Hearn, Solicitor, has been appointed Assistant Taxing Officer, in the room of Mr. Henry Crawford, resigned.

SCOTLAND.—Mr. John Burnett, Advocate, has been appointed Counsel to the Post Office Authorities in Scotland.

AFRICA.—Mr. Horatio J. Huggins, Queen's Advocate of Sierra Leone, has been appointed Assistant Judge of the Supreme Court of that Colony; and Mr. George Phillipps, Barrister-at-Law, Queen's Advocate, in the place of Mr. Huggins.

Sir Arthur E. Kennedy, C.B., Governor of the West African Settlement, has been appointed Judge in the several Courts of Mixed Commissions at Sierra Leone for the suppression of the slave trade.

CONSTANTINOPLE.—Mr. Philip Francis, Her Majesty's Legal Vice-Consul at Alexandria, has been appointed Consul-General and Judge of the Supreme Consular Court at Constantinople.

INDIA.—Mr. Frederick Augustus Barnard Glover, of the Bengal Civil Service, and Mr. Dwarkanath Mitter, have been appointed Judges of Judicature at Fort William, in Bengal.

WEST INDIES.—Mr. J. W. Wattley, Barrister-at-Law, has been appointed Chief Justice of the Island of Tobago, and Mr. A. P. Burt, Barrister-at-Law, Attorney-General for the Island of Granada.

Necrology.

January.

14th. Phillips, Thomas, Esq., Solicitor, aged 65.
16th. Smithe, W. Forster, Esq., Barrister-at-Law, aged 54.
18th. Dewes, C. S., Esq., Solicitor, aged 41.
18th. Conington, H. J., Esq., Barrister-at-Law, aged 41.
18th. Bowles, T. H., Esq., Barrister-at-Law. Registrar of the Supreme Court at the Cape of Good Hope.
19th. Busk, E. T., Esq., Barrister-at-Law, aged 32.
23rd. Anderton, James, Esq., Solicitor, aged 85.
25th. Smith, Henry, Esq., Solicitor, aged 68.
30th. Butler, C. Duncan, Esq., Solicitor, aged 32.
30th. Bolton, W. Draper, Esq., Barrister-at-Law.

February.

5th. Summerscales, John, Esq., Solicitor, aged 60.
6th. Overbury, Nathaniel, Esq., Solicitor, aged 57.
6th. Peachey, John, Esq., Solicitor, aged 61.
11th. Godfray, Francis, Esq., Barrister-at-Law, aged 61.
16th. Garbett, E. J. H., Esq., Solicitor, aged 25.
18th. Dalrymple, Arthur, Esq., Clerk of the Peace for Norwich.
19th. Filliter Clavell, Esq., Solicitor, aged 53.
19th. Shee, Hon. Justice, aged 62.
19th. Bramah, E. B., Esq., Solicitor, aged 46.
20th. Richards, Henry, Esq., Solicitor, aged 63.
21st. Leach, J. Vincent, Esq., Barrister-at-Law, aged 52.
23rd. Tyndale, J. Nash, Esq., Barrister-at-Law, aged 53.
25th. Wensleydale, Right Hon. Lord, aged 85.
27th. Peacock, J. Shields, Esq., Town Clerk of Middlesborough.
28th. Calverley, John, Esq., Barrister-at-Law, aged 74.

March.

1st. HOFFMAN, LEWIS, Esq., Barrister-at-Law, aged 52.
3rd. DOWLING, Mr. Serjeant, County Court Judge, aged 64.
3rd. POTTER, THOMAS, Esq., Barrister-at-Law, aged 38.
9th. SMITH, ROBERT, Esq., Solicitor, aged 70.
15th. BURBURY, T. POTTER, Esq., Solicitor.
16th. GRIFFIN, EDMUND, Esq., Solicitor, aged 72.
16th. BOLTON, J. THOMAS, Esq., Solicitor, aged 71.
18th. POWIS, WILLIAM, Esq., Barrister-at-Law, aged 56.
21st. COVERDALE, JOHN, Esq., Solicitor, aged 78.
22nd. SOUTHAM, S. P., Esq., Solicitor, aged 72.
24th. PEACOCK, W. EUSTACE, Esq., Barrister-at-Law, aged 28.
24th. FOSBROOKE, W. B., Esq., Solicitor, aged 72.
24th. EDWARDS HENRY, Esq., Solicitor, aged 48.
25th. TAYLOR, J. R., Esq., Solicitor.
27th. SAYWELL, ROBERT, Esq., Solicitor.
29th. BURLAND, J. BLANCHARD, Esq., Solicitor, aged 65.
29th. BADELEY, EDWARD, Esq., Barrister-at-Law.
30th. IMESON, J. FORSTER, Esq., Solicitor, aged 23.

April.

10th. PALMER, WILLIAM, Esq., Solicitor, aged 56.
12th. STEELE, JOHN, Esq., M.P., Solicitor, aged 82.
13th. PRATT, F. T., Esq., D.C.L., aged 68.

THE

Law Magazine and Law Review:

OR

QUARTERLY JOURNAL OF JURISPRUDENCE.

No. L.

Art. I.—LORD BROUGHAM.

THE noblest ornaments of a nation are the great men to whom it has given birth. Their memory it is bound to cherish, and their good name posterity should do its best to preserve. This is especially the case with those distinguished characters who, as in the instance of the subject of the present memoir, have devoted their best energies to promote the welfare of their country, and consecrated their vast powers to further the general good of mankind. Lord Brougham's was essentially a life of action; and the results which he not only aimed at but successfully achieved, were eminently practical. The fruits of this noble tree were indeed abundant and rich, and extensively has the nation—we may say the world at large—benefited by what it yielded.

The biography of such a man, extending over not merely so many years, but so important and so exciting a period of history—he was born some time before the first French revolution broke out, and long before the vast appliances of steam or gas had been discovered—in which, moreover, he played so conspicuous a part; and embracing in its range

quarters of a century, must fill some volumes, and would take years satisfactorily to accomplish. A sketch only of that wonderful career is here attempted. And, indeed, the efforts of biographers may well be spared, inasmuch as Lord Brougham has fortunately left behind him his own autobiography, which, however incomplete in some of its details, embraces the grand outline of his career, particularly those portions of it best known to the general public. In a letter to the writer of these pages in 1862, Lord Brougham said—"My autobiography is so far prepared with the intention of an immediate publication—at least of being published while I remain alive, and ready to meet any attacks, and give any explanations; so that I shall be able to show it to you, and to confer about it as soon as I return from Cannes, whither I shall go in a week or ten days. . . . The work is nearly all written, and the correspondence copied fair out. But the time is unfavourable to publication, while the American war and distress lasts."

In a subsequent letter, written in 1864, he stated—"All idea of publication is given up for the present, and during the interruption of the American market by this horrible civil war, and the love of slaughter which has seized the Yankees."

Autobiography has of course its advantages and its disadvantages. It reveals what no one else can reveal, but it also not unfrequently conceals, or attempts to conceal, what an ordinary biographer would not hesitate to proclaim. In Lord Brougham's case, who lived a life so public, that concealment, even had he desired it, would be next to impossible, explanation, as he himself seems to have felt, is what on certain points is mainly needed. Probably no person but the subject himself knows the extent of his own power, or his own weakness; his real worth, or his actual baseness: while an indifferent biographer is of course far better qualified impartially to survey and to narrate impartially the general career of the individual in question.

not only politics and jurisprudence, but science and social progress; and all that relates to public events for three-

Although Lord Brougham's family had, for several centuries at any rate, resided on their ancestral estate, Brougham Hall, Westmoreland, yet Lord Brougham was born in Edinburgh, on September 19, 1778, the place of his birth being at head of the Cowgate, above the shop of Mr. Thompson, in the third flat, as on one occasion pointed out by Lord Brougham to a party of friends visiting Edinburgh. The house was at that time a boarding-house, kept by Mrs. Syme, sister of the celebrated Dr. Robertson, the historian, whose niece Lord Brougham's father married, and continued to reside in Edinburgh after that event.

We regret much that we possess no record of the early years of this great man. Ardently do we hope that the autobiography may supply the omission. The narrative written by himself of the growth and development of the mind of a man of really great and original power, would be one of the most valuable contributions to literature that could be rendered. Unfortunately, however, in nearly all the biographies of great men this is wholly wanting, as the subject of it alone could have supplied the omission. An account of the "Boyhood of Brougham" would doubtless have been a very extraordinary and most interesting production. Would that some of his school-day contemporaries were alive to tell us of his versatile acquirements, his eccentric freaks, his ready and sarcastic replies, and the energy he even then displayed. The childhood of Napoleon, his quarrelsome, meddling, domineering disposition, foreshadowed pretty accurately what the man would turn out. So marked a character as that of Lord Brougham must have evinced very determinate traits in his youth. One characteristic anecdote of him has been preserved. His mother's servant, when accused of breaking anything, was in the habit of always coming out with the ready reply—"Sure, ma'am, it was crackit before." One day

when Master Harry tumbled downstairs, his anxious mother shouted out—"Oh, boy, is your head broken?" "No, no, mother," cried the young Pickle, "it was crackit before!"

All that we really know about the juvenile career of this young gentleman is that at an early age he was sent to a school kept by a Mr. Luke Fraser, who had also among his pupils Walter Scott and Francis Jeffrey. When a boy, Henry Brougham used to walk about his father's grounds at Brougham Hall, occasionally in the company of his illustrious great-uncle, Dr. Robertson. At the age of fifteen he entered the University of Edinburgh, after passing some time at the High School, under the well-known Dr. Adam. He soon became remarkable here for the display of intellectual power, and before he was seventeen years of age he composed a very able essay upon optics, which was transmitted to the Royal Society. The merits of this production were so highly estimated by the society that it was honoured with a place in the account published by them of their transactions during the year 1796. The transactions of the society published in 1798 contain a second paper, forwarded to the society by Mr. Brougham during that year, containing some general theorems on the higher geometry. This paper caused much discussion, and was deemed worthy of a reply by Professor Prevost, of Geneva. At this time young Brougham corresponded on scientific subjects with several of the philosophers on the continent. In 1860 he published an edition of his tracts on scientific subjects, dedicated to the University of Edinburgh, "begun while he was its pupil, finished when its head." He was elected a Fellow of the Royal Society in 1803.

So extensive indeed was the display of young Brougham's powers at this early period, that it was predicted that he would attain the highest eminence in whatever profession he engaged; and that he would become a very distinguished philosopher if he were not unfortunately drawn off into

politics. He selected the law, and, after leaving the University, was admitted a member of the Edinburgh Society of Advocates, and was called to the Bar in 1802. He also distinguished himself as a member of the Speculative Club, to which Southey, Scott, Horner, Jeffrey, Dr. Thomas Brown, and other individuals who subsequently attained eminence, also belonged. Before being called to the Bar, young Brougham made a tour through Holland and Russia, in company with Lord Stuart de Rothsay, who had been appointed to a temporary mission at one of the northern courts.

In 1802, the *Edinburgh Review* was established, to which young Brougham became a contributor, and in which he continued to write until a late period of his life. Among the other original contributors were William Allen, Sydney Smith, Jeffery, Thomas Brown, and Horner. One of Brougham's articles at this period was the famous critique on Lord Byron's "Hours of Idleness," which called forth an equally celebrated reply in "English Bards and Scotch Reviewers," from the pen of the noble poet. The practice of early and constant composition in writing must have, no doubt, been highly advantageous to Mr. Brougham, in preparing him both for the forum and the senate. "Lord sauf us!" once exclaimed an Edinburgh printer, "did I ever think to see the laddie, who used to sit kicking his heels and whistling in my office till a proof was thrown off, make such a stir in the world as Henry Brougham has done."

In 1803 appeared "An Inquiry into the Colonial Policy of the European Powers," in 2 vols. By Henry Brougham, jun., Esq., F.R.S., Edinburgh. This work has been highly commended as a statesmanlike production, although some of its opinions, especially in regard to negro slavery, have been asserted to be not precisely in accordance with those of Mr. Brougham in after years. The preparation of this work must, however, have been highly useful to him in directing his attention to this latter subject, and in supplying

him with information which enabled him to grapple with the evil which he took so leading a part in suppressing. The book treats generally "on the relations that subsist between a state and its colonies," political and commercial; after which it considers separately the colonial policy of particular countries, especially those of England and France. It discusses also, "the foreign relations of colonies." Book IV. treats s. 1 "Of the free negro system, or the policy of cultivating the colonies by means of free negroes." S. 2. "Of the negro slave system, or the present state of society in the slave colonies, and the means of improving it." He here examines the comparative mode in which the slaves are treated by the colonists of different countries. He speaks strongly and decidedly of the cruel treatment of negro slaves, in many instances, by their masters; but does not, at that period, appear to have been free from apprehension as to the evil consequences of various kinds which would be attendant upon the immediate emancipation of the slaves. In one passage he observes, "Until the chains of the negroes are either firmly rivetted, or broken for ever, the island (St. Domingo) must remain in a state of insecurity within." Vol. II., p. 121. Nevertheless, he asserts distinctly, "It is scarcely credible that men should have been found absurd enough to defend the system of negro slavery upon abstract principles." Vol. II., p. 486. And abolition he contends for as beneficial not only to the negroes, but to the colonists themselves; and also that "the abolition of the slave-trade must, as we have already seen, greatly ameliorate the structure of society in the West Indian colonies." Vol. II., p. 500.

In the course of the year, 1806, Mr. Brougham paid a second visit to the continent, when he went to Spain. It has been stated* that this expedition was undertaken at the suggestion and under the sanction of Mr. Pitt, then at the

* Harwood's "Memoirs of Lord Brougham," p. 16.

head of the Government; and that wishing for further and more correct information than written communication could supply on the real state of Spain, and its disposition and ability to resist the efforts of Napoleon, he determined on sending there an agent for that purpose, and accordingly selected Mr. Brougham, young and inexperienced as he then was, for this very important and difficult undertaking.

Mr. Brougham must have been by this time convinced, both by the consciousness of his own powers, and the opinions of those about him, that it was desirable for him to obtain a wider field for his exertions than he would be likely to meet with as a Scotch Advocate in Edinburgh. He therefore determined to go to London, and to become a member of the English Bar, to which he was accordingly called by the Honourable Society of Lincoln's Inn, in 1807. For some time he was a pupil of Mr. Tindal, then a celebrated pleader, afterwards a contemporary on the northern circuit, and eventually Chief Justice of the Common Pleas. He had already made his appearance in London as a Scotch advocate at the Bar of the House of Lords on behalf of the claim of Lady Essex Kerr to the dukedom of Roxburgh; and his speech on that occasion was a highly successful effort, although he was only junior counsel in the case. Mr. Brougham selected the Court of King's Bench, and the northern circuit as the arena for his professional efforts. In the year 1808 we find him engaged in a case of great importance. Some of the principal merchants of London, Manchester, Liverpool, Birmingham, Bristol, and other commercial towns, petitioned the House of Commons against the celebrated Orders in Council relative to trade with America, and which were asserted to operate most injuriously, and with great partiality and injustice. Mr. Brougham was selected by the petitioners to support their interest; and the able and efficient manner in which he discharged his duty on this occasion, at once proved the wisdom of the selection, and afforded presage of his future professional eminence. On March 16, he

appeared at the Bar of the House of Commons and opened the case, after which he proceeded to call witnesses in support of the petition. He subsequently addressed the House with great force, commenting on the evidence. Although the prayer of the petitioners was not granted, the reputation of Mr. Brougham was at once established, and both in Westminster Hall and on the northern circuit he acquired extensive practice.

The ability displayed by Mr. Brougham marked him out as a very desirable person to be introduced into Parliament as a supporter of the great Whig party, with whose principles he appeared to be identified. Accordingly, in the course of the year 1810, we find him taking his seat for Camelford, one of those "rotten boroughs," then in the interest of Lord Darlington, the existence of which was so strongly condemned, and which he subsequently took so leading a part in extinguishing; but which have, nevertheless, been the means of introducing to Parliament so many rising young men of ability. It is remarkable indeed that until his return for Yorkshire in 1830, although he had contested other large constituences, Mr. Brougham successively sat for close boroughs. He made his maiden speech shortly after his election, during the debate on Mr. Whitbread's motion, censuring Lord Chatham for his conduct in the Scheldt expedition, on which occasion we believe that we are correct in stating the late Sir Robert Peel also made his *début.* As in the case of Sir Robert Walpole and our present premier, Mr. Brougham's first parliamentary effort was regarded as a failure; at any rate it fell far short of the expectations that had been raised by his success at the Bar. We are told, nevertheless, that the performance was one of great merit, and sufficient to ensure for him a patient hearing by the House for the future. And on June 15, in the same year, 1810, Mr. Brougham brought forward a motion in the House of Commons calling attention to the inefficiency of the Slave Trade Abolition Act, and to the extent of its evasion by

foreign powers. His speech on this occasion was one of great force of argument and eloquence, and the address was agreed to without a dissenting voice.

Notwithstanding his election to the House of Commons, and his success there, Mr. Brougham did not, as has been the case with some rising juniors, neglect his practice at the Bar. On the contrary, we are told * that he was most assiduous in his attendance on the Court of King's Bench, and that it was no unusual occurrence to find him, on the morning succeeding a long and heavy debate in the Commons, in which he had taken a prominent part, one of the earliest at court, and one of the last to remain until the court rose. On the northern circuit, too, his attendance was regular. At this time a splendid galaxy of talent adorned that circuit. His old tutor and friend Tindal, Scarlett and Pollock, successively Lords Chief Baron, Hullock, Williams, Parke and Alderson, subsequently judges, were among Mr. Brougham's competitors on that noble arena. One of his contemporaries on the northern circuit, who is now a highly respected Q.C. and M.P., and who has filled with credit important offices, informs us that he remembers him on the circuit at an early time, when he always attracted notice, but rather from his literary and political fame as a reviewer and the assailant of the "Orders in Council," than as a barrister, for his employment for some time was but meagre. In 1820 he was largely engaged. The lead of the circuit was at that time incontestably with Scarlett and Pollock, and Hullock nearly equalled Brougham in amount of business. In all cases of some grievous wrong to be redressed, or fraud to be exposed, his vehemence and power of sarcasm and satire were irresistible; but otherwise, in any intricate commercial case, he was not a match for his competitors. He sometimes lost his temper with a jury if they were inattentive, or some one amongst them seemed by his gesture to dissent from

* Harwood, p. 24.

what Brougham was saying. He has been known to stop, and looking at the refractory juryman, to say that he should not go on again till he saw that he was attended to. Scarlett, if he had arranged an ingenious scheme by which to catch a verdict, when he perceived that it was not quite comprehended by the jury, used to abandon his own view and say, "Perhaps there is not much in this"—"it is too minute," and forth with he would take up some coarser view of his case, and win by it.

The prosecution of Messrs. Leigh and John Hunt, proprietors of the *Examiner*, for whose defence Mr. Brougham was retained, afforded him an opportunity of appearing in a case peculiarly fitted for the display of the powers with which he was specially gifted. The Attorney-General, Sir Vicary Gibbs, commenced proceedings against the journal in question for copying from a local newspaper an article in the form of a letter reprobating the system of flogging in the army. Mr. Brougham's bold, able, and eloquent defence, elicited not only the applause of the Attorney-General, but even Lord Ellenborough, who presided at the trial, in his summing up to the jury described it as "a speech of great ability, eloquence, and manliness." The Chief Justice, albeit, summed up strongly for a conviction; but the jury returned a verdict of not guilty. The successful efforts of Mr. Brougham in this case must, of course, have been highly advantageous to his career, notwithstanding it was rumoured that they drew down upon him the heavy displeasure of the Prince Regent, afterwards George IV., between whom and Mr. Brougham, it must be acknowledged, the love never appears to have waxed very warm. It was even asserted* that the Prince Regent exerted his personal influence to prevent Mr. Brougham from being returned a second time to Parliament. Drakard, the proprietor of the newspaper, the *Stamford News*, in which the article copied into the *Examiner*

* Harwood, 26.

originally appeared, was tried at Lincoln, and convicted of libel, notwithstanding the energetic defence of him by Mr. Brougham, who was specially retained for the occasion. His speech was repeatedly interrupted by loud outbursts of applause which the court was unable to repress.

In the year 1812 the opposition determined to attack the ministers in the House of Commons on the subject of the Orders in Council, and Mr. Brougham was selected as the person best qualified to bring forward a motion, which he did on March 3rd, for the appointment of a select committee to take into consideration the state of trade and manufactures, particularly with reference to the Orders in Council. He spoke at considerable length, and with great ability, but the motion was negatived by 216 to 144. Subsequently, however, the obnoxious Orders were revoked as regards America. In several other debates during this session Mr. Brougham took a prominent part, and on September 29th, Parliament was dissolved.

Mr. Brougham had at this period attained a considerable degree of popularity, and his partially successful opposition to the Orders in Council rendered him a great favourite with the trading portion of the community. He consequently received a very pressing invitation to become a candidate for Liverpool at the general election, to which he consented. The contest was a severe one, but ended in the election of Mr. Canning and General Gascoigne, the two Government candidates; the numbers being, for Mr. Canning, 1631; for General Gascoigne, 1532; for Mr. Brougham, 1131; and for Mr. Creevey, who was his colleague, 1068. At one period of the election it appeared likely that Mr. Brougham would be successful; but a coalition between the ministerial candidates effected his defeat. On a subsequent occasion he thus alluded to the present contest between himself and Mr. Canning.

"To be opposed, as I then was, to a man like Mr. Canning, was

a high honour; to be defeated by him was no disgrace. He was a man who took no undue advantage of his opponents; who conducted the contest fairly and honourably; and who added to his triumph the praise that it was won by laudable means. Opposed during a long contest to this distinguished orator, a man of the greatest talents and most accomplished mind of the day; no angry feeling was produced, no reason for complaint was given on either side; and as we met as friends at the beginning of the election, so we parted at the end with mutual thanks and congratulations on the manner in which it had been conducted."

Mr. Brougham's colleague, Mr. Creevey, complained on this occasion that while they flung only precious stones at Mr. Brougham—alluding to some one having thrown a ring into the carriage of the latter—they pelted him with real stones. In a speech delivered some years after, Mr. Brougham alluded in facetious terms to the appearance of a friend with a huge black patch on his face, about the size of a sergeant's coif, which, he said, covered a wound that had been inflicted during an election contest, at which he had been persuaded to appear as the representative of Mr. Brougham.

Another effort was made by Mr. Brougham's friends during this general election to obtain for him a seat in parliament, and he was put in nomination for the Inverkeithing burghs. But here, also, he was unsuccessful, and he accordingly remained out of the House for four years.

In December of this year, 1812, Mr. Brougham was again called upon to defend Messrs. Leigh and John Hunt, on account of an alleged libel on the Prince Regent, which had appeared in the *Examiner*, and which purported to be a reply to some fulsome praise of the prince that had appeared in the *Morning Post*. Mr. Brougham made a forcible and brilliant appeal to the jury, during the delivery of which, however, he was several times interrupted by the Attorney-General, Sir W. Garrow, and by the Chief Justice, Lord Ellenborough, for introducing irrelevant matter

into the case. The defendants were both convicted, but Mr. Brougham's speech is said to have given grave offence to the Prince Regent.

Mr. Brougham was afterwards engaged in a case of some interest, being an action for the recovery of money on a wager respecting the life of Napoleon. Mr. Brougham was counsel for the plaintiff on the trial at York, when the jury found for the defendant; which verdict was afterwards confirmed by the Court of King's Bench, on the ground that the wager in question was contrary to law, contrary to morality, and contrary to Christianity.

During the early part of the year 1813, Mr. Brougham became the legal adviser of the Princess of Wales, afterwards Queen Caroline, of Brunswick. It has been generally supposed that the letter addressed by her to the Speaker of the House of Commons, in March 1813, was written under Mr. Brougham's advice, and with his assistance, as also her letter to the queen, written about the same time. Mr. Brougham is also said to have been her adviser on the occasion of the Princess Charlotte leaving Warwick House on July 12, and seeking an asylum with her mother at Connaught House, when Mr. Brougham was at once sent for to advise the Princess of Wales. On August 9, the Princess of Wales left this country for the continent, where she resided for some years.

Mr. Brougham was engaged as counsel at this period in several of the most important cases of the day; among others that of the Earl of Roseberry against Sir Harry Mildmay, for criminal conversation with Lady Roseberry. Judgment was allowed to go by default, and on a writ of inquiry to assess damages, Mr. Brougham appeared for the defendant, and spoke with great eloquence and power in mitigation of damages, which were, however, assessed at £15,000.

In 1816, Mr. Brougham was again returned to Parliament—as before, for a close borough—through the interest

of the Earl of Darlington, and he continued to represent Winchelsea until the dissolution in 1829. During the debate on the address at the opening of the session, he commented in strong terms on certain portions of it relating to our financial condition and the slave trade.

An important constitutional question arose at this time respecting the right of the Government to hold Napoleon Bonaparte, late Emperor of the French, as a prisoner of war, and to detain him in custody at St. Helena. In the course of the discussion which took place, Mr. Brougham observed, that although a difference of opinion might exist upon some points, he believed there was an unanimous concurrence with the Government as to the propriety of detaining Bonaparte in custody. In his opinion it was legal to detain a prisoner of war, whose restoration was not claimed by that power of which he was the subject.

During the debate on the Corn Bill, introduced by Mr. Robinson, Mr. Brougham remarked—

"The warehousing of grain was another system which had his decided disapprobation, as being productive of no good whatever. Had the farmer no yard of his own? Had he no barns to keep his grain in? or was he less afraid of the rats in his majesty's warehouse than in his own stack-yard?"

On May 8, Mr. Brougham introduced into the House of Commons a Bill, the object of which was the better to secure the liberty of the press, embracing, as he stated three main points. First, it would enable the truth, in cases of libel, to be given in evidence; secondly, it would go to restrain the practice of *ex officio* informations; and, thirdly, it would extend to the regulation of special juries. One provision which he contemplated introducing into the Bill would have for its object to take away the right which the counsel of the Crown, under the existing system, claimed in trials for libel and seditious words, to reply on the defendant's counsel, even though the defendant should

have called no evidence. Mr. Brougham, however, although fully convinced of the justice and desirableness of the measure, from its unfavourable reception by the House was induced subsequently to withdraw it, preferring such a course to direct defeat.

In the year 1817, Mr. Brougham commenced those grand efforts in the cause of education, which have conduced so much to his own honour, as well as to the welfare of his country. On May 21, he first brought the matter before the House of Commons in a speech of great eloquence, when he obtained a committee on the subject, of which he was, of course, selected as the chairman. On June 20, he brought up the report of the committee, which stated that in the metropolis above 120,000 poor children were destitute of the means of obtaining education, although the amount of public and private funds appropriated to the instruction of the poor exceeded £70,000 per annum. He recommended the appointment of a paid Parliamentary Commission of efficient persons, which should progress through the country, and have power to examine persons upon oath.

On March 3, 1818, he obtained the appointment of a committee of the House of Commons, with powers much more extensive than those which had been entrusted to the former committee, and the enquiries of which were not to be confined to the metropolis, but to extend over the whole kingdom. No less than five reports were presented by this very industrious and energetic body, aided by their zealous and indefatigable chairman, in the course of the session. A Bill on the subject of educational charities and schools was introduced by Mr. Brougham, and passed with some modifications through both Houses of Parliament. A commission of enquiry under this Act was issued; but considerable surprise and dissatisfaction were expressed at the omission of Mr. Brougham's name from this commission, considering more especially his knowledge of the subject, his vast efforts in the cause, and that he had been in fact the moving spring which had originated

these important measures. Such a course did not argue very satisfactorily for the anxiety of Government in the same great cause.

During this session he strenuously opposed the suspension of the Habeas Corpus Act, and took a leading part in nearly every important debate. In the autumn of 1818 Parliament was dissolved.

At the general election which followed, Mr. Brougham was a candidate for the county of Westmoreland, a numerously signed requisition from the freeholders having been presented to him for that purpose. He was, however, unsuccessful here, the numbers at the close of the poll being, for Lord Lowther, 1211: for Colonel Lowther, 1157; and for Mr. Brougham, 889. His connection with the county, in which his family had for so long possessed extensive property, fairly entitled him to aspire to the honour of becoming one of its representatives. He was again without a seat in Parliament, but early in the year 1819, he was a second time returned Member for Winchelsea.

In September, 1818, Mr. Brougham published "A Letter to Sir Samuel Romilly upon the Abuses of Charities;" with an appendix, containing minutes of evidence taken before the Education Committee. This work passed through ten editions in the course of a few months, and its effect on the public mind was very considerable, serving, moreover, to prepare it for the efficient measures relating to this important subject which were shortly to follow.

During the session of 1819, Mr. Brougham exerted himself with his usual activity in his place in Parliament. He found himself called upon to defend the Education Committee against some attacks which were made upon it by Mr., afterwards Sir Robert, Peel; and he also took a leading part in opposing the address in answer to the speech from the throne by the Prince Regent. He, moreover, strenuously exerted himself in opposition to the six Acts brought in by Lord Castlereagh.

In the autumn of 1819, Mr. Brougham married a very accomplished and amiable lady of the name of Spalding, widow of Mr. John Spalding. Mrs. Spalding was the daughter of the late Mr. Thomas Eden, uncle to Lords Auckland and Henley. By her marriage with Mr. Brougham she had two daughters, both of whom died in the lifetime of their father.

We now approach a period in many respects the most important in the eventful career of Mr. Brougham. We allude to his celebrated defence of Queen Caroline, and the events connected with the memorable proceedings which took place on that occasion. His efforts as the advocate of the unfortunate princess crowned his reputation, and placed him in a position at the English Bar such as few have ever attained. As we have already seen, Mr. Brougham became the chief legal adviser of the Princess of Wales in 1816, and after her departure from this country he once visited her at Como. The death of George III., which took place on January 29, 1820, made the Prince of Wales King of England, and his wife Queen; and she did not appear at all disposed to forego any of her pretensions to the honours to which she was entitled. On the third day of Easter Term Mr. Brougham took his seat within the Bar as Attorney-General of the queen, Mr. Denman being appointed her Solicitor-General. In the discussions in Parliament shortly after the accession of the new sovereign, respecting the settlement upon the new queen, and her public recognition as such, Mr. Brougham took part.

Parliament was prorogued on March 13, and dissolved shortly afterwards. At the general election Mr. Brougham was again a candidate for the county of Westmoreland, but with no better success than on the former occasion, except that the numbers between himself and his successful opponent were considerably diminished. At the close of the poll, the votes were, for Lord Lowther, 1,530; for Colonel Lowther, 1,412; for Mr. Brougham, 1,349. He was, however, a third

time returned for Winchelsea, and the new Parliament met on April 21. A grand debate on the civil list, in which Mr. Brougham took a prominent part, occurred on May 2. His speech on this occasion called forth a very animated and powerful reply from Mr. Canning. On June 28 he brought forward the subject of the establishment of a system of general national education, in a very elaborate and instructive speech, and in a very full house. On this occasion he remarked that the alacrity which the established clergy had manifested in procuring for him the necessary information, and the warm hearted interest which they took in the education of the poor, entitled them to all confidence, and pointed them out as the persons destined by Providence to assist in that great work. On July 11 the Bill was brought in and read a first time; but its provisions excited great discussion out of doors, and appeared to be viewed with dissatisfaction and distrust by those of opposite parties, dissenters as well as churchmen. No farther progress was consequently made with this measure, which was withdrawn previous to the end of the session. During his visit to the continent to confer with the Princess of Wales, Mr. Brougham took the opportunity of visiting some of the principal educational establishments in Switzerland.

In June, 1819, a proposal was made by Mr. Brougham, as the legal adviser of the Princess of Wales, to Lord Liverpool, the first Lord of the Treasury, that her income of £35,000 per annum should be secured to her for life, instead of ending with the demise of the Crown, and that she should undertake to reside permanently abroad, and not to assume the title of Queen of England. It has been asserted, however, that this proposal was made without the authority or knowledge of the princess. Lord Liverpool's only reply was that there would be no indisposition to entertain the proposal when the proper time for doing so arrived. Mr. Brougham, who was not much in the habit of inhaling the atmosphere of palaces, is said in a letter on one occasion to have alluded to

his royal client in terms the reverse of courtly. "We must not let that *devil* come over the water to us."

On George IV. succeeding to the throne, it was understood that he was desirous of at once adopting measures to obtain a divorce, but to this course his ministers would not assent. They expected indeed that the queen would agree to the proposal which had been made by Mr. Brougham; and the only decided step which they took was the omission of her name from the liturgy, against which Mr. Brougham did not remonstrate, though he afterward commented upon it in strong terms. A memorandum based on Mr. Brougham's proposal was subsequently drawn up by the Government and forwarded to Mr. Brougham, who was desired to obtain to it the queen's signature. He does not appear, however, to have taken any steps to communicate this document to her majesty, his omission to do which has been the subject of much comment, but of which possibly some satisfactory explanation may be afforded by his autobiography, and the voluminous papers and correspondence accompanying it.

Singular as it may seem, no information appears to have been sent to the queen of the event which raised her to her present dignity, which she first heard of through the newspapers, as also of her name being omitted from the liturgy. She at once went to Rome, where, on applying for a guard of honour as Queen of England, she was informed that no instructions on the subject had been received. On April 15, it was, however, rumoured in London that her majesty was in Calais, and would be at Dover in the course of the day. This was not the case. From Rome she proceeded to Milan, and thence to Geneva, whence she sent a messenger to Mr. Brougham requesting him to meet her there, or at one of the French sea-ports. A consultation between Mr. Brougham and Mr. Denman took place, at which some of the queen's friends were present. Geneva was deemed too far, and her majesty was requested to go to Calais, or some other French port, where Mr. Brougham would meet her. On May 18,

Mr. Brougham stated, while addressing the Court of Chancery in reference to an answer which her majesty was called on to make to a Bill then pending, that her majesty's answer would be put in immediately on her return to England. She afterwards wrote to Mr. Brougham to meet her at St. Omer's on May 31. Alderman Wood and Lady Hamilton went to the continent to meet her majesty, which they did at Monthard, on June 7; and to them she expressed her determination to proceed immediately to England, and to assert her rights as queen. Mr. Brougham was prevented reaching St. Omer until two days after the time appointed, when he was accompanied by his brother and Lord Hutchinson. They were very graciously received by the queen, and Lord Hutchinson announced that he had a proposition to make to her from the king. She however declared that it was her determination to abstain from taking into consideration any proposal, or giving any answer, until she arrived in England. The next day, however, Lord Hutchinson stated the object of his mission, which was that a pension of £50,000 per annum should be settled upon her upon condition of her renouncing the title of queen, never using the name of the royal family of England, or returning to this country. In the event of her declining these terms, she was told that, immediately on her placing her foot on the British shore, a message would be sent down to Parliament, and in all probability proceedings would be instituted against her. Mr. Brougham observed that certainly those were not the terms he should counsel her majesty to accept; at the same time he begged her majesty to consider what terms she did require; her majesty knew best what was befitting her real situation. The queen expressed great indignation at these proposals, at once quitted the room, and, accompanied by Alderman Wood, Lady Hamilton, and the persons comprising her suite, shortly started for Calais, whence she lost no time in proceeding to England. It was remarked that Mr. Brougham did not make his appearance at St. Omer's after the interview, even to lead her

majesty to the carriage. The queen's reception in England, all along the road to London, was most enthusiastic. On arriving in London she went at once to the residence of Mr. Alderman Wood, in South Audley Street.

A message was the next day sent to both Houses of Parliament by the king calling upon them to adopt such proceedings with regard to the queen as the justice of the case and the honour and dignity of the Crown required, at the same time papers relating to the subject were presented by Lord Liverpool and Lord Castlereagh, in sealed bags. In the meantime some warm discussions, in which Mr. Brougham took an active part, occurred in the House of Commons, relative to the rumours that had transpired with respect to the late proposal to the queen, and the transactions connected with it.

On June 7, the message of the king was taken into consideration by the House of Lords, and a secret committee for examining the papers relative to the queen was agreed to. The queen in the meantime, acting under the advice of her counsel, sent a message to the House of Commons, protesting against this secret tribunal as a proceeding unknown to the laws of the land, and a flagrant violation of all the principles of justice.

After the reading of the queen's message, Lord Castlereagh moved to take into consideration that of the king. Mr. Brougham, in the course of his reply to Lord Castlereagh, observed that for sagacity and propriety of mind he had seldom met any lady that surpassed the queen. He trusted there would be some discussion even before the noble lord obtained his little snug inquiry upstairs. Why did not his majesty's advisers on this occasion follow established precedents? There were the bills of attainder, and other great monsters of the reign of Henry VIII; why not take them as the model of these modern proceedings? As to the comparison between a committee and a grand jury, there was no analogy. A grand jury was sworn; it was impartial, and it

was impartially selected. He implored them to take into their consideration all the circumstances of the case. His last prayer on this occasion, the best wish he could breathe on the subject, was that the negotiation which, unfortunately, had not been brought to a favourable issue, might not be broken off, all at once, and for ever. But if it were possible that the country should be spared those calamities to which such an inquiry must give rise, he implored the House to consider how much more virtuous an act they would do by avoiding such an investigation, rather than by showing their constancy and perseverance in steering, however successfully, through these accumulated difficulties. The proposal for a secret committee was, however, agreed to, after which a communication from the queen was sent to Lord Liverpool, stating that the queen was ready to receive any proposition consistent with her honour. A second communication of the same nature was sent to Lord Liverpool through Mr. Brougham. Hopes were for some time entertained of a satisfactary arrangement, and a resolution expressive of this desire was, on the motion of Mr. Wilberforce, passed by the House of Commons and presented to the queen. In her reply she declined to consent to the sacrifice of any essential privilege, or to withdraw her appeal to those principles of public justice, which are alike the safeguard of the highest and the humblest individual. Mr. Brougham and Mr. Denman, who had attended upon her majesty, and by whom her reply was framed, were loudly cheered as they entered their carriages; and the crowd expressed a desire to take the horses off and draw them in triumph to their residences. Mr. Brougham, however, strenuously resisted this proposal. The people inquired anxiously whether the queen had consented to give up her rights? And on being informed by Mr. Brougham that she had not, thunders of applause rent the air.

All hopes of an accommodation being at an end, the investigation of evidence before the secret committee proceeded. The queen petitioned to be heard by counsel,

which was at once agreed to, and her Attorney- and Solicitor-General, Mr. Brougham and Mr. Denman, together with Mr. John Williams (afterwards a judge of the Court of Queen's Bench), appeared at the Bar of the House of Lords on her behalf and addressed the House at considerable length, expressing their satisfaction that there was some chance of her obtaining justice on constitutional principles, but asking for some delay in order to afford time for preparation; which was however refused by a majority of 195 to 100.

On June 28, the secret committee met, and on July 4 they presented their report, expressing their opinion that the charges against the queen ought to be made the subject of solemn inquiry. On the following day the Bill of Pains and Penalties against the queen was introduced into the House of Lords by Lord Liverpool. Mr. Brougham was heard at the Bar of the House against the preamble of the Bill. The Bill was appointed to be read a second time on August 17, after which counsel were called in. On the part of the Crown appeared Sir Robert Gifford, the Attorney-General, Sir John Singleton Copley (afterwards Lord Lyndhurst), the Solicitor-General, Sir Christopher Robinson, the King's Advocate-General, Dr. Adams, and Mr. (afterwards Baron) Parke. On behalf of the queen appeared Messrs. Brougham and Denman, her Attorney- and Solicitor-Generals, Dr. Lushington, and Messrs. John Williams, Tindal, and Wilde.

Mr. Brougham objected to the principle of the Bill as a private law made for a particular case, and for the punishment of a particular individual. It was also a retrospective law. Mr. Denman followed, and the Attorney-General then proceeded to open his case in support of the Bill. The examination of witnesses for the Crown lasted till September 7. On October 3 Mr. Brougham was heard on the part of her majesty, in which he reviewed and commented on the evidence, especially the contradictions which had occurred. His splendid peroration on this occasion, which is too well known to all members of the profession to render its quotation

here necessary, is one of the first pieces of forensic oratory extant. He was followed by Mr. Denman and Mr. Williams at great length. The examination of witnesses for the defence then commenced. On Mr. Brougham asking Mr. Powell, the solicitor to the secret commission, who was his client or employer in the case, the witness was ordered to withdraw while their lordships considered whether the question could be put, Mr. Brougham contending that it was of great importance to know who his client was; "whether it be a man; or if it be but the likeness of a kingly crown it wears." The lords were however of opinion that the question could not be put. The evidence occupied the House of Lords *until* October 30. The king's Solicitor-General, Sir J. S. Copley, then replied upon the evidence. On November 2, the debate on the second reading of the Bill took place, when the numbers were, for the Bill, 123; against it, 95. Majority for the second reading, 28. A great sensation was created out of doors by the smallness of the majority, which many deemed equivalent to a defeat of the measure. The queen presented a petition to the House solemnly protesting her innocence. On November 10, the third reading of the Bill took place, and was carried by only a majority of 9, Lord Chief Justice Ellenborough, among others, speaking and voting against it. Lord Liverpool then proceeded to move that the further consideration of the Bill be adjourned to that day six months, which was at once agreed to. A message was sent to the House of Commons by the queen through Mr. Denman; but before he had time to deliver it, the House was summoned amidst great uproar and cries of shame, and even hisses, from the opposition side, to the Bar of the House of Lords, where Parliament was prorogued to January 23.

Thus terminated these celebrated proceedings, in which Mr. Brougham bore so conspicuous a part. His efforts on this occasion were stupendous, and his vast and varied powers were displayed to the full, alike by eloquence, by argument,

by knowledge of constitutional law, by the acute way in which he cross-examined the witnesses, and by his wonderful fertility of resource on each occasion. In addition to all this, one does not know which most to admire, his moderation and candour in the counsel he gave to the queen when conciliatory proceedings appeared possible; or the indomitable courage which he displayed in braving the anger of the king in defence of his injured and persecuted client.

On July 4 and 5, Mr. Brougham appeared before the Privy Council to argue in favour of the right of the queen to be crowned with the king. His address, powerful and eloquent as it was, it was unsuccessful.

The death of the queen in August, 1821, deprived Mr. Brougham of his rank as a leader from being her Attorney-General. Nevertheless, after the queen's trial, owing to the high reputation which he had gained from his conduct of that famous case, his practice increased rapidly, especially on the northern circuit, where for some years subsequent, he and Mr. Scarlett divided between them the leading business. A gentleman who was one of the leaders of the northern circuit at that period, and who has since filled for several years one of the highest judicial offices, with distinguished ability, and whose conduct in that position has insured for him in his dignified retirement the respect and veneration of every member of the profession, informs us that at this period he paid great attention to Mr. Brougham's mode of conducting his cases, and that there was a freshness and originality in his most ordinary addresses, in which he used to throw in remarks which carried them out of the region of commonplace. His vocabulary was immense, more copious, perhaps, than choice. Indeed, no one had a greater command of language, or was capable of greater variety of *dicta*. He had less command over the gentle and pleasing affections than he had over the violent and angry passions; and great and varied as his talents were, he could not adapt them to the common and ordinary business of life as it appears in the courts of law. As the same

high authority observes, law itself is a jealous study, and admits of no rival. But a case at *nisi prius* is still more jealous, and the attention of the advocate must be fixed on the subject before him, and riveted to it. Brougham's mind was always excursive. In a case which required the closest and most unremitting attention, he would read and answer letters from all parts of the world. At one period his political and other correspondence was very great, and he has been known to sit in court, while conducting an important case, reading letters and tearing them until he was almost up to his knees in envelopes and fragments of letters. Such a practice however, was quite inconsistent with the proper conduct of a case, and the advocate who habitually indulged in it, could never become the leader of his circuit; and accordingly Brougham never was the leader of the circuit in respect of the amount of business, or the success of it. Until he became Attorney-General to Queen Caroline, in 1820, Mr. Brougham had no considerable share in the general business of the circuit, although his talents were occasionally called in where a speech was the principal matter, as in cases of *crim. con.*, libel, or breach of promise of marriage. His rank as Attorney-General to the queen was a great advantage to him on the northern circuit, as it placed him next to Mr. Scarlett, and above Serjeants Hullock and Cross; and he of course continued to hold that precedence until the death of the queen. He did not, however, lose the whole of his business by losing his rank. Serjeant Hullock, however, obtained a larger share of the lead, and both the merits and defects of Mr. Brougham began to be appreciated. For certain great occasions Mr. Brougham's style of eloquence was admirably adapted, and his power of sarcasm and invective was very great.

A case of this description was tried on the northern circuit in the summer of 1822, at the Durham assizes, being an indictment of Mr. Williams, the proprietor of the *Durham Chronicle*, for a libel on the Chapter of Durham, on account

of their omitting to order the bells of the cathedral to toll on the death of the queen. Mr. Brougham was retained for the defendant, and Mr. Scarlett appeared for the prosecution. Mr. Brougham's speech for the defence, which was listened to with admiration even by his political opponents, had more of withering scorn in it than is perhaps to be met with in any other effort of the kind. Indeed, this was a case in all respects exactly suited both to his capacities and his feelings. Moreover, from his official connection with the late queen, and from having been the leading advocate in her case, he had the fullest information on the subject, and felt the most lively interest in all that related to it. On the whole, this is probably the finest and most effective forensic effort of Mr. Brougham. It was not, however, successful. After deliberating five hours the jury returned a verdict of guilty against Mr. Williams, but with some qualification annexed to the verdict, so that the defendant never was called up for judgment.

The peroration of this speech was said to have been written out beforehand, as was the case with several of those to his most celebrated addresses. One of his contemporaries on the circuit, already quoted from, informs us that during the assizes Mr. Brougham slept for two or three nights at Lord Durham's, at Lambton, and that he went out to think over the speech, strolling in the plantations for half an hour or more.

Mr. Scarlett conducted the prosecution; and dwelt on what he described as the intolerance of the newspaper editors—

"They required not only that every one should sympathise with their opinions, but insisted that they should express them in the same manner. It was not always the man who made an open display of his grief that was the truest mourner. It might well be that in the many serious feelings and distress which would follow in such a sad event, it had not occurred to the Chapter at the moment to issue any order on such a matter of mere routine."

This was a false step, of which Brougham took instant

advantage, assuming that the Chapter had "instructed" their counsel to assert that they were really so bewildered by their grief that they could not think of minor demonstrations of sorrow, but that at the bottom of their severed hearts "they felt the more because they expressed the less." During the whole of the passage Brougham's voice was low and subdued, till at the last closing words it was almost a whisper; and then, after a moment's pause, he burst forth with the full powers of his voice, a wonderful organ—"Oh, to talk of hypocrisy after this!"—and continued his invective in a perfect storm of indignation which electrified the court. Some of the clergy were on the bench, and one of them got up and left the court. The sensation it produced was immense, so as even quite to unsettle the subsequent proceedings of the court.

Another gentleman, to whose information we are indebted as regards the present memoir, holding an important judicial office, and who was warmly attached to Lord Brougham, with many of whose efforts in the cause of civilisation he was for several years associated, informs us that the real mover in the prosecution against Mr. Williams was the present Bishop of Exeter, then a prebendary of Durham Cathedral, and who took his seat just under the jury-box, so that he received the full fire of Mr. Brougham's terrible invective, as Lord Jeffrey very appropriately termed it.

We must now, however, revert to the parliamentary efforts of Mr. Brougham. On May 23, 1824, he took the opportunity, in his place in the House of Commons, of adverting strongly to the proceedings of the Association for Suppressing Seditious Publications, many of whose proceedings had been arbitrary and oppressive. During the session of 1822 he objected to the bringing in the Bill for suspending the Habeas Corpus Act. On April 29, he supported Lord John Russell's vote in favour of parliamentary reform. On June 24, Mr. Brougham moved a resolution in the House of Commons, "That the influence possessed by the Crown is unnecessary

to the maintenance of its due prerogatives, destructive of the independence of Parliament, and inconsistent with the well government of the state." His speech was highly sarcastic as well as argumentative, but the motion was negatived by a majority of 216 to 101. Subsequent to this he proposed a resolution relative to the distress at that time existing in the country, which was also rejected.

In the year 1823, soon after the meeting of Parliament, the conduct of the Holy Alliance, so far as regarded its interference with the affairs of Spain, became a subject of discussion in the House of Commons, when an admirable speech was made by Mr. Brougham, censuring the conduct of the allies. What he said on this occasion is preserved at length among his speeches, vol. i., with a preface by himself. We once heard Lord Brougham asked what he considered the most important debate in which he had ever taken part in either house; when, after pausing for a short time, he replied, that on the Holy Alliance in 1823. On Lord Brougham paying a visit to the Harrow speeches a few years ago, he found quite unexpectedly that his oration on this great occasion had been selected as one of those which were to be spoken by the boys. Its close application to the case of Denmark at that period, excited the attention of an illustrious lady who was present. In several other questions debated during this session Mr. Brougham also took a leading part. In a speech on the Catholic question he charged Mr. Canning with having exhibited "a specimen, the most incredible specimen, of monstrous truckling, for the purpose of obtaining office, that the whole history of political tergiversation could furnish." Mr. Canning at once rose and called out, "It is false." Dead silence followed, and great excitement; after which the speaker called upon Mr. Canning to retract the offensive expression, but which for some time he refused to do. After much confusion, and great exertions being made by the mutual friends of both parties, a qualified withdrawal of the charge on the one hand, and the denial on the other, were effected.

The year 1823 was remarkable in the career of Mr. Brougham from the active part that he took, in conjunction with Dr. Birkbeck, in the establishment of the London Mechanics' Institute, which led to the formation of many other societies of the same kind in different parts of the country. He afterwards pulished a pamphlet under the title of "Practical Observations upon the Education of the People, addressed to the Working Classes and their Employers." This work in a short time passed through twenty editions, the profits arising from which Mr. Brougham liberally devoted to the benefit of the London Mechanics' Institute.

Early in the year 1825, Mr. Brougham had the distinguished honour of being elected Lord Rector of the University of Glasgow, his opponent being a no less eminent individual than Sir Walter Scott. The contest was a very severe one, and was only decided by the casting vote of Sir James Mackintosh. The installation took place on the 6th of April, when Mr. Brougham delivered his justly celebrated inangural address, a composition of exalted eloquence, and displaying varied knowledge, as well as great taste and judgment. Unfortunately, however, the only period allowed for its composition was when he was fully occupied by his professional occupations on the northern circuit. No one but a person thoroughly imbued with his subject could, on such an occasion, have produced anything at all equal to this splendid effort.

The day before his installation, a magnificent banquet was given to Mr. Brougham by the people of Edinburgh, to celebrate his arrival in his native city, on his way to Glasgow, the chair being filled by Mr., afterwards Lord Cockburn, then a very eminent member of the Scottish bar, and Solicitor-General for Scotland, who proposed the health of their distinguished guest and fellow-citizen amidst the greatest enthusiasm.

During the session of 1824, Mr. Brougham addressed the House of Commons with considerable effect on the delays which occurred in the conduct of cases through the Court of

Chancery, on financial affairs, and on the case of a missionary of the name of Smith, who had suffered death in Demerara. The energy with which he had taken up this latter case, exposed him to an extraordinary attack in the lobby of the House of Commons, towards the conclusion of the sessions, by a person of the name of Gourlay, who flourished a whip over Mr. Brougham's shoulders, and accused him of neglecting his interests in not supporting some petition of his to the House of Commons, respecting some supposed rights of the petitioner in Canada, "while he had taken up the case of a dead missionary." The assailant was at once taken into custody, and proved to be insane.

Parliament assembled early in 1825, and Mr. Brougham took the lead in opposing the address in answer to the speech from the throne. During the session he spoke also on the Catholic claims, the Duke of Cumberland's Annuity Bill, and the establishment of the London University, for which purpose he introduced a Bill into Parliament, but which he afterwards abandoned. Mr. Brougham also presented a petition from the Catholic Association, and adverted with considerable asperity to the celebrated declaration of the Duke of York, the heir presumptive to the Crown, respecting concession to the Roman Catholics.

During the session of 1826, Mr. Brougham spoke in the House of Commons on most of the leading topics—the general state of the country, the Bill to allow counsel to address juries on behalf of prisoners accused of felony, the practice of the Court of Chancery, and the corn laws. On May 10, he moved a resolution on the subject of slavery in the West Indies, but which was rejected by a large majority. At the end of this session Parliament was dissolved, when Mr. Brougham again became a candidate for the county of Westmoreland, but was also again defeated, and by a larger majority than before, the numbers being for Lord Lowther, 2,907; Colonel Lowther, 2,024; Mr. Brougham, 1,378. Mr. Brougham was, however, again returned for Winchelsea.

The "Society for the Diffusion of Useful Knowledge," was established in 1827, to the formation of which Mr. Brougham was instrumental, of which he was elected President, and for which he wrote his celebrated essay "On the Objects, Advantages, and Pleasures of Science."

Parliament met early in 1827, and on the formation of Mr. Canning's ministry we find Mr. Brougham, for the first time, addressing the House of Commons from the ministerial side. Mr. Brougham on this occasion declared, that "as Mr. Canning had successfully established a system of liberal and manly foreign policy, that gentlemen should in the course of his administration have from him that which he had a right to expect—in point of consistency, to demand—a cordial, zealous, and disinterested support." It appears, however, from his own declaration, that although privy to all the councils of Mr. Canning's ministry, he imposed such stipulations as utterly excluded the possibility of his taking office.

It has been said that Mr. Canning offered to make Mr. Brougham Lord Chief Baron of the Exchequer, saying, "That, you know is the half-way house to the Chancellorship;" to which Mr. Brougham significantly replied—"Yes, but you deprive me of the horses which are to carry me on!" It has also been asserted that the Duke of Wellington subsequently, against the wishes of George IV. offered Mr. Brougham high judicial office, which he however declined. The autobiography will probably set at rest the truth of these statements.

The professional loss to Mr. Brougham from his being deprived of his rank at the Bar as Attorney-General to the Queen, must have been very great indeed; and it must be acknowledged by men of all parties, that great injustice was done to him, from whatever motive it proceeded, and whether the king, or the Chancellor, Lord Eldon, were the cause of it, in denying to him the rank of King's Counsel, to which from his eminence at the Bar, and the leading cases in which he was engaged, his claims were paramount. This injustice was repaired in Trinity Term, 1827, Lord Lyndhurst being then

Lord Chancellor. It was said that the king was very reluctant to grant the honour, but the Duke of Wellington, who became Prime Minister on the death of Mr. Canning, strongly urged the justice of doing so.

Between Lord Eldon and Mr. Brougham there appears to have been an antipathy as marked probably as their natures were opposite to each other. In 1825, Mr. Brougham made a direct attack upon the veteran Chancellor.

"Do the ministry think that one of their coadjutors, a man of splendid talents, of profound learning, and unwearied industry, would give up his place—that he would quit the great seal? Prince Hohenlohe is nothing to the man who would effect such a miracle. His patience under threats can only be rivalled by the fortitude with which he bears the prolonged distress of the suitors in his own court. The more splendid the emolument of the situation, the more extensive its patronage, the more he is persuaded that it is not allowed to a wise and good man to tear himself from it."

But the old Chancellor found an opportunity of returning the compliment, and attacked Mr. Brougham on a point where he knew that he was, not without reason, very sore.

"No young lady was ever so unforgiving for being refused a silk gown, as Brougham is with me, because, having insulted my master, the insulted don't like to clothe him with distinction, and honour, and silk."

Early in the session of 1828, Mr. Brougham delivered his celebrated speech of six hours' length, in favour of the reform of the law, which produced an immense effect, not only upon the House, but throughout the country, and the impetus created by which, it is not too much to say, has hardly yet subsided. Argument, knowledge, eloquence, were here happily and effectively blended; and the manner, the tone, and the earnestness of the orator gave effect to every sentiment, and rivetted the attention of his audience. As a whole it is a

masterpiece of oratory. The peroration is magnificent. We regret that we have only room for the following extract.

"It was the boast of Augustus—it formed part of the glare in which the perfidies of his earlier years were lost—that he found Rome of brick, and left it of marble; a pride not unworthy a great prince, and to which the present reign has its claims also. But how much nobler will be our sovereign's boast, when he shall have to say that he found law dear, and left it cheap; found it a sealed book, left it a living letter; found it the patrimony of the rich, left it the inheritance of the poor; found it the two-edged sword of craft and oppression, left it the staff of honesty, and the shield of innocence."—*Speeches of Lord Brougham.* Vol. II.

During this session Mr. Brougham also took part in the debates on the Catholic question, the Test and Corporation Acts, the slave trade, and the delays in the Court of Chancery. In relation to the Battle of Navarino, he made his celebrated declaration that he had no fear of slavery being introduced into this country by the power of the sword.

"Let the soldier be ever so much abroad, in the present age he can do nothing. There is another person abroad—a less important person, in the eyes of some, an insignificant person—whose labours have produced this state of things. The schoolmaster is abroad; and I trust more to the schoolmaster, armed with his primer, than I do to the soldier, in full military array, for upholding and extending the liberties of my country."

Mr. Brougham obtained his silk gown just at the time that Mr. Scarlett left the northern circuit by becoming Attorney-General, by which means he had the precedence over Mr. F. Pollock and Mr. J. Williams. Unfortunately, however, as one of his most distinguished contemporaries, already quoted, says of him, he never could condescend to pay that sort of attention to a cause which was likely to make it successful. His mind wandered away to something else—an article in the *Edinburgh Review*, a correspondence with Lord Holland, some work he

had in hand on history or philosophy. He had no acquaintance whatever with book-keeping, or with the actual mode of transacting commercial business, and gradually he lost the lead on his circuit which he had once obtained, so much so, that at the last assizes he attended at Lancaster, in the summer of 1830, Mr. Alderson was selected to conduct the defendant's cases in two important causes then pending. Mr. Brougham is believed to have been very ambitious of becoming the leader of the northern circuit, but he was disappointed. It is, however, much to his credit, and to the credit of his successful rivals too, as one of the most distinguished of them assures us, that "during the whole time we were opposed to one another, not one syllable of disrespectful language ever dropped from either of us to the other—nothing that either of us could wish unsaid. And his conduct on the woolsack was as kind and friendly as possible."

On one occasion in London, Mr. Brougham had to reply upon Mr. Charles Phillips, in one of his earlier cases after he came from Ireland, when he indulged rather freely in flights of Irish eloquence. It is said that the complete demolition which he experienced from his opponent entirely withered his reputation, and to this circumstance has been attributed his subsequent promotion through the influence of Lord Brougham. On another occasion, when a young barrister attempted to be eloquent instead of attending to the rules of evidence, Mr. Brougham told him that he had "studied the wrong Phillips"—Phillips' speeches, instead of "Phillips on Evidence."

Notwithstanding the high position which Mr. Brougham had now attained, and the vast services which he was rendering to his country by his senatorial efforts, his career in the House of Commons seemed likely to be terminated abruptly. His parliamentary patron, the Earl of Darlington, now Marquis of Cleveland, who had returned him for Winchelsea, having become a supporter of the Duke of Wellington's ministry, to which Mr. Brougham was opposed,

he felt bound from a high sense of honour to resign his seat, and was again for a short time out of parliament. Early in 1830 he was, however, returned for Knaresborough, through the interest of the Duke of Devonshire; having been thus, though so popular with the country, six times returned for "rotten boroughs," and five times rejected by popular constituencies.

Shortly after his election for Knaresborough, Mr. Brougham brought in a Bill for the Establishment of County Courts, which he some years after successfully advocated; but in consequence of the opposition of several of the law lords, and the changes consequent on the death of George IV., the measure was for the present abandoned. During this session, he also spoke against the vote by ballot; and, in a very eloquent speech, again brought the question of slavery before the House of Commons.

Parliament was dissolved on July 24th, 1830. Previous to the dissolution, Mr. Brougham received a requisition to become a candidate for Yorkshire, to which he acceded, and for which he was triumphantly returned; the numbers being, for Lord Morpeth, 1464; Mr. Brougham, 1295; Mr. Duncombe, 1123; Mr. Bethel, 1064; Mr. Stapylton, 94. For this great and very important county, Mr. Brougham was elected free of expence, although unconnected with it by property. This event, as he observed in his address, "would arm him with an extraordinary, vast, and important accession of power to serve the people of England." Such was his prodigious energy at this period, that in the course of this contest he rode 120 miles, made eight long speeches, and the day after the election was over he was busy with his briefs in court at the Yorkshire assizes. At this period of life, as we are informed by one who was then with him on the circuit, he was full of spirit and energy, and in the very prime of his powers and popularity both with his brethren on the circuit, and throughout the great northern industrious towns. There were, of course, no railways then, but he used to drive off, after the court rose, to

an evening meeting, then again to an early meeting the next morning, then back to York, when he rushed into court, made an opening speech, or examined a witness, and then went out of court for some local canvas, all helping him—Bench, Bar, and justices. He was very popular on the circuit, and had always a special friendship for our great pleaders—Pollock, Tindal, Parke, and Littledale, men of high intellectual attainments.

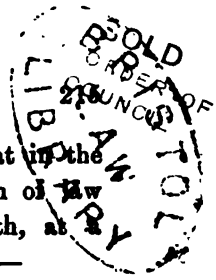
On the meeting of Parliament, Mr. Brougham was loudly cheered when he appeared in the House to take his seat for Yorkshire, and on the second day of the session he gave notice of a motion respecting parliamentary reform. The Duke of Wellington's ministry, however, shortly afterwards resigned, and Lord Grey was called upon to form a government in its stead. Lord Althorp, therefore, appealed to Mr. Brougham in the House to postpone his motion, to which he replied, "No change that can by any possibility take place can affect me." It is said that there was no small perplexity among the proposed leaders of the new ministry what to do with Mr. Brougham. He was doubtless too powerful to do without; but perhaps he was also too powerful to do with. All greatly admired him, but probably, though he had some ardently attached friends, not many entirely liked him. He was most desirable as a supporter in the House of Commons; but they doubted how far he would be agreeable as a colleague in the cabinet. What was to be done? "Will he be satisfied with the Attorney-Generalship?" inquired Lord Grey; but he was speedily persuaded that he would not. Lord Grey, indeed, quite felt, and even told the king, that they could not get on without the aid of Mr. Brougham. Lord Duncannon was set to sound him; no easy task. Finding he would not be likely to accept the Attorney-Generalship, Lord Grey wished to make him Master of the Rolls, but for some reason the king would not consent to this. In many respects such an arrangement might have proved anything but a happy one for the new ministry. As Master of the Rolls, Mr. Brougham could have

retained his seat for Yorkshire, and not impossibly, as an independent member, his ardour for reforms of various kinds might have proved not altogether congenial to his allies on the Treasury Bench, who, when in office, did not entirely wish to move onward at the "express" rate which, when in opposition, they declared so desirable. The king subsequently remarked, no doubt to the utter astonishment, and perhaps discomfiture, of his new premier, "Why not make Brougham Chancellor?" And so without more ado they did. Accordingly, on November 22, The Right Honourable Henry Brougham took his seat on the woolsack as Lord High Chancellor, and on the following day was created a peer of the realm, by the title of Baron Brougham and Vaux. His old friends would not allow him to give up the name of Brougham, and Vaux was an old title to which the family believed they had a claim. A severe attack was made upon him in the House of Commons, by Mr. Croker, in reference to his declaration to Lord Althorpe; but Mr. Macaulay and Sir James Mackintosh defended him with equal spirit. His own very characteristic defence of himself deserves here to be quoted, as he himself was best qualified to do justice to his motives.

"The thing which dazzled me most in accepting the office was not the gewgaw splendour of the place, but as, if I were honest (on which I could rely), if I were consistent (which I know to be matter of absolute necessity in my nature), if I were able as I was honest and consistent, it afforded me a field of more extended exertion."

The foregoing paragraph appeared in his address on taking leave of his Yorkshire constituents; and from the reception which they gave him on his paying them a visit soon afterwards, it was evident that however they might regret to lose him as their representative, they entirely approved of the course which he had adopted.

The new Lord Chancellor soon gave proof that his energy as a reformer had not diminished in consequence of his pro-



motion. On the very day on which he took his seat in the House of Lords, he laid on the table a huge plan of law reform, which caused his old friend Sydney Smith, at a reform meeting at Taunton, to refer to him as follows—

"Look at the gigantic Brougham, sworn in at twelve o'clock, and before six he has a Bill on the table, abolishing the abuses of a court which has been the curse of the people of England for centuries. For twenty-five long years did Lord Eldon sit in that court, surrounded with misery and sorrow, which he never held up a finger to alleviate. In an instant the iron mace of Brougham shivered to atoms this house of fraud and of delay; and this is the man who will help to govern you, who bottoms his reputation on doing good to you, who uses the highest gifts of reason and the most splendid efforts of genius to rectify those abuses which all the genius and talent of the profession have hitherto been employed to justify and protect."

On another occasion the same able and effective writer bade the man who feels an interest in the reform of our law to look where Brougham "points his long, lean, skinny finger," and observe how abuses fell at his very gesture.

Possibly, however, there was rather more haste than was altogether desirable with regard to the measures introduced by the new chancellor, inasmuch as we find that the Local Courts' Bill, and the three Bills for regulating the Court of Chancery, as also the Bankruptcy Bill, were abandoned shortly after their introduction.

Lord Brougham was extremely assiduous in the discharge of his duties in the Court of Chancery. During the first year of his presiding there he concluded his sittings on September 1, having sat only two days later than Lord Eldon had done. But by sitting for a longer time each day, he was able in the course of a few months to hear 120 appeals, including a long list of arrears; so that at the rising of the court for the long vacation, the Lord Chancellor had the satisfaction of stating to the Bar that he had not left a single appeal unheard,

or one petition unanswered. His conduct of the business of the court was no doubt a great contrast to that of Lord Eldon; but, on the other hand, he wanted the patience, and the extensive knowledge of case law, which distinguished his very learned predecessor. Suitors were no doubt pleased to have their cases so speedily disposed of; but wary practitioners doubted whether the speed in question compensated for the distrust which was entertained with regard to some of his decisions. Indeed, the very celerity of the decision of itself in many minds created a doubt as to its soundness.

The writer well recollects his first sight of Lord Brougham while presiding in the Court of Chancery. His features were then careworn, lank, and haggard, exhibiting every appearance of a man who was undergoing immense labour. Occasionally he leant back in his chair as though thoroughly exhausted. He was apt to be somewhat impatient at the prolixity of counsel, and was accused of occasionally beguiling the time when he was supposed to be, or rather ought to have been, listening to the argument before the court, by scribbling a leader for the *Times*, or an article for the *Edinburgh Review*.

Early in the session of 1831, the Lord Chancellor again introduced his Bankruptcy Bill into the House of Lords, which eventually became an Act of Parliament, and now stands in the statute book as 1 & 2 W. 4, c. 56. On September 28, he again brought in a Bill to provide for the more expeditious administration of justice in the Court of Chancery. The grand measure of this session was, however, the first Reform Bill, which, having miscarried, it was thought desirable to take the opinion of the country upon the question. It was therefore determined to dissolve, and the Chancellor undertook to manage the king, and to bring him down to the House, having previously ordered the royal carriages and servants. So Lord Brougham urged the modest request upon his majesty to dissolve at once. "But," said the king, "the great officers of state have not been summoned."

"Pardon me, sire," was the reply, given with apparent humility, "we have summoned them." "But, my lords, the crown and robes are not prepared." "They are all prepared, sire, for your majesty's use." "But, my lords, the thing is impossible, the troops are not ready." Said the Chancellor in reply, "Pardon me, sire, we know your majesty's great goodness, and your anxious desire for the safety of the kingdom, and the happiness of your people. *I* have given orders, and the troops are ready." This was going rather too far, inasmuch as the household troops are ordered only directly by the sovereign. His majesty turned red in the face. "What, my lords," said the king, "have you dared this? It is treason, high treason, my lords!" "Sire," replied the Chancellor, "I do know it is treason; I submit myself to your majesty's pleasure, but I entreat your majesty to follow our counsel." The Chancellor was successful, and the king went and prorogued the House at once, preparatory to its dissolution.

In the new Parliament a large majority in favour of a Reform Bill was secured, but the House of Lords was still strongly adverse to the measure. Here, therefore, it was that the battle had to be fought. The Lord Chancellor was foremost in the contest, and supported the measure with the utmost ardour, and with all the argument and eloquence that he could command. His speech on the second reading was a splendid effort, remarkable alike for the knowledge which it displayed, and for the wit, argument, and eloquence by which it was adorned. At the conclusion of his address he slightly bent the knee to give effect to the words,—"I implore you, yea on bended knees, I supplicate you not to reject this Bill." This attempt at stage effect was commented on, and compared to that of Burke when he produced a dagger in the House of Commons. The Bishop of Exeter alluded to it on a subsequent occasion. "Nor will I in imitation of the most eloquent of living orators, bend the knee before your lordships." The Reform Bill was, however, rejected by a majority of 41, and on October 20, Parliament was prorogued until November 29.

Great excitement throughout the country was caused by the loss of this measure, and considerable was the perplexity to the members of the Government as to what was to be done. It is said that the Chancellor was for dissolving Parliament at once. The Premier did not like this, and doubted whether the king would approve of it. Some were for creating new peers sufficient to carry the Bill through the House of Lords. But to this it was said the king would not consent. This idea was therefore abandoned, and on December 6 Parliament reassembled. The Reform Bill again passed the House of Commons by a large majority, and the second reading of it in the House of Lords was fixed for April 9, 1832. The Chancellor supported the measure with his usual eloquence, and the second reading was carried by a majority of nine. Subsequent to this, the Bill being defeated in committee by a majority of 35, ministers felt bound *to* advise his majesty to create new peers, and accordingly Lord Grey, accompanied by the Chancellor, went down to Windsor for the purpose. This advice being declined, they at once resigned; and, on May 12, Lord Brougham took formal leave of the Chancery Bar, informing them that he should leave no case undecided, and only a very trifling arrear in the business of the court. The Duke of Wellington, however, being unable to form a ministry, Lord Grey and his colleagues returned to office, and Lord Brougham resumed his seat on the woolsack and in the Court of Chancery. On June 4, the Reform Bill was read a third time in the House of Lords by a majority of 84. It has been asserted that the king had given the Chancellor a promise to create as many new peers as might be necessary to carry the measure, in the event of its fate being again placed in jeopardy.

The new and reformed Parliament assembled on January 29, 1833. During this session several very important measures were introduced by the Lord Chancellor. Among them was a Bill to carry into effect the recommendations of the Law Commissioners, as contained in their report. The

Local Courts Bill was again, but unsuccessfully, introduced. Bills were also brought in by him for regulating the practice of the Court of Chancery, and in the Ecclesiastical Courts, for establishing a Court of Appeal in Chancery, and for amending the course of proceedings in the Insolvent Debtors Court, but none of them became law.

During the session of 1834, which commenced in February, Lord Chancellor Brougham introduced a very important and valuable measure for improving the system of administering justice in the metropolis, which led to the establishment of the Central Criminal Court. He also brought in a Bill for assimilating the practice of the Irish Court with that of England.

In the course of this session, the Lord Chancellor had occasion to bring before the House of Lords a question of breach of privilege, arising out of an attack upon him by the *Morning Post*, professing to be comments upon a judgment pronounced by him, and accusing him of oppression. The Lord Chancellor said that, having denied the truth of the statement in question, he should take no further notice of the matter. Other peers, however, thought that the subject ought to be taken up, and that the printer of the paper should be summoned to the Bar, which, having been done, the Lord Chancellor moved that he be discharged with a reprimand. Lord Denman moved that he be committed to the custody of the serjeant-at-arms, which was carried; the next day he was brought to the Bar, reprimanded, and set at liberty on paying his fees.

During the vacation of this year, the Lord Chancellor made a tour in the north, and was at a grand festival in Edinburgh, given in honour of Lord Grey's visit to that city, on which occasion he delivered a very eloquent oration. That nobleman had recently resigned the office of premier, and was succeeded by Lord Melbourne. In the course of November, the king not feeling full confidence in his present advisers, adopted measures for the formation of a new ministry, on which

the existing Government, of course, at once resigned, and Sir Robert Peel was sent for from Rome to accept the office of Prime Minister. Lord Brougham was succeeded in the office of Lord Chancellor by Lord Lyndhurst, who had been previously Chancellor under Mr. Canning and the Duke of Wellington; but who, on the dissolution of the Government of the latter, had accepted the office of Lord Chief Baron of the Exchequer, which he, of course, vacated on becoming a second time Lord Chancellor. Lord Brougham proposed to the new Lord Chancellor that he should succeed him in the Chief Barony, with a laudable desire of saving to the country the amount of his retiring pension, and also of rendering his services useful. The acceptance of the offer was deferred until Sir Robert Peel's return, before which, however, the offer was withdrawn. It has been the subject of much comment since. The appointment was ultimately conferred upon Lord Brougham's old rival on the northern circuit, Sir James Scarlett. Thus ended the career of Lord Brougham as Lord High Chancellor of Great Britain.

While Lord Brougham held the Great Seal, he sat in court, on an average, eight hours a day, of itself enough to exhaust the energies of any ordinary man; besides which he had to preside in the House of Lords, in the debates of which, as we have seen, he took a very active part, and was the originator of several important measures, requiring great attention and labour in the preparation of them. On one occasion he was taken to task by Lord Eldon for being absent from the House of Lords on account of his holding evening sittings in his court, with a view to diminish the business. And in addition to his judicial duties, he had to attend the Councils of the Cabinet, at a time, too, when the Government, with a very unfriendly House of Lords, and not very friendly sovereign, must have been frequently in great perplexity as to the course they should pursue. Nevertheless, although on Lord

Brougham's taking the Great Seal in 1830, 120 appeals had been entered in the Court of Chancery; in 1831 only one was left in which he had not given judgment. His decisions as Chancellor embrace a wide variety of subjects, and many of them were relative to questions which had been quite out of his sphere as a practitioner at the Bar. There were cases on privilege, and a great many on points of real property, and the construction of deeds and wills. Literary and commercial questions also came before him, those relating to the very perplexing subject of trusteeships, and some on points of practice. As regards his mode of preparing his judgments, he some years ago gave the following account in a letter addressed to the writer of the present memoir—

"As to notes of my judgment there are none. I prepared them very carefully, and they were copied by one or other of the secretaries and given to the reporters, Mylne and Craig, or Mylne and Keen. I think some were by accident omitted, and I dictated them to Gurney, the short-hand writer, and he gave them either to one of the secretaries, or to myself to correct, and then they went to the reporters. The one on the privilege question (we presume that of *Mr. Long Wellesley*, 2 *Russell and Mylne*, 658, and which was delivered on July 28, 1831, is the one here referred to) was delivered without any notes, and I think I corrected the report of it before it was printed."

A valuable and interesting volume of "Select Cases decided by Lord Brougham in the Court of Chancery in the years 1833 and 1834, edited from his lordship's original manuscripts," was published by Mr. Charles Purton Cooper in 1835.

The reversal by the House of Lords of one of his decisions, that of *Wharton* v. *The Earl of Durham*, 3 *Clark and Finnelly*, 146, occasioned Lord Brougham some annoyance, and he has remarked that this was done by the votes of peers who were not law-lords, and contrary to the known opinion of Mr. Bickersteth, afterwards Lord Langdale and Master of the

Rolls, who was counsel for Lord Durham, who was the appellant. The case came on in the House of Lords during Lord Brougham's absence from illness. The Vice-Chancellor of England, Sir Lancelot Shadwell, whose judgment Lord Brougham had affirmed, always held the same opinion. We believe that the reversal was carried by one vote, and that nobleman a lay peer.

As a law reformer, Lord Brougham's position and influence while on the woolsack would seem to have been a great advantage to him, from the influence that it would necessarily give him. But though he certainly lost none of his energy as a law reformer while Lord Chancellor, his numerous duties while in office must undoubtedly have interfered considerably with the preparation of Bills for Parliament. Consequently, his most valuable measures of law reform, more especially his Bill for establishing County Courts, were brought in and carried while he was out of office. Some censure and ridicule have been cast upon him for the Bill which he carried while Chancellor for abolishing the fees to be taken by the Lord Chancellor, and substituting in lieu a fixed salary, and giving a retiring pension of £5,000 per annum, instead of £4,000, more especially as from his long enjoyment of his retiring pension, the measure undoubtedly proved very advantageous to his own interests. But then it should be borne in mind, in justice to Lord Brougham, that at the time the measure was introduced there appeared to be every prospect of his continuing for a long time in office; his party was powerful, and he was popular and in robust health, so that the probabilities were that the measure would not be an advantageous one to himself. And in addition to this when he did resign the Great Seal, he proposed to take the Chief Barony of the Exchequer, in case of which he would have reaped no benefit from the increased retiring pension of the Chancellor. Moreover, by his assiduous attendance at the House of Lords during its sitting on appeal cases, he well earned the pension.

We believe that we are correct in stating that with Lord Chancellor Brougham's dispensation of his patronage, whether legal or clerical, no fault has been found. The judges whom he raised to the Bench were men of most distinguished acquirements, and fully satisfied the expectations that had been raised respecting them, although some of them in politics were decidedly opposed to their patron. Among them we may mention Lord Denman, Baron Parke, Mr. Justice Hullock, Baron Alderson, and Baron Gurney. As regards his clerical patronage, it is said that the bishops and clergy were surprised to find one upon whom they had looked with so much distrust, so fair and even orthodox in his choice of persons for promotion. The celebrated Professor Lee of Cambridge he made a canon of Bristol. To the still more celebrated Dr. Arnold of Rugby he offered a living, which that very consistent and conscientious man declined to accept, on the ground that his scholastic duties would prevent his residence; a reply which drew forth warm comments in his praise from the Chancellor. But he does not appear to have tendered him any more suitable promotion. The clergy were also gratified and satisfied by Lord Brougham's regular attendance at church, frequently at the Temple Church, a custom which report said was not very punctually observed by a venerable predecessor of his lordship, although a zealous champion of the Church.

A very circumstantial and entertaining account of one of the levees of Lord Chancellor Brougham appeared in the *Edinburgh Magazine* of the time, which is too long for quotation here, in which the writer remarked that the Lord Chancellor enjoys all "the little peculiarities," as he terms them, of his office; that he assumes a studied dignity in announcing the royal assent to Bills in Parliament, for which his voice was not ill fitted. His levees were held at ten o'clock on Saturday evenings, and appear to have been very numerously attended. "The Chancellor," says the writer, "took his place at a corner of the room, backed by his

chaplain, and was soon encircled by the visitants. His dress was remarkably plain, being a simple suit of velvet in the court cut." The attendance appears to have been large, and among the company were the Archbishops of Canterbury and York, and several of the bishops, to whom the Chancellor paid marked attention. The Duke of Wellington was also there, with whom the Chancellor shook hands very cordially. Several peers were also present. When Sir James Scarlett was announced, the Chancellor left his place to meet him, gave him a very hearty welcome, and remained longer in conversation with him than with any other of his distinguished visitors. The Speaker of the House of Commons and Sir Thomas, afterwards Lord Denman, were also among the company.

Sir Robert Peel's first ministry broke up early in April, 1835, when Lord Melbourne, with most of his late colleagues, returned to office. Lord Brougham's name was announced among the members of the cabinet; but the post assigned to him was not that of Lord Chancellor, but of Lord Keeper of the Great Seal, and Chairman of the House of Lords, without a seat in the cabinet. Inquiries on this subject were made in the House of Commons, when it was announced that the arrangement was to be but temporary. The Great Seal was afterwards put in commission, and in January, 1836, Sir C. C. Pepys was appointed Lord Chancellor, and created Lord Cottenham. The real cause of Lord Brougham's exclusion from the cabinet has never been satisfactorily explained. It has been said that the king took offence at the free use which the late Chancellor had made of his majesty's name. An assertion was attributed to Lord Brougham, that it was the act of Queen Adelaide. But from her majesty subsequently appointing Lord Brougham one of her executors, she could hardly have felt the dislike or distrust of him which was supposed. The probability is that his colleagues desired a more compliant, and, possibly, a less energetic, member of the cabinet in so leading a position.

Be this as it may, Lord Brougham was now at large, free from the trammels of office, and certainly under no obligation to his party, and therefore at full liberty to pursue the course which he thought proper. Not improbably he heartily wished himself back in the House of Commons as Member for Yorkshire. But still there was a wide sphere of action open to him. And in justice to him it must be acknowledged that he availed himself of it to the utmost. In the session of 1835, he had brought the question of National Education before the House of Lords, in a very able, temperate, and highly philosophical speech, admirably adapted to a cultivated audience. During the greater part of 1836, Lord Brougham was absent from Parliament, owing, it was said, to ill health, brought on by over-exertion.

Soon after the accession of her present Majesty in 1837, some discussion took place in the House of Lords respecting the provision for the Duchess of Kent, mother to the Queen, when Lord Melbourne and the ex-Chancellor came into direct collision, Lord Brougham objecting to the form of the provision, and entering his protest against it on the journals of the House. On another occasion the ex-Chancellor levied his sarcasm against the Premier, observing—

"In this house my noble friend knows he can do what he likes (hear, hear, from the ministry)—when he is doing wrong. (Loud laughter.) *Illâ se jactet in aulâ*, and he is little opposed here."

On February 20, 1838, Lord Brougham moved in the House of Lords, a series of resolutions on the subject of negro slavery, which he enforced, though unsuccessfully, in one of the most powerful and eloquent speeches ever delivered by him. The peroration is one of great splendour. He presided at the grand banquet given, in 1839, at Dover to the Duke of Wellington as Lord Warden of the Cinque Ports, at which a very distinguished assembly were present, when he pronounced a magnificent eulogy on the character of this great man, which was received with the utmost enthusiasm.

Towards the close of this year a prodigious sensation was created throughout the country by a report, which was circulated through the newspapers, that Lord Brougham had been suddenly killed by the overturning of his carriage. It seems that an accident did occur to Lord Brougham's carriage, but nothing serious was the result. The event was chiefly remarkable from the panegyrics which it called forth from the different newspapers on Lord Brougham's career and character, even those most directly opposed to him, in which they one and all dwelt on his splendid attainments, his wonderful talents, and the vast services which he had rendered to his country. Most gratifying to his lordship must it have been to peruse these various memoirs drawn in terms so eulogistic.

In 1841, Lord Lyndhurst, then Lord Chancellor, between whom and Lord Brougham, notwithstanding their difference in politics and occasional contests in public, a warm friendship ever existed, proposed to Lord Brougham to accept the office of permanent Vice-President of the Council, with a salary, which he however declined. From 1841 to 1846 he generally supported the ministry of Sir Robert Peel. In 1841 he brought in his Insolvent Debtors Bill, which became law. On the question in the House of Lords respecting O'Connell's sentence, when seven of the judges recommended its confirmation, and two its reversal, Lord Brougham, with Lord Lyndhurst, voted for confirming it, while three other lawlords, Lords Denman, Cottenham, and Campbell voted for its reversal. In 1844 was established the Society for the Amendment of the Law, in forming which Lord Brougham took an active part in conjunction with Mr. James Stewart, M.P. for Honiton. Of this society Lord Brougham was elected president, very constantly attended its meetings, and took an active part in its discussions, even during the most important parts of the Parliamentary sessions.

During the debates which occurred in the session of 1866

on the repeal of the Corn Laws, Lord Brougham supported the ministerial measure for that purpose, but denounced as unconstitutional and dangerous the agitation that had been got up on the subject. In the session of 1847 he advocated the measure for promoting the education of the people, which was, indeed, based on his own previous measures. In the course of this session he introduced and carried his grand scheme for the establishment of County Courts throughout the country, which though perhaps the most opposed and ridiculed of all his measures, has proved in every way eminently successful. The plan was several times introduced by Lord Brougham, and even while he held the Great Seal, but he was defeated in his attempts to carry it through the House. Some of the most important improvements which have recently been introduced into the system, such as giving these courts a limited jurisdiction in equity, formed parts of Lord Brougham's original plan.

In the year 1835, Lord Brougham purchased some land at Cannes, in the south of France, celebrated in history as the place where Napoleon landed from Elba, at a spot which Lord Brougham used to point out to his friends. Lord Brougham also mentioned once in conversation, that he was in Paris in 1814, in company with the Duke of Orleans, afterwards King Louis Philippe, when Lord Brougham asked him if they had heard anything of Bonaparte lately. "No," said the duke, "but if he were to drop down among us from the clouds at this moment, all the people would at once rally round him, and we should have to be off to Belgium, or somewhere." And so it shortly proved. Lord Brougham was first induced to visit Cannes for the sake of his daughter's health, who died in 1833, and to whose memory the following verses, written by Lord Brougham, are engraved on a tablet, and placed in the hall of the beautiful Italian château which he erected there, and which is still called after her name, Eleanora Louisa—

ELEANORA LOUISA BROUGHAM.

Born October 3, 1821. Died November 3, 1838.

Mount, gentle spirit, to the sphere,
Where pain or grief none can e'er know;
Yet sometimes shed an angel's tear,
O'er those who sorrow still below.

Oh, swiftly dawn the blessed day,
When we, too, heavenward shall rise;
Casting this mortal coil away
To join thee in thy native skies.

There is a water-colour portrait of her in the drawing-room, beneath which are some lines on her death by the Marquis Wellesley; and engravings of this portrait are in each of the bed-rooms. In the year 1839, Lord Brougham lost his other daughter. These were his only children.

Lord Brougham added considerably to the land about the château, purchasing a forest at the back of it, and the land between it and the sea. The prospect from the windows over the Mediterranean is most enchanting. The house is approached through an avenue of orange trees. To one point in the grounds at the back of the château, Lord Brougham once conducted the writer, and told him that Corsica was visible from thence just at sunrise, forming a black spot on the ocean at the horizon. Lord Brougham has of late years always passed the winter at Cannes, the climate of which was well suited to his constitution. In one of his letters written in February, 1862, he says—

"The settlement, for the present at least, of the American affair, makes it not necessary for me to be at the meeting of Parliament, and I should very reluctantly be dragged away to encounter frost and fog instead of the sultry summer which we still have here. I shall therefore defer my northern journey for a fortnight."

Even before railways were established in France, Lord Brougham was in the habit of travelling direct from Paris to Cannes, without sleeping on the road, posting in his own

carriage, and ordering a relay of horses beforehand. After the revolution of 1848, Lord Brougham offered to become a citizen of France, but was told this could only be granted on his ceasing to be a citizen of England. The purchase of his property at Cannes was, however, officially confirmed and secured to him. At one period his French neighbours appear to have viewed Lord Brougham's settlement among them with some jealousy and distrust, and an attack by a mob was one night made upon the château, creating considerable alarm among some of the English visitors, especially the ladies. They, however, describe Lord Brougham as being not at all frightened, and running briskly about the house, seeming greatly to enjoy the fun. Of late years he was treated with the utmost respect by both natives and English, all the peasantry taking off their hats to him as he passed. At the English church, the services of which he regularly attended, the congregation used all to wait for Lord Brougham to go out first before they moved from their seats. In the drawing-room of the château are two views of Cannes, one as it was in 1835, a mere cluster of fishing huts; and another as it was in 1863, adorned with beautiful villas and stately mansions. For its extraordinary rise and prosperity it is mainly indebted to the residence there of Lord Brougham.

Lord Brougham's seat in England, Brougham Hall, near Penrith, which, as already stated, has been in the family for centuries, is known to many vistors to the English lakes. The situation is commanding, and the beautiful ancient chapel was some years ago restored by Lord Brougham. Near the Hall stands Brougham Castle, formerly also belonging to the Brougham family, but forfeited during the wars between the Houses of York and Lancaster. To his English seat Lord Brougham usually retired after the session of Parliament, going to Cannes for the winter, and remaining there until after the subsidence of the cold

winds of the spring. Passing through Paris, both on going to and returning from Cannes, he was in the habit of paying his respects to the French sovereigns, both Louis Philippe and Napoleon III. The former he had known for years, and on one public occasion styled him his "sovereign and friend."

For many years Lord Brougham was a member of the National Institute of France, a distinction which he much prized, and he was in the habit of reading scientific papers before them in very pure French. With many distinguished foreigners he was on intimate terms, particularly M. Berryer, the celebrated French advocate. The grand entertainment given to whom by the English Bar, in 1864, in the hall of the Middle Temple—at which Lord Brougham was present—will be in the recollection of our readers; M. Berryer was on this occasion the guest of Lord Brougham, at his house in Grafton Street. A photograph, containing admirable likenesses of those two great men, sitting together in friendly converse, was on this occasion taken by the desire of Lord Brougham.

The National Association for the Promotion of Social Science was founded in 1857, under the auspices of Lord Brougham, and he was chosen its first president. He was on more than one occasion spoken of as its founder, but at Glasgow, in 1860, he declared emphatically that he was not entitled to that honour—"that is a mistake; Mr. Hastings was the founder."* The first annual meeting was held at Birmingham in 1857, at which Lord Brougham delivered the inaugural address, a master-piece in its way, which was rapturously applauded. Meetings of the same society, for the reading of papers and discussion of questions connected with social science, have been held annually in the different principal towns of the kingdom ever since. The last attended by Lord Brougham was that at Man-

* *Times* of October 1st, 1860.

chester, in 1866, where he delivered an address with singular energy, and containing point and reflection worthy of his best days. But the great man was then but a shadow of his former self—

"Majestic, though in ruin."

Feeble and tottering he was led about, reminding one of Turner's magnificent picture of the old Temeraire, which had braved many a battle and many a breeze, being towed to its moorings. His appearance wherever he went was the signal at once for enthusiastic applause, particularly by the artizans, which appeared much to gratify him. He was too feeble to attend the banquet, where his health was proposed in a very eloquent and most appropriate speech by Sir Eardley Wilmot.

During the year 1858, Lord Brougham was requested to preside at the inauguration of a statue to Newton, at Grantham, on which occasion he delivered a very masterly and philosophical address. The subject was not only one which he was peculiarly well-fitted to handle, but to which perhaps he alone of all the men of his time could do ample justice. The "Principia" of Newton he had commented upon, and Sir David Brewster has asserted that Lord Brougham has contributed more than any man to render thoroughly comprehensible that wonderful work.

In 1860, Lord Brougham having no son, the Queen conferred a fresh peerage upon him, with remainder to his brother, William Brougham, the present peer, and his heirs male. The patent specified that this favour was granted as a reward for his eminent services, especially in the cause of education and the suppression of the slave trade. And in June of the same year he received from the University of Oxford the honorary degree of D.C.L. His name was received with shouts of applause, quite a storm prevailing, doctors, proctors, masters of art, and undergraduates, all vieing with each other to do him honour by the loudness of their shouts.

Lord Brougham was for many years, and to the time of his death, President of University College, London, which would not, however, we believe, be considered by some of his Oxford friends of itself to entitle him to any very high place in their esteem. And in 1860, he was elected Chancellor of the University of Edinburgh, on which occasion he delivered a masterly oration, rivalling his best and earlier efforts. He was also one of the benchers of Lincoln's Inn.

As a literary man alone, indeed, he well deserved the honour which Oxford tardily, but heartily at last, bestowed upon him, although the fame of his authorship is eclipsed by the brilliancy of his achievements in so many other departments of intellectual effort. His translation of Demosthenes' "De Coronâ" did not meet with a very favourable reception from the members of either university, and as a mere scholastic effort it was not likely to excite much admiration among university tutors, or mere schoolmasters. How far it is entitled to distinction as a free translation by one great orator of the sentiments of another, aiming rather to give full effect to the thoughts and language of the other than literally to supply the exact words which a strict translator would use, it is beyond our province here to decide. Lord Brougham's attainments as a linguist were considerable. Besides Greek and Latin, he had, as we have already observed, an accurate acquaintance with French, as also with German and Italian. A gentleman who was editing an edition of Dante, some time ago, informed us that Lord Brougham perused the proof-sheets, and evinced an extensive and singularly accurate acquaintance with the Italian language. His best works probably are his biographical efforts, comprising his "Historical Sketches of Statesmen who Flourished in the time of George III.," and his "Lives of Men of Letters." He brought out an edition of Paley's "Natural Theology," with notes by himself and Sir Charles Bell, in 1835. A few years later two supplementary volumes were added to it, entitled—

"Dissertations on Subjects of Science connected with Natural Theology." His speeches, with the requisite introductory prefaces to them, were published in 1838. In 1842 he published his "Political Philosophy;" and in 1845 he brought out in French, lives of Voltaire and Rousseau, with some letters of Hume and Voltaire. He also published a "Dialogue on Instinct."

In 1853, in conjunction with Mr. E. J. Routh, he published his "Analytical view of Sir Isaac Newton's Principia," a work which has been extensively used at Cambridge. Other works are attributed to his pen, among them a novel, and one or two anonymous pieces. He published besides several pamphlets and letters on different important topics of the day, as well as being a voluminous contributor to the *Edinburgh* and other reviews, including this periodical. On one occasion he is said to have written a whole number, with the exception of two articles, of the *Edinburgh Review*, one of his papers being on lithotomy. The list of his works occupies fifty-eight pages in the large folio catalogue of the British Museum, some of them being in French and German. His last published literary effort was a short letter which appeared in some of the English newspapers, addressed to the people of England on the subject of corruption among the electoral constituencies.

Lord Brougham retired to Cannes as usual for the winter last year. His health appeared vigorous to the last, but his mind was much enfeebled. He was able to take exercise in his carriage. The only real disease, if so it may be termed, which seemed to affect him was old age. He retired to rest as usual at an early hour, and on his valet going into his room, he found that this great man, who had witnessed so much turmoil, and taken part in events of such stirring importance, had peacefully passed away, as it were falling asleep after the huge exertions which for so long a period he had put forth. He died on May 7 last, in the 90th year of his age. In reality he had ceased to exist a twelvemonth before

he actually expired. His remains were quietly and unostentatiously interred in the cemetery at Cannes. One cannot but regret that his ashes should repose in a foreign land, far away from the country he so benefitted and so adorned. And surely if national monuments are raised to do honour to those who have done service to their country, no one merits this tribute to his memory more than does Lord Brougham, whose whole life and gigantic efforts were spent in that country's service, or rather in the service of mankind. In his case it may truly be said that a monument is needed not to preserve his memory, for that is imperishable, but to preserve in memory the esteem in which he was held by a grateful country.

We cannot conclude these pages without taking a general survey of the character of this extraordinary man, of whose career we have attempted to afford a sketch. But the difficulty is in what way to regard him, his very versatility rendering any adequate description of his attainments a task of no mean difficulty. As advocate, judge, statesman, orator, author, philosopher, philanthropist, he was alike distinguished, and in each capacity is entitled to regard. But versatile as he unquestionably was, his was not the versatility of a shallow mind, which dips into everything but goes deep into nothing. What he did not know he never pretended to know. What he learned he learned thoroughly. And whatever he did he did well. His was the versatility of that order of mind which distinguished Bacon, and Newton, and Locke, and Michael Angelo, and Leonardi da Vinci, who studied a variety of subjects, but made each aid the other. All his pursuits were connected with, and assisted one another. *Omnes artes, quæ ad humanitatem pertinent, habent quoddam commune vinculum, et quasi cognatione quadam inter se continentur.* So in Lord Brougham, each of his studies, however varied, were linked together by his study of man, and his gigantic efforts for the amelioration of the human race. To say that he knew or tried to know every-

thing, is as contrary to fact as it would have been irrational in the attempt. He was no poet, no painter, no musician, no chemist, no metaphysician. In reality, although sneered at for directing his vast mind to so many subjects at once, and thence argued to be necessarily a shallow man, he did not in reality embrace so wide a range, much less did he grasp topics so unconnected and so opposite, as did some of the great men whose names we have cited, and whom none have dared to call superficial or shallow. His literary productions, more especially his biographical works, have been generally read, and will continue to live; although like Johnson, with all his stupendous powers, he has left behind him no one grand performance of this order to immortalise his name. That name indeed must continue to hold its place in the pages of his country's history, intimately, indeed inseparably, associated as it is with that country's progress in legislation and civilisation for more than half a century. His judgments, although they may be sneered at by mere case lawyers, whose minds are neither sufficiently comprehensive nor sufficiently acute to regard the study as a science, are nevertheless remarkable and valuable as exponents of leading principles on many of the most important topics of jurisprudence, an effort of all others the most difficult of accomplishment, and a quality which not only distinguished the judgments of the most profound jurists who have adorned this country—our Hardwickes, and Mansfields, and Ellenboroughs, and Stowells—but which was after all their highest merit. His versatility of acquirement no doubt aided him here, both by the information with which his mind was stored, and the cultivation which his reason had obtained. Nor are these masterly judgments to be regarded only as fine and philosophical elucidations of scientific legal principle. On the contrary, their practical value is fully attested by their quotations in the various standard treatises on practical subjects, and in the judgments delivered by some of the greatest ornaments of the Bench in our day.

His speeches, however, must be regarded as his grandest performances, and will probably be read long after his other works are forgotten; and in these are reflected the most completely the whole soul of their author. For withering sarcasm as well as argumentative eloquence, they have never been excelled, if indeed they have ever been equalled. His eloquence, nevertheless, vivid and effective as it was, was terrible rather than attractive, powerful more than pleasing. You were not drawn along but driven by its force. It was the brilliancy of the flash, not the radiant glow by which you were enchanted.

Probably no public man ever attempted more than what Lord Brougham endeavoured to effect, and few, if any, have accomplished so much. His law reforms alone occupy a considerable space in the statute book. For education he effected a vast deal. No one contributed more to the extinction of negro slavery. Of political and social progress he was the pioneer. Of every abuse he was the determined foe.

Such was the life, and such were the career and character of one whom Great Britain must ever regard as among the most notable of her worthies, and the most remarkable of her many gifted sons. What a vast variety not only of acquirement, but of capacity did he display. From the "Principia" of Newton to writing pamphlets on the topics of the day, he could at once turn his hand. No subject was too vast for his genius; no topic too commonplace or ordinary to be beneath his notice. With his splendid intellectual acquirements and untiring industry were moreover combined a high moral courage, and a sterling integrity, which no dread of power could ever daunt, no temptation ever lead astray. Fortunately, perhaps, for his fame, and still more so for his country, the period in which he lived was exactly suited to exhibit to the full the stupendous powers and energies of such a man; while he was in all respects singularly and completely adapted to the peculiar exigencies of such an age.

ART. II.—THE PROSPECTS OF A DIGEST.

IN November of last year the Digest Commissioners, having reported generally in favour of the scheme, issued a circular, in which they invited members of the Bar to assist them in an experiment as to its practicability. They selected three distinct classes of rights, under the heads: "The Law of Mortgage, including Lien;" "Bills of Exchange, including Promissory Notes, Bank Notes, and Cheques;" and "Rights of Way, Water, and Light, and other Easements and Servitudes."

They asked for specimens of a Digest of the existing law relating to each of these three subjects. These specimens were to include a general summary, in an analytical form, of the whole matter comprised under the particular head dealt with, and a subdivision, worked out in detail, as an example of the mode in which the outline was to be filled up. They asked also for suggestions as to the method in which the work of a Digest should be framed. This, though it came last, was, in fact, the most important of the three subjects upon which information was required.

In answer to this circular eighty-seven papers were sent in, and of the writers of these papers, three have been selected to prepare a specimen Digest. The names of these three successful candidates are guarantees for the impartiality of the Commissioners, and of their freedom from all preconceived opinions as to fitness. For, whilst Mr. W. R. Fisher has a well-earned position as an authority on the law relating to charges upon property, Mr. Leybourn Goddard, whose paper on easements was selected, is not yet of five years' standing at the Bar. Mr. Macleod again, who has been chosen to prepare the Digest of the Law relating to what he calls "Instruments of Credit," is well-known as the author of a work on "The Theory and Practice of Banking," in which, with

marked ability, he has given a practical exposition of the subject, stripped of all the vagueness and mystery which hang about finance.

We have received copies of two of the three successful papers, and part of the third (that on "The Law of Mortgage, including Lien") is placed as an introduction to the new edition of Mr. Fisher's "Treatise on the Law of Mortgage," which we notice elsewhere. But the Commissioners have made no report as to the course they have taken in the examination of the eighty-seven contributions, or of the grounds for the selection they have made. Nor have they supplemented their first general report by any detailed statement as to the method which, in their opinion, should be adopted for carrying out this great work. As yet the only result of the Commission has been the selection of three men to prepare each a specimen Digest, of the Law relating to three detached heads.

We are far from wishing to deal with the proceedings of the Commission in the severely critical spirit which was shown by some of our leading daily journals at the time when the invitation for assistance was issued to the profession. Appointed only as an experiment, to inquire into the subject, with no permanent existence or constitution, and with limited powers; beset by all the vast difficulties, practical and theoretical, which set at nought even the vigour and sagacity of Cromwell, we think that the appeal to the profession was politic. But we hope that the outcome will be somethin gmore than the appointment of Messrs. Fisher, Macleod, and Goddard, and their specimens of a bit of Digest.

The time has, in fact, come, when we may fairly expect from the Commission a definite and clear statement of their views as to the machinery by means of which the complete work is to be performed, and the plan upon which it is to be framed.

In their first report they make the following pertinent remark:—

"Any plan [for 'forming such a Digest as we contemplate'] must we think involve the appointment of a commission or body for executing or superintending the execution of the work. It is obvious that whatever arrangement be adopted a certain number of functionaries must be employed at a high remuneration in the capacities of commissioners, assistant-commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the legal profession employed from time to time in the preparation of the materials to be ultimately moulded into form by or under the immediate supervision of the commission or responsible body."

They then express their anxiety to "avoid any recommendation that would involve the necessity of immediate outlay on a large scale," and advise "that a portion of the Digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared, before the State is committed to an expenditure which will be considerable; and which, when once begun, must continue for several years, if it is to be at all efficacious."

It was in pursuance of this recommendation that the Commissioners were authorized to issue the invitation which has resulted in the eighty-seven contributions already mentioned. And they now propose, before any uniform and systematic method has been decided upon for the whole work, to have three bits of it finally prepared. Nothing could in our opinion be more injudicious, or more calculated to defeat the object of the Commission. The three rooms which the three successful candidates are under orders to construct—each be it remembered according to his own individual notions—may be admirable specimens of ingenuity and convenience. But it surely is beginning at the wrong end to have them built before the plan has even been sketched for the temple of which they are to form part; before it is even known whether there are to be two temples of law and equity, or one temple of law alone; nay, before is quite settled that any temple shall be built at all; for

all that has been hitherto settled is, that it ought to be built.

The Commission no doubt, like a certain working committee which was appointed about two centuries ago to reform the laws of England, finds "the job heavy." But we trust it will not be allowed, like its predecessor, to languish gradually; and "die into comfortable sleep,"* only reviving upon "being poked up again," to be finally extinguished by the difficulty of deciding "what is an incumbrance."

If it is to fulfil its mission, it must now take another and a very decided step. It must grapple with the real difficulties involved in the whole undertaking, and before it commits the State to any further expenditure. It must pass from generalities to details.

In the first place, we think that the Commissioners should state clearly and decidedly their views as to the numbers and constitution of the permanent body which is to superintend, and be responsible for, the work. They have already given it as their opinion, that this work can only be properly done by a highly-paid permanent body of able and experienced men. One of the most eminent of their members, to whom the existence of the Commission itself is mainly due, has already declared, that "the first judicial minds of the country are alone adequate to the task, at least, in its ultimate stages, and that it is far beyond the reach of the unpaid services of occupied men."† In making their report on the subject, it will be important that they should be very explicit. A suspicion, not unreasonably excited, exists in the public mind, that the evils of the present state of our law, due greatly to the self-interest or indifference of the profession, might be easily removed by earnest and competent men. How mistaken this notion is none know better—none have learnt by a more weary experience—than the Commissioners. It

* Carlyle, Letters and Speeches of Oliver Cromwell, ii. 167.

† Address at York to the Jurisprudence Department of the Social Science Association, by Sir James Wilde.

behoves them, therefore, to inform the public mind on this subject: to show how great and laborious a business will be this of reducing our vast and undigested collection of statutes and decisions—of legislative and judiciary law—into some uniform and complete system. A few broad, intelligible facts would bring home to the non-legal mind this truth, which is often not realized by the theoretical lawyer himself. It is laborious work enough to prepare a new edition of a text-book, such as one of "Roscoe's Digests" or "Smith's Mercantile Law;" but, to take all the existing treatises to pieces, to verify every minute detail of which each is composed, and then rebuild them into a new edifice of law—for this it is proposed to do—is a monumental work which can only be fitly carried out with the expenditure of much time and treasure. Therefore, it would be as well that the Commissioners told the public at once, and plainly: "This work, whether Digest or Code, will occupy many years, and require the undivided energy and attention of many men of conspicuous ability." To use the words of one of themselves: "Without permanence we may be convinced all attempts will be merely disappointing. The work to be done is so extensive and difficult as to demand the devotion, for a long series of years, of a body of men acting on definite principles, and with a settled plan."* Such services cannot be got for nothing. Indeed, when the final result is looked at, they can scarcely be bought too dear. To have a complete, yet clear, exposition of our law, which men may read and understand, we might fairly pay the money we have paid that we might free from captivity our fellow countrymen in Abyssinia. Yet the public mind will have to be prepared for an expenditure of a million upon a Digest of English Law, by a calm, temperate, and convincing statement of the labour which will have to be performed, of the difficulties

* Observations on a Digest of Law, by F. S. Reilly, Esq., p. 32, read before the Law Amendment Society.

which will have to be dealt with in preparing it, and of the immense advantages, social and economical, to which it will lead.

It is beyond the scope of this article to consider in detail the constitution of the board which will have to take the place permanently of the present Commission. Whether it be a Committee of the Privy Council, or a Branch of a Ministry of Public Justice, it will require a large staff of subordinate but able officers, to whom shall be entrusted the detailed labour of collecting the materials, arranging them, and drawing up the final work, under the supervision of the supreme authority. The terms on which these officers should be employed, the expenses which would be incurred in the formation and conduct of the whole establishment, could be approximately estimated without difficulty. The present Commission is the body best fitted for doing this, and this it should do without delay.

The Commissioners evidently shrink from committing themselves to a decided expression of opinion, as to the principles on which the new body of substantive law and its procedure should be framed. They probably regard themselves as a tentative body, and their functions as merely preparatory; and may therefore think that they are not called upon to exercise their judgment upon this, the most important subject, connected with the proposed undertaking. If so, we must with all respect differ from them, and express our regret, that with all the valuable materials before them, which they have collected during their inquiries, they should content themselves with giving a general assent to the method of a Digest, as opposed to a Code. Eighty-seven men, more or less qualified to form an opinion, have sent in papers in answer to a request that they should make suggestions on the method on which a general Digest should be framed. Of the three papers which have, we must assume, been judged to be most complete, only one (Mr. Goddard's) contains any

suggestions on the subject. Mr. Macleod, it is true, devotes a section (iv.) of his elaborate introduction, to the "method of framing a Digest of the law of instruments of credit," and there incidentally touches upon the arrangement of the general Digest. But the short paragraph in which he refers to this subject treats only of the two difficulties which must crop up, wherever a detached specimen is prepared with a view to being incorporated with, and forming part of, a homogeneous body of substantive law. Those two difficulties are; (1) whether the Digest shall be, in form, a statement of cases, or a statement of general principles, deduced from decided cases; and (2) how far it will be necessary in dealing with subdivisions of rights, such as obligations created by instruments of credit, to state the general rules affecting all rights.*

Now the terms of their commission from the Crown, and of their own invitation to the profession, clearly show that the duty, first in importance, and first in the natural order of doing the work, is the preparation of a complete and uniform plan, upon which the general Digest is to be drawn up. This duty should no doubt, so far as details go, be performed by the permanent body, which will succeed the present Commission. But it is to be hoped that the Commissioners will not leave that duty to others, until they have given the State the benefit of their united learning, ability, and experience on this matter. All that they have hitherto done has been to draw up a general definition of a Digest as "a condensed summary of the law as it exists, arranged in systematic order, under appropriate titles and subdivisions, and divided into distinct articles, or propositions, to be supported by reference

* The introduction to Mr. Fisher's treatise is only part of the paper which he sent in, but we presume that if he had made any suggestions on so important a subject, he would have placed them at the beginning of his new edition.

to the sources of law, whence they were severally derived, and illustrated by citations of the principal instances on which the rules have been discussed or applied."

Perhaps no single sentence has ever been written by a body of eminent lawyers—and this is a bold proposition—which has raised, and left unanswered, so many formidable questions as this does, and it will not be unprofitable to indicate some of them.

Taking the terms of the definition in their proper sequence, we are told that it must be "arranged in systematic order, under appropriate titles and subdivisions," and here the first, the most formidable, difficulty presents itself. What system is to be adopted? Are we to be for ever bound to the unmeaning divisions of rights into "rights of persons" and "rights of things?" Is this great undertaking really to have its foundation laid upon what Mr. Goddard calls that "useful model," the "Commentaries of Sir William Blackstone?" As well propose to build a new Great Eastern upon the "useful model" of Noah's Ark, as depicted in the old Bible engravings. Can it be possible that we are to have one "book on the law of real property" of which one of the branches is to be "incorporeal rights?" Such is the proposal which Mr. Goddard gravely makes. Indeed he has headed his specimen of that part of the proposed Digest which is to deal with "rights of way, water and light, and other easements and servitudes," with the title "Incorporeal Rights." We had thought that this jargon of corporeal and incorporeal rights was no longer admitted by intelligent jurists, and it is with a failing heart that we find the Commissioners who are to begin after a fashion this great work, adopting with implied approval such propositions as we have just quoted from what Mr. Goddard is pleased to call "these few remarks" of his. We cannot be surprised to find the Commissioners stamping with their approval the division of the sources of English law into—1. The

Common Law; 2. The Statutes; and, 3. The Decisions of the Judges—because here Mr. Goddard has only followed in substance, the arrangement given by the Commissioners themselves in their first report. But we must with all respect demur to a classification which we conceive to be only less arbitrary and unmeaning than the old division of law into "written and unwritten." Nothing has tended more to make it impossible to conceive our system of law with distinctness and precision than this confusion of the *sources* of law with the *rules* of law. No progress can be made towards simplification until it is got rid of, and the fact, as simple as it is scientific, is made clear to men's minds that there can be no valid rule of law which is not made by the sovereign power in the State;—either (1) directly by legislation; or (2) indirectly by judicial decision. We presume that the Commissioners agree with the statement (to us quite void of meaning), that "the rules of the Common and Statute Law are very arbitrary in their nature, while those of the judicial decisions are chiefly based upon principle." Then again we are told, we must of course assume with their consent, that "on examination the principles appear to be of two kinds which we may denominate—*first* principles and *secondary* principles, the first being the chief and the secondary, branches of the first," and that "in cases of purely statutory subjects, as, for instance, County Courts, Common Law Procedure, and Merchant Shipping, where there is a total absence of principle, and the only judicial decisions turn upon the meaning of the Acts of Parliament, or the reconciliation of conflicting enactments, the arrangement in the Digest must be made according to the order of the subject matter. We don't know what may be meant by "the order of the subject matter," but Mr. Goddard has apparently failed to perceive that substantive law is entirely distinct from, and independent of, the procedure, by means of which the rights created by it are enforced. The County Courts

Acts and the Common Law Procedure Acts are, in fact, two codes of rules regulating the process by which men are to vindicate the rights declared to be theirs by the rules of positive law. To talk of incorporating these codes with the Digest of substantive law is mere nonsense. It is to be hoped that the result of the inquiries made by the Judicature Commission may be to simplify the procedure, so that all civil rights may be enforced by a uniform and easy process—direct, untechnical, exact. When this has been done, the rules of civil process may be brought within the compass of one Consolidation Act which will be our code of civil procedure.

But Mr. Goddard is greatly perplexed by the Statutes. "It is difficult to know how to deal with the Statutes. Our Statute Law is so various in its character that it scarcely admits of any rule for its introduction in the Digest." He is struck at the same time with the inconvenience and absurdity of having a separate Digest of them, and with some hesitation he comes to a kind of compromise. He "ventures to suggest" that "the better method of treating the Statutes" will be to "introduce the different sections of the Acts (with such alterations as may be requisite for making them intelligible in their broken form) in their appropriate places with the other matter." But, having come to this conclusion, his old bugbears, the County Court, Common Law Procedure and Merchant Shipping Acts, start up again—"those Acts" (as he now terms them) "which are of themselves the sole origin of their subject, quite unconnected with the Common Law." He gets rid of them by proposing to Digest them "by classing together the different sections relating to each branch of the subject."*

* It is right that we should here say a few words as to the execution of Mr. Goddard's specimen. It appears to have been done with considerable ability. The main propositions of law have been extracted from the judicial decisions with much care, and are stated clearly as well as succinctly.

We accept with real disappointment this result of the invitation to the profession, and hope that the Commissioners, taking the matter in hand themselves, will devote their next report to an outline of a consistent and uuiform scheme for the Digest. If it is to be of use, such a scheme when complete should include:—

I. A philosophical and lucid exposition of the nature and origin of positive law; in other words, *what* laws are, and *how* they are made.

It is now more than thirty years since Mr. Austin delivered to an audience, which though small included men who have since become famous,* those lectures in which he attempted to define the province of jurisprudence, and by which his name will be known to future times when most of the successful lawyers of his day are forgotten.

The history of that attempt is full of a simple and touching interest, which will grow stronger as time goes on, and the world begins to understand how great was the business he undertook, and how noble the effort he made. Mr. Austin was gifted with all the intellectual and moral qualities needed for the task. A vigorous, logical, and accurate mind, free from all prejudice, longing for the truth, to receive which his whole nature was for ever open, fitted him admirably for clearing the ground and laying the foundations for the proper study of the science of law in this country. It is sad to think of the neglect and indifference with which the profession treated his attempt. He found sympathy only amongst a few earnest young disciples, who have since vindicated by their own eminence the learning and ability of their teacher. With all the sensitiveness of fine natures, he felt bitterly the loneliness of his position amongst the crowd of active men who would not even turn aside from their busy quest of wealth and fame even to read his wise

* Mr. John Stuart Mill and Sir G. Cornewall Lewis were members of it, and the notes to the third volume show how great an interest they took in them.

and weighty lectures, which remained almost unknown for many years. A frame physically weak as his was, could not stand the strain caused by labours so severe as he had taken upon himself, unless borne up by the recognition of others; and he was forced by ill health to leave his work unfinished. But the lectures which he printed himself, and the fragments which his widow has tenderly preserved and published, would supply all the materials necessary for such an exposition as is now needed. Their only defect is a natural consequence of the circumstances under which they were composed. Pursuing for the first time and alone a series of inquiries new to students of law in this country, he was over anxious to "prove all things," and went too much into detail. The views he puts forward are now substantially accepted by all who have studied the science of jurisprudence, and nothing would do more to prepare the public mind for a proper arrangement of our body of law than a clear and concise statement, in a popular form, of the matter contained in the lectures of Mr. Austin. If executed by competent hands—and the work would be worthy of the most eminent amongst our legal writers—the greatest possible service would be done to the cause of legal reform. The law would be stripped of all its vagueness and mystery; men would learn how simple and intelligible are the principles upon which it rests, and yet how much skill and nicety are required to frame its rules aright: how important therefore it is that the making or altering of them should be entrusted only to trained and able men, and how essential it is that the existing rules should be extracted from the confused details of infinite cases, and be reduced to some system.

II. The next thing which should be done is to arrange a consistent and uniform scheme for the Digest.

That any such scheme should be in strict accordance with the scientific classification of rights and duties, or obligations, would be, of course, impossible. It would, however, be quite possible and practicable—and, in our opinion, of the last

importance—to frame the scheme according to such a classification as would be quite consistent with the fixed principles of jurisprudence, upon which rights are based. In the paper by Mr. Reilly, to which we have already referred, he urges that, as "the work is to be a practical work, the distribution of the contents should be natural [whatever that may mean], with no attempt at scientific analysis." His reason for this proposition is, "that any philosophical classification of human rights and acts (which are the subjects of human law), is of necessity unpractical." Of course, if the final result is to be, what Mr. Reilly there proposes, merely a series of compendious treatises on the principal branches of the law as it stands, it would be just as well to take the heads or divisions indiscriminately, or, to use his own words, "as the actual state of the law suggests." But, since this so-called Digest (or, rather, these treatises, for they would be nothing else) is, according to his views, to be "left to rest, for such acceptance as it would require at first, merely on its intrinsic merits, and on the fact of its compilation by official authority,"* we can see no advantage which would be gained by spending the public money upon such an undertaking. We believe that if a scheme of this kind is seriously proposed to the nation, it will be fatal to all chance of carrying through any complete and systematic measure for bringing our law into a reasonable compass. We protest against the assumption that a philosophical classification of human rights is unpractical, and are amazed to find such a statement in the mouth of one who quotes Mr. Maine as an authority. What would be said of a writer on political economy, who should begin a treatise on that science with the statement, that any "philosophical classification" of the laws which regulate the production and distribution of commodities is "unpractical"? Even if the intended Digest were to be merely an exposition of the existing law, with

* P. 85.

all its remaining legal fictions, its distinct and often conflicting principles of law and equity, its double procedure, and all its other anomalies left standing, no one can deny that our body of substantive law reposes on "general principles and broad bases," which are capable of philosophical classification. In truth, it is only through such a classification that we can hope, to use the words of Sir James Wilde, that these principles, "which have tacitly guided the decisions of our Courts, will be brought to the surface, grouped together, subordinated in their several relations, and contrasted in their differences."

Nor, we submit, will there be any grave difficulty in the way of such a classification. The bulk and complexity of our law is due entirely to its unsystematic development. The greater part has grown up from habits and customs, reduced to rules by a process of judicial legislation. By the same process, both in our courts of law and equity, these rules have been constantly—too often capriciously—varied or enlarged, to meet the wants of rapidly changing conditions of society, and a swift onward movement of civilization. Had these agencies been supplemented by a wise and consistent method of direct legislation, the work now projected would have been comparatively light. But, unluckily, our method of direct law making was perhaps the most imperfect and slovenly that could have been hit upon. It added to, instead of lightening, the labours of our judges, and offered a constant premium to legal subtlety and refinement. Hence, the vast and bewildering extent of our case, or judiciary, law, both Common Law and Equity. It is a mass of decisions, which contain in muddy solution almost all the great rules of positive law that affect the persons, property, and social relations of Englishmen. Though the writers of treatises have endeavoured to extract these rules by a careful process of abstraction and induction, the collection still remains so bulky, and so unreliable (without constant reference to authorities) that, as Mr. Austin justly observes:—

"It is impossible for even the most experienced lawyer to know it more than imperfectly. The knowledge of an English lawyer is nothing but a beggarly account of scraps and fragments. His memory may be stored with numerous particulars, but of the law as a whole, and of the mutual relations of its parts, he has not a conception."*

Yet all the rules contained in these decisions create or define rights which may be referred to a classification of rights founded on established principles of jurisprudence. And it would be as idle to maintain that any one of them could not be included in a philosophical classification, as it would be to maintain that a man could under any circumstances withdraw his being from the operation of physical laws. Whether the rights created by any of such rules are expedient is of course another question, which lies outside the province of jurisprudence, and can only be settled by appeal to what is in fact the origin of all law—the public opinion for the time being of the community. This public opinion is derived from a vast number of sources, from the existing conditions of society, the requirements of trade, the laws of political economy, nay, even the laws of physical science. The question, for instance, whether married women *should* have a right to contract, can only be settled by an appeal to the state of feeling existing in a given state of society, and that feeling is based upon a variety of circumstances, too remote to be here traced. The question whether there *should* be a right to import corn, and if so, whether there should be any restriction upon the right would be settled by appeal to a state of public opinion, derived from the laws of political economy so far as they are known to the community.

But when once a right has been established it falls into some well defined class; nor has all the ingenuity of lawyers

* Vol. II. p. 153.

or the stupidity of legislators been able to create a right or impose an obligation which is incapable of classification. It is true that in our system perverse attempts have been made to create false distinctions; but these distinctions do not stand in the way of a proper classification of rights. If the first part of the scheme has clearly explained the nature of all rights, and the method by which they are created, the classification of those rights will not be by any means so difficult as it seems at first sight.

First will come the introductory treatise, containing "English law in its origin, or, constitutional law." This treatise will deal with the nature of that sovereign authority, which is exercised by the people, through the two Houses of Parliament and the Crown:—the executive functions of royalty, and the rights which it retains under the name of Prerogative:—the *quasi* rights which the sovereign authority reserves to in itself in its legislative capacity, such as the privileges of Parliament:—the rights and obligations which it creates in favour of, or imposes upon, its executive officers:—the rights and obligations in connection with the exercise of the sovereign authority, which it confers upon its own constituent members, chief among which are the rights of political representation.

Then would follow the first great division of the Digest, which would deal with the duties of persons, considered generally as ordinary members of the community, so far as the violation of these duties are pursued and punished as "Crimes" or penal offences by the State.

The second great division would deal with the civil or municipal rights and obligations of persons—with the exception of "particular" or special rights of persons.

First, in the order of their development, the rights which arise by contract between individuals would be dealt with:—because it may be broadly stated, that from such rights all the rights included in this division, which hold good against

the whole world, such as the rights of ownership in all their varied modifications take their rise.

Then, following the general treatise on contractual rights, whether created by—(1), express contract; (2), implied contract; (3), or *quasi* contract—would come the second part of this great division. This would include all those rights which, when once created in any one, he may enforce against the whole world. The first section of this part would be devoted to those rights of this class, of which the subject is the person in whom the right resides; the rights, namely, which the sovereign authority has conferred upon every member of society, to—(1), personal liberty and safety; and—(2), to personal reputation. The second section of this great part would comprehend *Rights in respect of things.* An introduction to this great branch of positive law should explain clearly—(1), the nature of rights in respect of things; and—(2), the natural division of things into such as are immovable and such as are movable. And here the absurd distinction which has placed estates for years in land amongst things personal, and which has been discarded by the Succession Duty Act, would be finally got rid of, together with other absurdities of a like kind. The first title of this part of the Digest would then, in successive books, treat of the modes by which the various rights in respect of real or immovable property are—(1), created; (2), modified; (3), transferred; and (4), extinguished. In a book of this title, what Mr. Goddard calls "Incorporeal Rights" would be properly dealt with, under the head of "Rights over or in respect of real property, which are distinct from the ownership thereof." The second title would deal similarly with personal or movable property. A sub-section of the part would be devoted to "Charges upon Property," real and personal. Here we have an illustration of the necessity for drawing up, in the first instance, a consistent scheme for the Digest. We cannot conceive it possible that in the end the old and useless rules of the Common Law Courts respecting charges

upon property will be allowed to remain side by side with the new and consistent rules which Equity, adapting itself to every fresh influence of utility and convenience, has created. The law of mortgage, cannot, as it stands, be treated properly. In order to do this, the rights which it creates must eventually be treated uniformly as charges, independent of any right of ownership, and this fact can only be made clear by a proper preliminary classification of rights.

Last would come "Particular," or Special Rights of persons, or bodies of persons, arising from *status* (so far as it exists in modern society), or from contract, whether express or implied. In this subdivision would be included the rights and obligations of—the executive or subordinate officials of the sovereign authority; corporations; husband and wife, including—(1) parent and child, and (2) guardian and ward; master and servant; principal and agent; trustees; executors and administrators; professions; trades.

Such is a faint outline of the method for a Digest of our system of law, which would, we believe, be at the same time philosophical and practical. We quite understand that to raise, with the rough, unhewn materials which form the present huge, rambling structure, such a simple, yet graceful, stately, and useful building, will be an infinitely more laborious and delicate task, than merely to take it down, clear away the rubbish, and rebuild the shapeless mass. But this is the object with a view to which a Commission has been appointed; and the successful achievement of it is, we trust, to be the glory of our time. It cannot, of course, be carried out by such a body as the existing Commission, the leading members of which are men who have earned, or are close upon earning, repose from long years of wearing professional life. The business of organizing and superintending the scheme will of itself be no light one, for it will certainly not be completed in ten, possibly not in twenty, years; and during all that time there must be a supreme authority, full of learning, practical expe-

rience, vigour, vigilance, and patience; seeing that every detail is properly done, in due order; narrowly and conscientiously inspecting, by means of its members, every successive draft of each smallest division, and, by this means, bringing the work of each compiler up to one common standard of perfect workmanship.

But its final task will be of all the most arduous—the one which will need highest qualities of ability and discretion. Before the new body of law is given to the people, it will have to be cleared of all needless rules; contradictory decisions will have to be reconciled by the framing of a single rule of law; obscure questions will have to be made plain by the statement of an intelligible rule.

For we need scarcely say that we dissent from that part of the definition of the Commissioners which regards a Digest as a mere embodiment of the law "as it exists." Such a work will be but a beginning of the Digest; a mere rough draft, in which shall be extracted and put in an intelligible form all the existing rules of law, however, made so that on careful examination everything not wanted may be got rid of, everything wanted may be added, and new rules made for the "solution (we quote words of Mr. Justice Byles cited by Mr. Macleod) of such undecided questions on the subject as may hereafter arise." How this is to be done—whether the cases are to be withdrawn like a scaffolding when the edifice is complete, and whether the final and permanent form which the work will take will be a Digest or a code, these are all questions momentous indeed, but which need not be at once decided.

But if the Commission wishes to give the State any effective help towards doing the duty it so strongly enforces upon it, of taking "care that the laws shall as far as practicable be exhibited in a form, plain, compendious, and accessible, and calculated to bring home actual knowledge of the law to the greatest possible number of persons," it will leave vague definitions, and set about real work in some such

fashion as we have sketched out. The artificial language, the refined and needless distinctions, the bulk and senseless complexity of our law, offend, and irritate, and weigh down beyond all endurance a busy, active, and practical age and people. The nation is wearied out and demands a reform, which will render our system clear, concise, simple, intelligible to all. In a state of society so complex as ours, it would of course be vain attempting to bring our laws into a shape and within a compass which would allow even educated men to master it without making it a special study. Its practice and procedure must always be conducted by a trained class. But though, to use the words of Mr. Austin, it is quite true that "the law can never be so condensed and simplified that any considerable portion of the community can know the whole or much of it, it may be so much so that lawyers may know it and inform non-lawyers clearly as to their legal position. It may, too, be so arranged that each of the different classes may know something of that part which most concerns them,"* or, to use the fitting words of our greatest English statesman, "that the laws may be made plain and short, and less chargeable, to the people." † This clearly can never be done by adopting the existing divisions, and avoiding "scientific analysis."

Art. III.—THE LORD CHIEF JUSTICE OF ENGLAND AND MR. JUSTICE BLACKBURN.

FEW members of the Bar who were present in the Court of Queen's Bench on June 8, 1868, are likely speedily to forget the memorable scene which then took place. Those who for thirty years had been accustomed to witness

* Austin's Jur., 2-359.
† Speech of Cromwell, Sept. 4, 1654, Carlyle 2,-267.

the stream of justice flowing in unruffled calmness through those hallowed precincts, felt for a moment as if the idea of Euripides had been realised, and the fountains were flowing up the sacred rivers. But it soon appeared that it was only a temporary obstruction which had occurred; and after the Chief Justice had vindicated himself and the law of which he is the guardian, and Mr. Justice Blackburn had offered his explanation of his apparently wayward course, it became obvious that "the fountains of justice" were undisturbed, however clearly it had been shown that the streams that are derived from them are liable at times to flow unevenly, as well as to "take tinctures and tastes from the soil through which they run." But the strangeness of the event which then took place calls for some comment from us; and we shall state the views we have formed with reference to it and the circumstances out of which it arose, with all respect for the eminent personages concerned, but without any attempt to conceal our own deliberately-formed opinion. We think there can be little doubt, however much it was to be regretted that any necessity should have arisen for the Chief Justice to repudiate the views stated by Mr. Justice Blackburn in his charge to the grand jury of Middlesex in the case of *Reg.* v. *Eyre*, that the former did no more than his duty in publicly expressing his disapproval of the charge of the senior puisne judge. Every one who read the report of the charge in the newspapers must have seen at once its inconsistency with the views stated in the charge of the Chief Justice in the case of *Reg.* v. *Nelson and Brand;* and when Mr. Justice Blackburn stated twice during the course of his charge that he had the concurrence of the Chief Justice in what he said, it certainly seemed at first that the only inference that could be adopted was that the Chief Justice had materially modified his opinions on a question of great importance. Logical as this inference for the moment appeared to be, we confess that we struggled against it. The views which the Chief Justice had laid down had been so clear, and his conclusions so well grounded,

his opinions on martial law had been so consistent with themselves and with the whole of our legal system, and he had spoken with such a full conviction of their truth, that we could scarcely suppose that he had abandoned the strong position which he had formerly occupied. Sober reflection, therefore, led us to the conclusion, that "Some one had blundered;" and where the blame lay has now become tolerably clear and intelligible.

After comparing what was said in court by the Chief Justice on the occasion referred to, with the explanation then given by Mr. Justice Blackburn, and after reading the letter of the former, and that of Mr. Justice Lush, the facts are obvious enough, and supply sufficient grounds on which a correct judgment may be formed. Before charging the grand jury in *Reg.* v. *Eyre*, Mr. Justice Blackburn had embodied the substance of the law he intended to lay down in a paper. The view of the law therein contained, and which was assented to by the other judges of the Court of Queen's Bench, may be considered from the statement of the Chief Justice to have been as follows:—

There was undoubtedly a proposition of law which seemed to us sufficient for the guidance of a jury, and which we understood was the form, if I may so express myself, the basis of the charge, on which proposition we were all agreed, viz., that assuming the governor of a colony had, by virtue of authority delegated to him by the Crown, or conferred on him by local legislation, the power to put martial law in force, all that could be required of him, so far as affecting his responsibility in a court of criminal law, was that in judging of the necessity which, it is admitted on all hands, affords the sole justification for resorting to martial law—either for putting this exceptional law in force or prolonging its duration—he should not only act with an honest intention to discharge a public duty, but should bring to the consideration of the course to be pursued, the careful, conscientious, and considerate judgment which may reasonably be expected from one vested with authority, and which, in our opinion, a governor so circumstanced is bound to

exercise before he places the Queen's subjects committed to his government beyond the pale and protection of the law. Having done this he would not be liable for error of judgment, and still less for excess or irregularities committed by subordinates whom he is under the necessity of employing, if committed without his sanction or knowledge. Furthermore, we considered that a governor sworn to execute the laws of a colony, if advised by those competent to advise him that those laws justify him in proclaiming martial law in the sense in which Governor Eyre understood it, cannot be held criminally responsible, if the circumstances called for its exercise, even though it should afterwards turn out that the received opinion as to the law was erroneous. On the other hand, in the absence of such careful and conscientious exercise of judgment, mere honesty of intention would be no excuse for the reckless, precipitate, and inconsiderate exercise of so formidable a power, still less for any abuse of it in regard to the lives and persons of Her Majesty's subjects, or in the application of immoderate severity in excess of what the exigency of the occasion imperatively called for. Neither could the continuance of martial law be excused even as regards criminal responsibility when the necessity which can alone justify it had ceased by the entire suppression of all insurrection, either for the purpose of punishing those who were suspected of being concerned in it, or for striking terror into the minds of men for the time to come. This was the substance of what we all concurred in thinking was the proper direction to be given to the jury as to the responsibility of a governor in applying or continuing martial law. This was all that it appeared to us necessary to lay down in point of law.—*Daily News*, June 9, 1868.

It appears that Mr. Justice Blackburn had read the paper in which his views were stated to the other judges before the arrival of the Chief Justice in the room in which they assemble before going into court, but on the latter coming into the room Mr. Justice Blackburn made a verbal statement to him of what was embodied in the paper; and Mr. Justice Lush, in the letter already referred to, says that the paper contained only the general propositions mentioned by the Chief Justice in court, "adding that the application of

the principles to the particular case required him (Mr. Justice Blackburn) to tell the jury what was the law of Jamaica." We gather that this reference to the law of Jamaica was not mentioned by Mr. Justice Blackburn in his verbal statement to the Chief Justice; but after the broad principles which the former had declared that he was prepared to lay down, it could scarcely be very material what he intended to say to the grand jury with respect to the law of Jamaica. We, therefore, attach no importance to what we assume was an omission in his verbal statement to the Chief Justice. Mr. Justice Lush further says of the paper—"In no other way did it refer to that law, nor did it state anything about martial law, or refer to the case of Gordon."

It is clear from this that the points mentioned by the Chief Justice in the passage we have quoted were the only matters of law stated by Mr. Justice Blackburn to the other judges, and the only matters of law, therefore, in which they expressed their concurrence. Now it may be admitted that Mr. Justice Blackburn in his charge to the grand jury did mention these points, and so far directed them in accordance with the views of the rest of the bench, but unfortunately he mentioned a great many more which he had not brought to the attention of the other judges, and which were directly opposed to the views expressed by the Chief Justice in his charge to the grand jury in the case of *Reg.* v. *Nelson and Brand.* With respect to the legality of martial law as applied to civilians, the meaning of the Jamaica statutes, and the removal of Gordon from Kingston into the proclaimed district, Mr. Justice Blackburn expressed opinions in a clear and decided manner which were not stated by him to the other judges, and which were totally opposed to those of the Chief Justice as laid down in the charge just mentioned. Not only was no account made of the views which the latter had stated with the greatest distinctness and force, but he was actually represented as sanctioning doctrines which ran counter to all that he had laid down with so much care as to show how fully he

had considered the matter, and with so much clearness as to prevent the possibility of mistake.

The emphatic disclaimer by the Chief Justice of views which he was represented to have sanctioned, but from which he entirely dissented, was therefore not only perfectly justifiable, but imperatively called for. In a manner the most explicit, and in language the most unequivocal, he entered his protest against the opinions which had been expressed by the senior puisne judge in his charge to the grand jury of Middlesex.

I differ, in the first place, from the learned judge in the conclusion at which he seems to have arrived that martial law, in the modern acceptation of the term, was ever exercised in this country, at all events with any pretence of legality, against civilians not taken in arms. The instance referred to is of most doubtful character. In the second place, while I never doubted that it was competent for the legislature of Jamaica to confer on the governors the power to put martial law in force, I entertain for the reasons I have stated elsewhere very grave doubts whether the Jamaica statutes have any reference to martial law except for the purpose of compelling the inhabitants of the island to military service and subjecting them while engaged in it to military law. I abstain from expressing any positive opinion on so debateable a question, but I must, at the same time, say that, in my judgment, there is too much doubt on the subject to warrant a judge, in the absence of argument at the Bar and of judicial decision, to direct a grand jury authoritatively that these statutes warrant the application of martial law; nor does such a direction appear to me to be at all necessary, seeing that we are agreed that a governor, giving effect to those statutes in the sense in which they have been understood in the colony, would not be criminally responsible. But above all, I dissent from the direction of Mr. Justice Blackburn, as reported, in telling the grand jury that the removal of Mr. Gordon from Kingston into the proclaimed district for the purpose of subjecting him to martial law was legally justifiable.—*Daily News*, June 9, 1868.

With respect to the explanation given by Mr. Justice

Blackburn, we cannot but consider it as unsatisfactory. It was neither a humble apology for what he had done, nor a vigorous defence of himself. It oscillated between the two, and it conveyed therefore the impression of a man who felt himself to be in the wrong, but who had not the generosity to admit it frankly. We are fully alive to the difficulty of the position in which the learned judge was placed; but a little more boldness, or a little more candour, would have easily extricated him from the embarrassing circumstances which environned him. As it was, he left the matter very much in the same condition as it was when the Chief Justice finished what he had to say, and he did not succeed in the smallest degree in impugning the statements of the latter, far less in vindicating himself.

After carefully considering the whole matter, we have no hesitation in arriving at the conclusion that Mr. Justice Blackburn made a great mistake. Knowing as he did the opinions of the Chief Justice, it was his duty to explain to the other judges fully and explicitly the views which he intended to lay down to the grand jury. The statement which he made to the other judges did not contain the whole of what he did lay down in his charge, and in this he acted not merely unwisely, but, as we humbly think, unfairly. It was clearly his duty, after consulting the rest of the court, to adhere rigidly and scrupulously to the views which he had brought to their notice and to which they had assented as sound and just. Even if he had said nothing in his charge as to the sanction which the other judges of the court gave to his views, this was the obvious and straightforward course which he ought to have adopted; but his error was greatly aggravated by his claiming their sanction for views which had never been brought to their attention, and which he must have perfectly well known were opposed to the express declarations of the Chief Justice.

In his explanation to the court, Mr. Justice Blackburn, after referring to the charge of the Chief Justice, said, "I

came to the conclusion (it may be an erroneous one, but one which I still entertain) that there was no point on which it was necessary to give the grand jury a direction on which my opinion as to the law was in conflict in any way with any direction contained in that charge." It has been suggested that Mr. Justice Blackburn may have attached some technical meaning to "a direction," and that he did not consider the other parts of his charge touching on legal matters as coming under that category. We acquit the learned judge of quibbling of this sort. Neither do we for a moment suppose that he so totally misapprehended the scope of what the Chief Justice had said, as these words would seem to imply. The declaration seems to us only one of those unmeaning things which a man says when he finds himself in a disagreeable position and must say something, but has not the good feeling to say the right thing.

But the statement of the Chief Justice on one point makes the error of Mr. Justice Blackburn still more serious. It appears that almost on the eve of the delivery of the charge, the opinion of the latter was that the apprehension and removal of Gordon were in point of law unjustifiable. The Chief Justice says:—"It certainly was so understood by other members of the court, and I believe I am warranted in saying, that the statement of the learned judge to the grand jury on this head took the other members of the court as much by surprise as it certainly did me." Mr. Justice Blackburn made no attempt to explain his extraordinary change of opinion on this vital matter, and we believe for the very simple reason that it was impossible for him to do so. The feeling of the learned judge seemed to be a dogged determination to brave the whole thing out without explaining. In the circumstances in which he was placed, a man of a sensitive mind would have called on the mountains to cover him, or would have turned resolutely on the Chief Justice and fought *à l'outrance*. But Mr. Justice Blackburn did neither, and therefore excited little sympathy on the part of the crowded Bar, who witnessed the strange and painful scene.

We do not ascribe to Mr. Justice Blackburn any unworthy motive for what he did, or for what he failed to do. His whole conduct in this matter has the appearance of a freak—of an *escapade*—of a temporary aberration. The actions of men are in general governed by certain motives, and when these motives are very recondite, it requires a large amount of sagacity to discover their exact nature and operation. But cases occasionally arise which are entirely abnormal, and where things are done which are utterly inexplicable on any of the ordinary principles which regulate human actions. We are inclined to rank the conduct of the learned judge under this class of cases, rather than to ascribe it to any of the causes which have been suggested, and which we think it quite unnecessary to mention. Mr. Justice Blackburn is no doubt an excellent lawyer and an able judge, but he possesses perhaps too much of the *perfervidum ingenium* of his countrymen, and there are times when, even with the wisest of our northern friends, this quality escapes for a short season from the prudence which in general directs its action. We do not think that anything more can be said with respect to the case now before us, and we are happy to believe that this is really the sum of the whole matter. The thing was an untoward accident, and the sooner it is forgotten the better.

We have formed our opinion of the conduct of Mr. Justice Blackburn quite irrespective of the consideration whether the law he laid down, in opposition to that contained in the charge of the Chief Justice, was right or wrong. Neither have we been influenced by the importance of the question involved, but have endeavoured to treat the matter as if the bill presented to the grand jury had been for the non-repair of a highway, or for refusing to serve the office of petty constable. But we cannot conclude without expressing our dissent from the views stated by Mr. Justice Blackburn, and our full concurrence in the opinions of the Chief Justice. In the charge of the latter in the case of *Reg.* v. *Nelson and Brand*, the question of martial law was fully discussed, and the views arrived at supported by unquestionable authority and irrefragable argu-

ment; but Mr. Justice Blackburn rested his opinion on his own mere *ipse dixit*, and assumed certain doctrines as if the whole matter were too clear for argument. Even if the admirable exposition of the Chief Justice had not been in existence, this would have been rather too much for those who, like ourselves, had always considered the law of England as something which could not be set aside on any emergency, or for any reasons of state, or in consideration of any end to be gained, however great that might be. But to proceed in laying down the law on this vital matter, as if all that the Chief Justice had said with so much force of argument and clearness of statement went for nothing, was still worse. In a question of smaller importance this might have called forth only a slight censure, but when the highest points of our law were touched, it must be emphatically condemned.

On the case of Mr. Eyre we do not desire to pronounce any judgment, although we cannot but remark that on the facts Mr. Justice Blackburn exhibited an undue bias in favour of the defendant. The question of the guilt or innocence of the ex-Governor of Jamaica is one thing, but the question of what is the law of England on a subject of primary importance is a very different matter. The charge of a judge as to facts, like the verdict of a jury, however erroneous it may be, does not affect the law applicable to the case. But when the senior puisne judge of the Court of Queen's Bench lays down the law to the grand jury of Middlesex, on a matter of vital moment, according to his own private interpretation, and claims for his peculiar views the sanction of the Court which he represents, the country owes a deep debt of gratitude to one who, like the Chief Justice, boldly comes forward to assert the true doctrines of the law of England, and to vindicate the high court over which he so worthily presides. Among his many claims to the esteem and admiration of his countrymen, this will assuredly not be regarded as the least.

Art. IV.—THE UNION OF CHURCH AND STATE.

[In the legal views expressed by the learned writer of the following article in his answer to the first question propounded by him we concur generally, but we cannot assent to what he has stated in his answer to the second.—Editor of L. M. and L. R.]

THIS matter has ripened into one of the, indeed we may say, into *the* leading topic of the day; and, like many other questions of a public nature, it has become, from a variety of causes, so overloaded with irrelevant matter, that its real merits are almost lost sight of.

Though ventilated, to use a word much in vogue—though ventilated *usque ad nauseam* both in and out of parliament, there is a remarkable dearth of information on the subject.* The highest dignitaries in the Church, in common with the most exalted statesmen, are heard publicly to say, "What does *disendowment* — what does *disestablishment* mean?" This acknowledged dearth of information is, to say the least of it, very remarkable. But it is, we think, to be accounted for in the fact that it is more of a *legal* than a *general* question; and, as such, is beyond the reach of those, to whom we are in the habit of looking up to for information on questions of public policy. When regarded from a legal point of view, and in a right spirit, it is, we think, a very plain affair. Without more, therefore, we will hasten *in medias res*, assuming that if the question be not now involved in the Suspensory Bill, the issue will soon come to be raised: as it has been authoritatively announced that the disestablishment of the Church of England is looked forward to as a new and happy epoch for the Catholicity of the world.

We propose to take it in the following manner:—

1. What is the relation between the Church and the State?

* Written before the Suspensory Bill reached the House of Lords.

2. Has Parliament the power to alter that relation, as it regards the Irish Branch of the United Church?

1. We must go back to the Reformation to explain it. The state of things at that epoch (1534) was this. The Pope of Rome claimed to be supreme in all matters ecclesiastical. His power had been, it is true, much restrained before that by the several statutes of provisors and præmunire; but it was not until the Reformation that England finally renounced the authority of the See of Rome. No one will, we think, call in question any part of this. The authorities, at once numerous and clear, admit of no dispute about it.

Now, there is a wide-spread error, for it is an error, that the power of the Pope, whatever it was, passed, at that time, from him to Henry VIII.: or, if you prefer the phrase, passed from the See of Rome to the Crown of England. There is, we repeat, a wide-spread fallacy which takes this form: and it is one that has been pregnant with an unusual degree of mischief; for it has given rise to the belief (*inter alia*) that the Sovereign can, *ex mero motu*, give laws to the Church. What really did take place at the Reformation was this:— The power, which the Pope had, *quoad hoc*, was, by Act of Parliament vested, *not* in the king, but in the High Court of Parliament: and, from that time, "an enlightened parliament has overarched the whole community."* It is not an easy matter to fix the precise period of time when the High Court of Parliament got full control over all matters ecclesiastical; it is not, indeed, an easy matter to define the exact time when the Reformation itself began; but this is clear, that in 1533, when the 25 Hen. VIII. c. 19, was passed, the Church of England and all that related to its government, whether in doctrine or discipline, in form or substance, were placed under the full and complete control of Parliament. In other words, the supremacy of the law or of the civil power over the Church was complete; and, from that time to this, with an exception

* Grattan.

(*temp.* Q. Mary) unworthy of notice, the Church of England and all that relates to it, as we have said, whether of form or substance, have been and are in subjection to the High Court of Parliament. By way of illustration, take the Book of Common Prayer, the Thirty-nine Articles, and the like. These are, in the eye of the law, mere Acts of Parliament, and no more—Acts of Parliament receiving their construction, when controversies arise, in our courts of justice, just as any other Act of Parliament relating to temporal matters does, when called in question. Gorham's case might be cited, if any authority were needed, for what no lawyer would have the hardihood to deny.

We have shown, then, as plainly and as shortly as we could, where the power of making, repealing, and abrogating the laws affecting the Church became lodged at the Reformation, and where it now resides—we should say, where it *exclusively* resides; for no other person or persons whatever can interfere in the matter. Grattan spoke in the language and spirit of the British law when he said—"What is the Protestant religion but the interposition of parliament rescuing Christianity from abuses, introduced by its own priesthood?"

The exclusive right of legislating, in matters of religion, being shown, we proceed to show where the power of administering the laws so made resides. It is, as M. de Lolme, in his excellent work on the constitution of England, says, one of the characteristic excellencies of the constitution that the administering of the laws is committed to *one* person. "It has been made" (says he) "the indivisible and inalienable attribute of one person alone." The Queen, therefore, is not only supreme magistrate or chief of the executive; but in her is vested, *exclusively*, the whole executive power. She is only a component part of the High Court of Parliament or of the body that makes the laws (as already explained), but in her, as chief magistrate, is united the whole executive power. In her executive capacity she convenes, prorogues,

and dissolves the convocation of the clergy, just as she convenes, prorogues, and dissolves the High Court of Parliament. She appoints to the dignities and offices of the Church, as she appoints to those in the State, as in the army, navy, or in the law. She is, in few words, Supreme Head of the Church as she is Generalissimo of the army, and as she is the Fountain of Justice. The power of putting the laws in force must be lodged somewhere; and all the best writers on civil and religious liberty acknowledge the transcendant merit of the constitution of England in making it "the indivisible and inalienable attribute of one" supreme magistrate.

We may here be asked, probably, what is the meaning, the use, or effect of the several statutes which declare the Sovereign to be "supreme head of the Church of England if this be a proper account of the Queen's power?" We answer —these words were, at the time they were first introduced, words of vast political import. They were meant to convey to a hesitating world, by a formal public declaration, made in the High Court of Parliament (consisting of king, lords, and commons—*i.e.*, the people) that the Pope of Rome and all his claims to supremacy, real or pretended, had been finally renounced by the nation: and that no foreign prince or potentate had any jurisdiction in this realm. The Pope's supremacy being so renounced by the supreme power, the constitution itself, by the common law, independently of any act of supremacy or Act of Parliament whatever, vested the administration of laws relating to the Church, as the common law did the administration of laws relating to matters purely civil, in the king. *E majori cautelâ* only were these affirmative words declaratory of the King's supremacy in lieu of that of the Pope introduced.* It may be that some may differ from Sir Matthew Hale, in the construction of the statutes of supremacy. It may be that they did create and confer on the Sovereign some new powers, rights, and privileges, or abolish some existing ones.

* See Hale's P.C. 74. 4 Inst. 121.

But we are not really much concerned about the question, whether the Queen derives her power to administer the laws relating to the Church from the common, or from the statute law, provided it be admitted (which cannot be disputed), that her powers are purely and simply of an *executive* kind. That being granted, we have made good our position, that the Queen can, *per se*, make no laws affecting religion; and that is only what we wish to show. The framing of canons affords a good illustration of what we have been saying. The 25 Hen. VIII. c. 19, empowered the king to appoint thirty-two commissioners to examine and revise the canons then in use. And it also prohibited the clergy enacting any constitutions or ordinances without the king's assent; in other words, with the king's assent the clergy might make canons; but it has been repeatedly adjudged in our courts of justice, that none of such canons, nor any canon that has not received the sanction of Parliament, binds the *laity*.* Indeed, it is an abuse of words to say that they bind even the *clergy*; for it is what the clergy do in compliance with the Uniformity Acts, as by subscription, oath, etc., and not because the canons bind them that they hold this or that doctrine, or comply with this or that form of discipline.

We arrive then, again, at this (which cannot be too often repeated), that the Queen, as head of the Church, or as supreme magistrate, has no power whatever to make any law affecting the Church; and that such power *exclusively* belongs to the High Court of Parliament. As M. de Lolme says—"The Queen is the head of the Church, but she can neither alter the established religion, nor call individuals to account for their religious opinions. She cannot even profess the religion which the legislature has particularly (by the Act of Settlement) forbidden; and the prince who should profess it is declared incapable of inheriting, possessing, or enjoying the crown of these kingdoms."

* See 1 Steph. Comm. 67 n. v. *Middleton* v. *Croft.*, Str. Rep. 1056.

This, then, is *the relation between the Church and the State.* Call it by what name you will, this is the connection, and the only connection, between them. What it really is, can only be, like many other parts of the constitution, gathered from a plain and simple narrative of facts. It does not, in the nature of things, admit of a definition, but it may be described in few words, thus—the High Court of Parliament has the *exclusive* power of *making* all laws relating to the Church, and the Queen, as chief of the executive, has the *exclusive* power of *administering* them: and *this constitutes the relation between Church and State.* It was established at the Reformation: and was "established," as Lord Eldon said, "not for the purpose of making the Church political, but for the purpose of making the State religious." Edmund Burke, as we all know, in one of the most sublime passages in his "Reflections on the Revolution in France," applies the word "consecration" to the effect of this alliance. We heartily re-echo the sentiment: for he has lived in vain who does not see, as he saw, that the consecration of the State by a State religious establishment is made, not only "to operate with a wholesome awe upon free citizens, but that all who administer in the government of men, in which they stand in the person of God Himself, should have high and worthy notions of their function and destination."

What has been the effect civilly considered? "This system of Church government," says Adam Smith, in speaking of the Lutheran Church, "was from the beginning favourable to peace and good order, and to submission to the civil sovereign. It has never, accordingly, been the occasion of any tumult or civil commotion in any country in which it has once been established. The Church of England, in particular, has always valued herself, with great reason, upon the unexceptionable loyalty of her principles."

"I love," says Grattan, "I love the mild government of the Church of England. It is a home for piety; it is a cradle for science; so that, by an early alliance with divinity, you

guard the Majesty of Heaven against the rebellion of wit.

* * * * * * *

The wisest men we know of, Locke and Newton, were Christians and Protestants. It is the minor genius that mutinies against the Gospel. He affords to the universe one glance, and has not patience for the second." Such is the record of the most eminent philosophers and statesmen upon the matter.

Now it is this long-tried connection that some men seek, at this time, to disturb, if not destroy. When this connection is severed in the manner proposed, and explained hereafter, the Church is *disestablished.* It is then no longer "by law established." The word *disendowment,* which seems to have perplexed so many, admits, also, of an easy explanation. When this connecting link is struck off, in the manner proposed and hereafter explained, the endowments of the Church would not necessarily be put up to public auction (for the Convention, which is thereafter to rule in matters of religion, might or might not confiscate them, or otherwise lay hands upon them); but thus much may fairly be inferred from the language of the leading advocate of the proposed change, that the proposed Convention, once in session, would lose no time in declaring the *voluntary* system (wherein endowments are unknown) to be alone fit for this "Age of Reason." That declaration made, as it soon would be, the Church would be "disendowed," that is to say, it would lose its endowments. What would become of those endowments we need not stop to speculate upon. It is enough for our purpose to say, that the Church, whose property they are now, would lose them. What the endowments of the Church of England are will be found elaborately explained in Vol. III., Steph. Comm., pp. 45-65.

At first sight, it does seem odd, to say the least of it, to find any one, professing to be a friend to *popular* rights, or to a *popular* form of Government, proposing to take away from the *people* the power which they have of making laws affecting

their religion! Had the supreme magistrate been enabled by law to make laws for the government of the Church; or, had the clergy in convocation claimed to do so, one could have understood an objection to the exercise of such powers; but for a friend to popular rights objecting to the people's right to share in making of the laws does seem, we repeat, most strange! We see in it not only inconsistency, but a contradiction, in thought, word, and deed; and, what is more, we cannot help seeing, under "the all-atoning name" of Liberty, an attempt to strike a deadly blow at one of the most inestimable privileges the people of England have—that is to say, the privilege of making their own laws in matters of religion. We have hitherto believed that to be a free country where the laws rule, and where the people are parties to the making of them. It seems we have been all along mistaken. However, *si erro, libenter erro, et me redargui valdè recusem.* Mr. Fox, we think, gave expression to a profound sentiment when he said—"If men had an interest in it, they would deny a mathematical as well as a moral truth."

Why, let us ask, for what reason—on what grounds is this long-established and well-tried relation between Church and State, as regards either the power of legislating for, or of administering the laws relating to, the Church to be disturbed? Has the High Court of Parliament either abused or failed in its trust? Trust abused is revocable. But is there any ground for such a charge? "Never innovate except where a grievance is felt," a sound maxim of legislation, is here set at nought. It may be that the legislative body, in endeavouring to clear Scylla ran foul of Charibdis; and passed the Six Articles and other laws, well deserving, from their Draco-like character, the censure that has been passed upon them. But the Church of England was in no way to blame for this. It was the dread of popery, which had taken such hold upon the people, that drove the people out of their wits, and the members of the legislative body into extremes. Again, inasmuch as all the disabling statutes have been

repealed, and almost universal toleration in religion exists, the competency of the legislative body to do its duty now must be, and is, not generally but universally admitted. And since the Bill of Rights (1 Wm. and M., s. 2., c. 2) took away the power of dispensing with and suspending of laws, and declared the Court of Commissioners for Ecclesiastical Causes illegal, no just ground of complaint has ever been nor can be brought against the executive power in this respect. We have, indeed, heard it asserted, as a reason for the present movement, "that it is time to correct the errors of the Reformation!" It was an error *ab initio*, according to this, either to give the High Court of Parliament (including the people!) the exclusive power of legislation in matters of religion, or to give the chief magistrate the exclusive power of administering those laws, or both.

"*Contrà negantem principia non est disputandum!*"

It remains to be considered, what would they, who seem dissatisfied with the present state of things, substitute in the place of what they would take away. This has, of late been publicly avowed by one of the most able and most zealous advocates of the new scheme. Mr. Bright, in a speech made at Liverpool on June 3, 1868, used the following words*:—

"What will happen will be this. The Irish Episcopal Church would call what in America they call a Convention. In reality, the archbishops, the bishops, and the clergy and their congregations, if they can bring them together, would meet in Dublin a thousand, or five hundred, or any smaller number of thoughtful, earnest men of the Church, to determine on their future organisation. When they come together they can determine all questions of creed and all questions of discipline; and they would require, of course, to originate what they call in the Free Church of Scotland a Sustentation Fund —that is, a fund to which everybody gives who is able and willing

* *Daily Telegraph*, June 4, 1868.

to give—a fund out of which ministers are supported in remoter parishes and districts, where their congregations are too poor to support them."

We have it thus authoritatively stated, that the power of making laws relating to religion is to be taken away from the High Court of Parliament (of which we, the people, are a component part) and, when taken away, is to be given to a Convention. This is the new plan! A stray leaf from the Rights of Man! So, then, the legislative and executive powers of the State, hitherto for the wisest of purposes kept distinct and separate, are to be *united;* and united in a Convention. That is not all. The people are to be deprived of the share they now have in making the laws for themselves! Nay, that is not all. The unity of the executive power, "that indivisible and inalienable attribute of one person," is to be destroyed. And how? by giving it to a Convention of many. Of how many it is to consist we do not know; but still its name is Legion. A triple crown, with infallibility for its rule of action, and universal supremacy for its motive, would be nothing compared to this; for there would be a Pope under every hat (whether that of a cardinal or a quaker), and the intolerance of the whole body would be in proportion to the number that constituted the governing body, and the passions they brought into it.

The proposed scheme, it seems, has this recommendation, that it is not a mere theory, but a system actually at work in the United States of North America. We can tell them, by way of information, that it was also actually at work in Utopia so far back as the time of Sir Thomas More. That it is in use at this day on the Potomac and Erie, in New York and New Orleans, may be, and is, probably, in the eyes of some, a strong recommendation. "Distance lends enchantment to the view." We have no desire to be nearer to it. We simply answer it in the ever memorable words of Grattan—"The

care of religion is placed no where better than in the legislature. Popery will tell you, that when it was entirely left to the care of the priesthood, it was perverted and destroyed." There are men still living who remember the Age of Conventions; and who remember one national convention, calmly and dispassionately, declaring "there is no God!" and shutting up the Temples dedicated to His service. What this new Convention, formed on the American model, would do, is not difficult to foresee.

A few words more. Milton and Locke it seems have been cited as authorities for something akin to this new scheme. We can answer for Locke, because we have his own words for it: that it is a libel upon him to say that he ever, for one moment, contended for a diminution of popular rights. If there ever was a friend to the *people* it was Locke. He was, for the same reason, the uncompromising advocate of toleration. But religious toleration differs as widely from the scheme proposed as light does from darkness. He lived and died a member of the Established Church. As regards Milton there is, we must own, more ground for it. A review of his Tractates on Church Matters, especially those on Reformation, Prelatical Episcopacy, Reason of Church Government urged against prelacy, and his Apology for Smectymnus shows that he was opposed, not only to all Church government, but to all religion, except, perhaps, his own; what that was none of his biographers have been able to tell us with any degree of certainty. Again, as Milton, especially after he began to write poetry, was wont to look down from the "Speculum Mount," and to speak over the heads of men (aiming at a perfection which Man here below seems incapable of), none but those who are at a dead loss for something to say would ever consult him for anything relating to the business of life; in other words, *Il ne faut pas être surpris des principes errones de ce fougueux republicain en matiere de religion, puisque il fût de toutes les sectes, et qu'il finit par d'être d'aucune.*

2. The second question is:—

Has the High Court of Parliament the power to alter that relation, as it regards the Irish branch of the Church?

By Art. 5 of the Act of Union (39 and 40 Geo. III. c. 6) the Churches of England and Ireland were united into one Protestant Episcopal Church; and the continuation and preservation of the United Church, as the Established Church of England, shall be deemed and taken to be "an essential and fundamental part of the union."*

Now what we say is this:—that for the Imperial Parliament to enact that the Irish Church shall entirely cease is *ultra vires*. Looking at the letter and spirit of the Act, we admit that it is within their powers to regulate or model the Irish branch of the United Church as they please; but to enact that it shall cease and determine is quite another matter. It has been gravely asserted, indeed, that Parliament can alter the hypothenuse, if it likes, or as one author expresses it, "Can do anything but make a man a woman, or woman a man." The divine attribute of omnipotence has even been assigned to it. But hear what Junius says about it:—

"The power of king, lords, and commons, is not an arbitrary power. They are the trustees, not the owners of the estate. The fee simple is in us; they cannot alienate, they cannot waste. When we say the legislature is supreme, we mean that it is the highest power known to the constitution, that it is the highest in comparison with the other subordinate powers established by the laws. In this sense, the word supreme is relative, not absolute. The power of the legislature is limited, not only by the general rules of natural justice and the welfare of the community, but by the forms and principles of our particular constitution. If this doctrine be not true, we must admit that king, lords, and commons have no rule to direct their resolutions, but merely their own will and pleasure. They might unite the legislative and executive power in the same hands, and

* See Stanhope's "Life of Pitt," Vol. III., 225, "Atkinson's Papinian," 1st Parliament.

dissolve the constitution by an Act of Parliament; but I am persuaded you will not leave it to the choice of seven hundred persons, notoriously corrupted by the Crown, whether seven millions of their equals shall be freemen or slaves."

It may be said that what is here alluded to is not a *legal* but a *moral* competency. As regards the making of municipal laws it may possibly be that there is no tribunal before which the legal competency of the High Court of Parliament could be determined; but as regards international questions, and they sometimes do arise, we see no reason to doubt of their being issuable, and that any one of our courts might adjudicate upon them. In so doing the court would be expounding, not making the law. At all events, the moral incompetency, if this only be meant by Junius, cannot fail, if enforced, to have its due weight in that august assembly, before which the Suspensory Bill will soon appear.

On this latter question, relating to the Irish branch of the United Church, we have strictly confined ourselves, for very obvious reasons, to the law of the case. Indeed, in answering the former we have done so as much as possible. A question of public policy, like a shaded silk, must be viewed in all situations, or its colours will deceive us; but the particular character of our work only admits of our holding it up to our readers in this one imperfect, perhaps, but never failing light.

. . . "Veniet de plebe togatâ
Qui juris nodos, et legum ænigmata solvat."

ART. V.—THE LAW OF MERCHANT SHIPPING.

A Handbook of Average, to which is added a Chapter on Arbitration. By MANLEY HOPKINS, Author of "A Manual of Marine Insurance." Third Edition. London: Smith, Elder, & Co., Cornhill; Stevens & Sons, Bell Yard. 1868.

A Practical Manual of Shipping Law. By W. A. OLIVER, Solicitor. London: James Imray & Son, Minories and Tower Hill; George Routledge & Sons. 1868.

The Practice of the High Court of Admiralty of England; also, the Practice of the Judicial Committee of Her Majesty's Most Honourable Privy Council in Admiralty Appeals, with Forms and Bills of Costs. By HENRY CHARLES COOTE, F.S.A., One of the Examiners of the High Court of Admiralty. Second Edition. London: Butterworths. Dublin: Hodges, Smith, & Co. 1868.

The Law and Practice of the High Court of Admiralty of Ireland, under the "Court of Admiralty (Ireland) Act, 1867," and the General Orders of 1867; with a Complete Collection of the Statutes relating to Merchant Shipping, and the Decisions thereon. By WALTER BOYD, LL.D., Barrister-at-Law, One of the Advocates. Dublin: Hodges, Smith, & Foster, Booksellers to the Honourable Society of King's Inns. 1868.

THE Merchant Shipping Consolidation Act was announced in the Royal Speech on the opening of Parliament last November; yet it has not been introduced during the session, and now lies relegated to the limbo of the Innocents, whither so many other flowers of jural growth have been recently consigned. It is strange that the Government did not make some effort to proceed with the measure, since there is very little diversity of opinion with respect to the reforms which this branch of law more imperatively demands. It is not likely

that the different schools of bankruptcy reform will ever come to a mutual accommodation, or be satisfied with the compromise which Parliament will make for them. But contracts, as distinguished from administration, do not admit of the same diversity of views in respect of the philosophic rules which should underlie contractual legislation. Contracts are *par excellence* the peculiar domain of the common law, which, after centuries of encroaching legislation, yet presents its original outlines and boundaries in striking contrast to the piecemeal and artificial limits set to this branch of law by successive statutes. The law of contracts, therefore, mainly consisting as it does of a number of first principles not very much overlaid by legislative frescoes, is eminently susceptible of philosophic emendation. However, we are strongly disposed to think that the chief aim of a reform of maritime private law ought to be to remove as far as possible all the rules of contract peculiar to marine jurisprudence, except where such special rules are necessarily connected with sailing rules, or other positive precepts peculiar to the code maritime.

The judicious Sir Edward Coke never stated anything that admits less of exception than that questions governed solely by the common law admit of little dispute, but that statute law is the fertile source of judicial hesitation and legal uncertainty. We may, therefore, safely generalise the observation we have made touching a reform of maritime law, and form a rough induction of the principles upon which law reform generally ought to proceed. These principles ought all to aim at a diminution of all unnecessary legislative exceptions to the rules of the common law, and to render legal questions susceptible of deductive rather than of inductive solution. Indeed all legal questions necessarily require a deductive solution; but the difference between questions of common law and those arising under statutes is, that in the former case the common law is only another name for legal reason, or sense. The postulates, therefore, whence the deduction is to be drawn, are few and undeniable; but as to a question arising under the construc-

tion of one or more statutes, every line of these enactments comprises a fresh principle which, as well as all common rules applicable to the point, must be kept steadfastly in view throughout the whole legal inquiry. It is no wonder, then, that the vice of unnecessary legislation perpetuates itself, and that one Act is applied to construe another—*obscurum per obscurius*—until, amidst this mass of statutes piled over one another, extrication from legal difficulty is impossible.

We are far from considering that marine jurisprudence admits as easily of reform as other branches of the law of contracts. This cannot be so, since the positive Mercantile Marine Code must always contain a vast amount of restrictions upon the private contracts of seamen, masters, and all other persons interested in maritime adventure. But so far as these technical rules do not interfere, the chief, if not the sole, aim of the reformer of our maritime code should be to place it in harmony with the more general principles of the common law of contracts.

Another great reform which should be contemplated by the framers of the Consolidation Act is the condensation in point of expression of the existing nautical code, or such portions of it as are to be retained. The Merchant Shipping Acts appear to have been drawn, at least originally, by lay officials, who have seemed to think that by the use of a profuse verbiage they would be placing a legal edge upon their own home-spun narrative. Accordingly, we find endless repetitions of the same words. Instances of this fault will be found in sections 38, 39, 80, 81, and in all the sections containing several clauses.

All these Acts could be very conveniently compressed into one-third of their present size. Bulk, as well as nutriment, is doubtless necessary for legal digestion, but bulk without proportionate nutriment is a great impediment to legal investigation. The marine code, in such a colossal form, too, seems to be the ultimate development of a legal bottle of smoke which none but legal genii could produce, and none but a

thorough lawyer could decipher. Such, however, was not the intention of the legislature in passing the Act of 1854. The object of Parliament was to have the private maritime law of this country stated in so clear and succinct a form as to be a highway for the simple mariners who were bound by its precepts. The profuse loquacity of the Act, however, renders it so ponderous that no person engaged in maritime adventure attempts to interpret it in any of its more complicated provisions. "Law made easy," indeed, is an incident of the millennium which it is folly to anticipate. But, most of our private maritime code is not law, but a collection of isolated precepts placed in juxtaposition only for convenience sake, and not in principle connected with one another. All that these rules require is to be stated in clear, but at the same time compendious, language, and, not like a nursery rhyme, to be repeating incessantly the thrice-told tale that the master and crew are not to do this, that, or the other thing.

In addition to the condensation of the language, and an excision of the unnecessary repetition of clauses in the way of recital or re-affirmance, the Act ought to be still further subdivided than it is at present. It ought to contain subdivisions relating respectively to evidence—practice—jurisdiction—and penalties. The last ought to be all enumerated together in a tabular schedule, each item referring in a column to the section of the Act inflicting the penalty; while the section should in turn refer to the schedule. For instance, the section instead of saying "And the master, for breach of any of the provisions of this section shall be liable to the penalty of £20," should merely state "shall be liable to the penalty stated in the schedule ( ) hereto.

This schedule of penalties should consist of about five columns, relating respectively to the section of the Act under which the penalty is sought to be enforced—the penalty—the jurisdiction under which it can be enforced—and, finally, the parties to whom it belongs, when of a pecuniary nature. This

manipulation would confer unlimited benefit on the practitioner, and still more on the persons concerned in marine adventure. The penalties at present scattered here and there throughout the Act—*rari nantes in gurgite vasto*—would be brought together, and this, where several different offences were tried at the same time, would give great facilities for reference to the Act, or, rather, would frequently dispense with the necessity for any reference outside the schedule.

These reforms being entirely mechanical ought not to require much time. The parliamentary draftsman, if expert in this branch of the law, ought to be able, by a judicious manipulation of the existing Acts, to produce in a week a fully developed and organised Act, such as we have described. However, if it required more time, it would be well worth the sacrifice.

The Social Science Association deserves well of the mercantile marine interests of this kingdom for its long-continued efforts in respect of a reform of the law of general average, or rather of a formation of such a law. For, unless we consider local customs to be equivalent to common law, there is no such thing as a general average code for the United Kingdom. London sometimes differs from Liverpool in its estimate of what losses should be allowed for in general average, while these ports are not always even consistent with themselves. It is unnecessary to refer to the still greater differences on these points which exist between British and foreign ports. And yet general average being a part of the general maritime law, ought to be deemed of an international nature, and to be regulated not by municipal, but by international rules. Acting upon this view, the Association convened, both in 1860 and 1862, a congress of deputies from all the leading maritime nations to discuss the provisions of a draft bill, which might be adopted by the different states respectively. Although an interval of some years has elapsed without this appeal of the Association having been acted upon by any legislature, it is to be hoped that the Society will renew

their onslaught upon the grievance which the maritime world suffers in this respect, and that it will have a Bill in conformity with its views presented at least to the British Parliament.

The Society has done much also in respect of the law of freight. But until all or some of its suggestions have received the sanction of Parliament, there is no likelihood that special marine contracts will be made expressly referring to the Society's code. The capital sunk in marine enterprise is so vast, and the contracts affecting such property so numerous that our courts are daily full of cases more or less connected with doctrines of maritime law. As in a multitude of counsellors there is safety, we have, therefore, no dislike to finding the treatises upon this department of jurisprudence multiplied beyond their present number, which, however, is not inconsiderable; nor do we find fault with such *brochures* as Mr. Oliver's; for, being intended for lay readers only, they meet a want which would otherwise be much felt, and which could not be satisfied by any display of mere technical lore.

Mr. Hopkins's book is of an intermediate character, between the *quasi* lay manual of Mr. Oliver, and the ponderous works of Abbott, Maude and Pollock, and Maclachlan. It approximates, however, in point of style generally more nearly to a mercantile disquisition than to a learned treatise, which it resembles only in size. We know not for what class of readers it was intended. But, whatever were the technical pretensions of the author, if it is found to be substantially a useful book to all, both the learned and unlearned alike, we will not quarrel with him for its homely exterior. If it arrives at another edition, however, we would suggest a few frescoes, in the shape of cases, as the work is singularly devoid of these ornaments at present—a want not supplied by reference to the Jettison of Jonah, or the Shipwreck of St. Paul. (p. 40.)

Mr. Hopkins deplores (preface 14) the want of success

hitherto attending the efforts of the Social Science Association, with respect to the formation of an international code of general average. He gives an interesting account of the causes of the "insuperable difficulty," that impeded the settlement of that question. "Unity," he observes, "can only possibly be attained by means of concession," and the point is, "whence is the concession to come?" "An ulterior difficulty," he conceives, "exists in the fact that the leading maritime nations enjoy at present highly organized codes, which either would not be changed to suit cosmopolitan views, or which could only be altered by laborious and tedious processes." This, however, is no difficulty at all; certainly no greater difficulty than any state of the law not in harmony with the international model. Take, for instance, any rule of our law of general average which the international model would seek to alter. The old rule could be as easily changed, if it were of statutory creation, as if it existed from time inmemorial. Indeed, the existence of codes in several of the countries of the continent rather facilitates a new casting of its jurisprudence. Common Law, or custom, on the contrary, is rarely altered without producing various effects which the law reformer never anticipated. There is not, in fact, any "insuperable difficulty" in the formation of an international general average code; and therefore, we hope the society will resume its learned labours, and not cease until it has attained the object of its wishes.

Our author has not been sufficiently explicit as to his own view of the principles on which general average reform ought to be founded. But, so far as we can infer, those principles, from his comments on peculiarly doubtful cases, his judgment seems to proceed on very philosophic and satisfactory grounds. He is bolder with respect to the mode of apportioning damages in cases of collision, and unsparingly denounces the present absurd rule of the Admiralty. If both vessels be in fault, the rule of the

court is to add the damages, losses, and costs of the two ships together, and then make each vessel, irrespectively of its value, pay half. This "inequality," to use a politico-economical phrase, of the incidence of damages in cases of collision under the present law may be very briefly exposed. A, for instance, is a new vessel, worth £10,000, and B, an old collier, worth only £1,000. If both are in fault, and damaged, the cost of the repairs will be equally apportioned on them. Let us suppose that the cost of the repairs to A amount to £1,800, and those to B to £200. Each vessel would then have to pay £1,000, so that "equality" in such a case would by no means be synonimous with equity. We concur altogether with Mr. Hopkins in thinking that "the incidence of the loss would be arranged better by letting each bear its own damages" (p. 190). He adds, that "the most obvious rule by which the principle of mutual participation would be maintained, and the inequality of penalty be at the same time avoided, is that of dividing the joint losses and expenses on the united values of the two vessels." The author seems to mean by this an assessment of the joint damages on each, according to its value.

A still better rule, is the entire and thorough adoption of the Common Law rule, as to contributory negligence, and, when this is gross, to suffer the damage to remain where it falls. This is Mr. Oliver's view, and is unquestionably sound. If the rule of the Common Law is sound and expedient for the cases to which it is applied by the Common Law Tribunals, it must be equally expedient for all others; and, conversely, if inexpedient or unsuited for the latter description of torts, it is equally unsuited for cases at Common Law. An injury by sea ought to be subject to precisely the same legal rules as if it happened on land. No one has ever suggested that Lord Campbell's Act should not be extended to marine disasters involving loss of life; nor does the occurrence of a fatality on a steamboat, rather

than on a railway, raise any legal element that can require special treatment.

Unless uniformity of principle is observed in adjudicating in different branches of law, the common law will in a short time have ceased to exist, and particular customs alone shall be the guides for judicial discernment.

In connection with this point, we may refer to the cases of *Wilson* v. *Rankin*, 34 L.J.Q.B., 62; and *Grill* v. *The General Iron Screw Company*, L.R., 1, C.P., 600. The former case was an action on a policy on freight, on a voyage from a port in North America to Liverpool. The vessel was chartered to load a cargo of wood goods, "and deck-load, if in season." The vessel sailed at a period when it was illegal to carry deck-loads, and loaded a small quantity of deals on deck, and some spars. This deck-load was not shipped by the charterer, and they were taken without the plaintiff's—the owner's—knowledge. They were intended for the use of the ship, but not for that particular voyage, and it was shown to be a common practice for vessels sailing from that port to take some spars on ship's account, because they are cheaper there than in England. A loss having happened, and a claim having been made on the freight policy, the ultimate question was whether the master was the agent of the owner, so as to bind him by the illegal act of carrying a deck-load at a prohibited time. The judgment of the court was against the underwriters, on the ground that the owner could not be taken to have constructive, as he had not actual, knowledge of the illegal act of his master. "In this sense, therefore," observes Mr. Hopkins, "an error of judgment in a shipmaster, producing ill consequences, may be converted into an illegal, and, consequently, barratrous act, the effects of which are entailed on the underwriter, and noton the owner, under whose general authority the master acts." Mr. Hopkins does not expressly offer any opinionupon the philosophy of this rule, but seems to consider it inexpedient.

The other case we have mentioned, *Grill* v. *General Iron Screw Company*, may be appositely reviewed with the foregoing. The action was on a bill of lading, which contained, *inter alia*, the exception of barratry. The steamer, which was the subject of the action, came into collision with another, and sank; the damage was owing to the negligence of the persons on board the former vessel. The plaintiff, who had shipped goods on board of her, having sustained loss, thereupon brought his action against the owners as carriers, as for gross negligence. The defendants pleaded the exception of barratry in the bill of lading, and relied on the "Merchant Shipping Act, 1854," which enacts that "any damage caused by non-observance of rules shall be deemed to have been occasioned by the wilful default of the person in charge of the deck." They contended, therefore, that the negligence complained of was barratrous, and, as such, was within the exception in the contract. The court, however, held that the conduct of the men in charge, though grossly negligent, was not barratrous. In reference to the analogy suggested between the case before the court and a policy of marine insurance, Mr. Justice Willes drew the following distinction:

"I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea; and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea. The fact that the loss is partly caused by things not distinctly perils of the sea, does not prevent it coming within the contract. The bill of lading is different; it is a contract to carry with reasonable care, unless prevented by the excepted perils."

The conveyancing lawyer is familiar with the inconveniences to which the different rules of interpretation, applied to settlements of real and personal property, have given rise; and nothing certainly can more impede the construction of a philosophic code in any branch of law, than the application of different rules to similar contracts.

Yet, insurers are certainly entitled to the peculiar consideration shown them by Mr. Justice Willes.

In connexion with the point in *Wilson* v. *Rankin* we may refer to the ruling in *Kirchner* v. *Venus*, 12 Moore's P.C.R., 361, (a case not mentioned by Mr. Hopkins) in which the Privy Council decided that evidence of a local custom unknown to the plaintiffs, could not affect their rights as *bonâ fide* holders for value of the bill of lading. Upon this point we can only repeat what we have already stated, that an assimilation of the law maritime to the common law, where there is no general international principle at stake, is the secret for allaying the conflict of laws which the Admiralty and Common Law tribunals will otherwise exhibit.

The tenacity of courts of equity in enforcing a vendor's lien for the unpaid purchase-money of an estate may be well contrasted with the facility with which a lien for freight is deemed waived by our Common Law Courts. For in the said case of *Kirchner* v. *Venus* the Privy Council also decided that when by a bill of lading freight is to be paid by the shippers at the port of shipment, no lien upon the goods can be maintained against the consignee at the port of discharge, even if the money is not in fact paid. We do not see "the inconveniences of establishing such a lien" referred to by Lord Chelmsford in his judgment in that case. For once that the goods were delivered by the master, the lien should be decreed abandoned. But, previously to the delivery, there is no greater difficulty in holding them subject to a lien than in an ordinary case where the bill of lading expressly shows that the goods are subject to freight. We should like to see our maritime code brought as much as possible into harmony, not only with the doctrines of the common law, but also with those of equity.

A maritime lien for damage caused by a collision follows the delinquent ship into whatsoever hands she may come, and can be enforced within a reasonable time; *Dean* v. *Richards*.

The Europa, 2 Moore's P.C.R., N.S., 1. There surely is as much inconvenience in the rule in The Europa's case as in that which we are considering. Again, if a bill given for the freight has become due and dishonoured before the ship arrives at her destination, the lien is revived unless the ownership of the cargo has been changed in the meantime. Here also we find the inconvenience referred to by Lord Chelmsford ignored on account of more important considerations. The law ought not to be astute in depriving a creditor of a lien or any other substantial security he may have for the satisfaction of his claim, where the right of a third party is not in question.

The question of lien, indeed, had been previously decided in the case of *How* v. *Kirchner*; so that the only point is the case of *Kirchner* v. *Venus* was whether the existence of a local custom at Liverpool affected the principle of the decision in *How* v. *Kirchner*. We are therefore not quarrelling with the legality of the decision in *Kirchner* v. *Venus*, but only with the philosophic principles referred to in that case by Lord Chelmsford.

The composition and style of Mr. Hopkins's work are very inartistic. For instance, we meet with such quaint phrases as "all the accidents of three elements," (p. 144) as descriptive of perils of the seas. Innumerable other instances of wide and unusual expressions occur throughout the work.

It is also to be regretted that a treatise abounding in so much practical good sense was not constructed with a closer view and reference to decided cases. Only 150 cases altogether are cited by our author, while his references to statutes are confined to five. He also seems to think that the repeal of the prohibition against deck-loading was effected by an Act of 1866, whereas the Customs Consolidation Act, which raised the prohibition was repealed by the Merchant Shipping Amendment Act, 1862.

He frequently refers to statutes as Acts of such a year without giving the chapters. A still more serious defect

on his part is his mode of citing cases. He invariably quotes them without referring to any reports in which they are to be found.

Even when he does favour us with an insight into the sources of his information, the initiation is of the slightest possible character. For instance, *Johnstone* v. *Sheddon*, we are told, "was tried before Justice Lawrence, and in the year 1802, when a similar question was being litigated, the court stated its approval of that decision." (p. 239). A reference to the court, month, and year is his usual mode of citation, *Ex. Gr.* "Queen's Bench, May 1854; Common Pleas, April, 1855; Exchequer, June and July, 1856." He seems to have an abhorrence of everything like a volume or a page. Thus we find (p. 420), "the dictum of Chief Justice Erle in *Aubert* v. *Gray*. (Ex. Ch. 1862, L.J.) is memorable." If it is, Mr. Hopkins ought to have given the page in the *Law Journal* and so facilitate access to a knowledge of the learned dictum. But he rarely gives any reference to a report, even without the page; the time and place alone enjoy his favour in this respect. These are very gross defects in a work which has reached its third edition.

If Mr. Hopkins is not a lawyer, we can only say that he is more learned than the learned themselves, and ought not to be too cautious in encroaching on professional preserves. His work would do credit, in point of substance, to a Lord Chief Justice, and therefore we hope that the next edition will not be subject to the numerous defects we have specified.

Mr. Oliver's manual does not require much criticism. It professes to be only a practical compendium of shipping law, without any citation of cases. The author has so entirely realized his object that we hope, as this manual is a development of the "instructions" to ships' captains, issued by him a few years ago, so a future edition of this *brochure* will expand itself into a full-blown legal treatise,

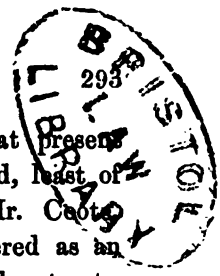
with cases, comments, analogies, legal metaphor, and philosophic disquisition.

This manual, though small, is a complete digest of shipping law, and we think the author is justified in saying that "no other book of the kind has hitherto been published (so far as the writer is aware), in which the various practical points relating to shipping law are collected together." (Preface p. 1).

A captain when from home, as the author judiciously observes, has generally no one to advise him, excepting those whose interests are in direct opposition to the interests of the shipowner, and hence the importance of having the leading points of shipping law collected together in a succinct form. This is an object which Mr. Oliver has certainly attained. We have rarely seen so much law accurately compiled within the same compass. The only defect we have noticed in the work is that it does not contain citations of cases. Mr. Oliver accounts for this omission on the ground that their insertion would have been of no use to non-legal readers. But of the correctness of this view we are not quite sure: at all events he has erred very much by excess of modesty, since his book may be consulted with profit by the learned, as well as by those for whose use it is more immediately intended.

He very properly denies the expediency of the present Admiralty rule for apportioning damages where both vessels are in fault, and prefers the rule of the common law in cases of contributory negligence on land. The chapter on general average is, as is usual throughout the work, sound, and contains much of the law relating to general average. He does not, however, sufficiently dwell on the distinction between general average sacrifices and general average expenses. On the whole, however, it is a most creditable production.

It is not necessary that we should devote much time to an examination of the two books of practice at the head



of this article. There is not much philosophy at present to be found in any branch of legal procedure, and, least of all, in the practice of the Admiralty Court. Mr. Coote being an examiner of the court, may be considered as an authoritative exponent of the points of which he treats. His treatise is, substantially considered, everything that can be desired to the practitioner. The philosophic jurist may perhaps find a few things wanting, which he might desire to see stated. For instance, it would not have been out of place for Mr. Coote to explain the reasons why the court always entertained suits for wages, bottomry, salvage ,&c., and why it eschewed causes of charter-parties, marine insurance, or necessaries supplied to a ship not foreign.

"The Admiralty jurisdiction," Mr. Justice Story observes, "primarily (originally) acted *in personam*, and now acts *in rem* only as auxiliary to its general authority." Nevertheless, Dr. Lushington is correct in saying, that the court resorts to equity only, "as it were, incidentally and of necessity." (*Saracen*, 4, Notes of Cases, p. 504.) The jurisdiction of the court, therefore, where it is untouched by statute, is a nice matter.

Besides being a court both of law and equity, this tribunal has a sort of international jurisdiction, with therefore a very wide basis for discretion, so far as its Common Law jurisdiction is left untouched by statute. It is thus eminently adapted to adjudicate in suits for apportionment or contribution.

Yet, prior to the statute of 3 & 4 Vict. c. 65, the jurisdiction of the court as to salvage was confined to cases where the salvage was performed at sea, or between high and low water mark; while it had no jurisdiction at all as to cases of towage. The sixth section of the Act referred to, however, gives it jurisdiction in all cases of salvage and towage. But, if the claim for salvage does not exceed £200, it must be referred, by the Merchant Shipping Act, 1854,

to the arbitration of two justices, with a right of appeal to the Court of Admiralty if the claim is for more than £50.

The assistance which the court receives from the Trinity Masters gives it an advantage over the Common Law Courts. It has the power of summoning a jury, but juries are not supposed competent to determine the vexed technical questions that arise in nautical suits. The setting down the leading particulars connected with each case in the "preliminary Acts," tends to remove the difficulty. This is a phase of Admiralty procedure, from which Courts of Common Law might learn a useful lesson. It is to be regretted that Mr Coote, while describing accurately enough the procedure as it is, rarely treats of it with any reference beyond the particular point he is considering.

Another defect in Mr. Coote's treatise is that it contains no reference to several important cases that have recently settled points of practice. In proof of these omissions we may refer to the cases of *Malcolmson* v. *Meeson; The Malvina Leycester* v. *Logan; The Victoria, Gardiner,* v. *Whitford; Cleary, Mc.Andrew,* v. *The Lady Blessington; In re Ohrloff* v. *Briscoll,* etc. etc. Dr. Boyd has not been guilty of the same degree of neglect, but has cited some of these, and his work altogether contains a vastly greater number of cases than are to be found in Mr. Coote's treatise. The citation of cases is by no means a mere mechanical labour but, on the contrary, when well done, gives peculiar value to a work.

A book on the practice of the High Court of Admiralty in Ireland was much needed by the practitioners of that country, since the passing of the Court of Admiralty (Ireland) Act, 1867 (30 & 31 Vict. c. 114), which opened up the practice of that Court for the first time to the profession at large. That Act, however, has not yet been the subject of any judicial decision, so that Dr. Boyd has been obliged to give his solutions of knotty points of practice in an approximate way only, and by analogy to the English

decisions on similar points. With a like view he has given in the Appendix all the Merchant Shipping Acts, together with some of the leading cases decided under the several sections. His work is not, therefore, a small treatise with a large Appendix, but a valuable and interesting compilation throughout. Giving the cases in juxtaposition with the several sections of the Merchant Shipping Acts is a peculiar boon to all concerned in mercantile adventure, and especially to the magistrates who now have so much jurisdiction under those Acts. This latter portion of the work will, to use the words of the learned author, "supply a want which has long existed," and will doubtless be found to afford much assistance to all who have occasion to consult the work. Although "comparisons are odious" as a rule, yet we would suggest to Mr. Coote to diminish his vast Appendix next time, by a compilation on Dr. Boyd's plan, and also not to omit all reference to the cases we have suggested, or to the many others of a similarly important character, which are being continually pronounced. Altogether, with *foci* of such excellent reflecting powers as the works we have been reviewing in this article, the benighted mariner may smile at the storms of legal disaster, and steer his frail bark safely through the surges of the Admiralty until he arrives at an adjudication, which, being founded upon civil, common, and statute law, can leave him nothing further to be desired.

The Report of the Select Committee of the House of Commons, 1833, did not recommend the throwing open of the Ecclesiastical and Admiralty Courts, on the ground that such a course would tend to discourage the study of the Civil Law. The intrinsic jural value of the Civil Law, no doubt, is very considerable, not to refer to the fact that many appeals to the Privy Council turn upon points of Civil Law, inasmuch as that law still obtains in several of our colonies. Throwing open, however, the Admiralty Court, instead of discouraging the study of the

Civil Law, ought greatly to promote it, by leading the profession generally to imbibe more or less at those recondite fountains of jural lore. It is the tendency of modern legislation to dry up all special fountains of legal redress, and leave one vast open current for the use of all. This consummation will be precipitated by the concentration of the courts, which will work as great a change in the manners and customs of practitioners as the fixing of the courts at Westminster by John must have done. In Ireland, the union of the courts under one roof always led to the practitioner passing freely from Nisi Prius to Chancery, and *e converso.* But while the legal Thespis of England had only temporary fixtures at Lincoln's Inn and lodgings at Westminster, it was not possible that the forensic drama could be produced with all its native grace and power. Under any state of the law or practice, however, two such excellent and carefully prepared works as the books on Admiralty practice, on which we have commented, will always retain much of their present great value.

Art. VI.—THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

IT betokens a healthy sign of the public mind when institutions, high or low, lay or ecclesiastical, are brought to the bar of public opinion and judged according to their merits. In a free country nothing ought to be hidden from the gaze of the people. The only claim which, in modern times, an institution has to exist, is not that it is ancient and time-honoured, not even that it is harmless, but that it is the means of doing some positive good to the nation. And in order that it may be found out whether a given institution possesses the requisite

qualification to be maintained, it should be laid bare before the public. We do not mean to assert that all institutions should be wantonly and recklessly, and at all times, made the subject of criticism. That would indeed be intolerable. Without doing the least good such criticism would only create disrespect in the minds of the people for institutions which, for the sake of the freedom of a country, must perforce be supported. It would alienate the well-affected from them, and thus materially interfere with, or even mar, their usefulness. But far different would be the effect of honestly examining into the operation of these institutions from time to time, and striking a balance between the good they have done and the evil they have consciously or unconsciously committed, or permitted to take place. By this means the efficiency of a system would be most successfully found out, and if there are any evils detected in it they would be speedily put a stop to. There is another and, if possible, a greater advantage which would result from such an examination. The system, instead of being shrouded in mystery, intelligible only to those who had made it the business of their lives to study it, and offering the greatest obstacles to the approach of outsiders, would become more and more popular; and the more the benefits it conferred were understood and appreciated, the more it would rise in the estimation of the country, and the greater would be its chance of continued existence. Bacon somewhere advises people to pause now and then in their avocations and carefully institute a mental examination of the work they have done. The same advice holds good with nations as with individuals. Self-examination, though rather scarce, is, when fairly conducted, an unmixed benefit, and the examination of national institutions, in a spirit of honest inquiry, cannot but be productive of unmixed good.

It is in this spirit of honest inquiry that we wish to draw the attention of our readers to the working of the

Judicial Committee of the Privy Council. We are not about to say anything disrespectful of, or to reflect in an uncharitable way on, this august tribunal. Our object is only to see how this high court of appeal first originated, the purpose for which it originated, the way it has fulfilled its duties, and whether it cannot be improved so as to make it more efficient than it at present is. If the opinion we arrive at be adverse to the efficiency of the Committee, we must not be understood to question the propriety of its establishment, or to find fault with the foresight of the reformers who first brought it to life. Indeed, when we mention that the great and revered and venerable name of Brougham—the father of law reforms—is mixed up with the formation of the Committee, that the first suggestion for its establishment came from him, that he carried through Parliament the measure to which it owes its being, and that for a long time he presided at its sittings, it will be seen that every prospective care that could have been taken to make it work well was taken, and that the failure, if it has failed, must be owing to causes, which although they existed at this time of the formation, were not clearly discernible.

Previous to the passing of the Statute 2 and 3 Wm. IV. c. 92, there existed what used to be called the "Court of Delegates," established by 25 Henry VIII. c. 19, and continued by 8 Eliz. c. 5. The Act of Henry provided that for lack of justice at or in any of the Courts of the Archbishops of this realm, or in any of the king's dominions, it should be lawful to the parties aggrieved to appeal to the king's majesty in the king's Court of Chancery; and that upon every such appeal a commission should be granted under the Great Seal to such persons as should be named by the king's highness, his heirs or successors, to hear and definitely determine such appeals and the causes concerning the same; and that the judgment and sentence of the commissioners in and upon any such appeal should be good and effectual and definitive, and that

no further appeals should be made from the said commissioners for the same. The Court of Delegates was also charged with the duty of hearing appeals from the decision of the "Admirals' Court," but its judgments not having been made final, and great inconvenience having resulted from the prosecution of further appeals, an Act (8 Eliz. c. 5) was passed, whereby it was provided that every such judgment and sentence as should be given and pronounced in any civil and marine cause upon appeal lawfully to be made therein to the Queen's Majesty in Her Highness's Court of Chancery by such commissioners or delegates as should be nominated and appointed by Her Majesty, her heirs and successors, by commission under her hand and seal, should be final, and that no further appeal should be made from the said judgment or sentence definitive, or from the said commissioners or delegates for or in the same, any law usage or custom to the contrary notwithstanding.

The Court of Delegates, thus made supreme, continued to discharge the duties entrusted to it vigilantly and well, but a reaction soon came, and its proceedings gave rise to discontent. Nor could it have been well otherwise. In those dark days of monarchical tyranny, cases the most remotely connected with politics used to give rise to dissensions, compared to which the angry feelings created by the Eyre Prosecution would appear perfectly tame. The king—we are talking of our kings after Elizabeth—was in a continual dread of losing his prerogatives, and rather than lose one of these, he used to take all the means in his power to get a decision favourable to the side he espoused. Thus, the commissioners were chosen, not with regard so much to their learning in civil and ecclesiastical law, not with regard so much to their standing at the Bar, but their known and avowed opinions in politics. The consequence was—and it was quite natural under the circumstances—that most incompetent men were often

selected to perform duties, difficult and delicate, and that their judgments, however much they may have commended themselves to the king, created anything but satisfaction in the minds of the people. So intense was this feeling that, in spite of the two Acts we have referred to, the king was obliged, "out of his royal favour, &c., &c., &c., upon petition to him in council made for that purpose," to grant "a commission under the present seal, authorising the commissioners therein named to review the judgments and decrees of the High Court of Delegates, so appointed as aforesaid." But even this second court was found in the course of time to be objectionable. As the ideas of the Revolution of 1688 took root, people began to speculate how it was that, although in his majesty's Court of Common Law and Equity judges were made independent of the Crown, the Court of Delegates was left in its dependent position. The more the times advanced, the more the latter court appeared to be an anomaly, but as with most of the abuses under our "free and glorious constitution" it escaped the eyes of the governing classes of that time, and nothing was done to put it out of sight until some time afterwards.

In the year 1828, Lord then Mr. Brougham, in a powerful speech in the House of Commons, pointed out among other evils in our judicial system those resulting from the imperfect constitution of the Court of Delegates, and in August 7, 1832, a statute (2 & 3 Wm. IV. cap. 92.) entituled "an Act for Transferring the Powers of the High Court of Delegates both in Ecclesiastical and Maritime Causes to his Majesty in Council" was passed to remedy them. This statute repealed the Acts of Henry and Elizabeth, and enacted that from February 1, 1833, the powers of the High Court of Delegates should be exercised by the king in council; and that no commission of review should be therefore granted. At the time these powers were transferred to the "King in council," this body—for it consisted only of a portion of the Privy Council—formed a most important Court of Appeal. In

the language of Lord Brougham, in the speech already quoted,* they discharged "as momentous duties as any of the judges of this country, having to determine not only upon questions of colonial law in plantation cases, but also to sit as judges in the last resort of all prize causes. The point," Mr. Brougham went on to say, "to which I more particularly address myself on this head, is that they hear and decide upon all our plantation appeals. They are thus made the supreme judges in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the east, where you and a trading company rule together over not less than seventy millions of subjects—or established among those rich and populous islands in the Indian Ocean, and which form the great Eastern Archipelago—and have their stations in those lands, part lying within the tropics, partly stretching towards the Pole, peopled by various castes, differing widely in habits, still more widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the New World are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all questions growing out of so vast and varied a province is exercised by the Privy Council unaided and alone." Appeals in prize causes used to be heard by "certain persons, members of the Privy Council, together with others, being judges and barons of his majesty's Courts of Record at Westminster," and the Indian and Colonial Appeals before a Committee of his majesty's Privy Council, who used to make a report to his majesty in council, whereupon the general judgment or determination used to be given by his majesty.†

* See Speeches of Henry Lord Brougham, Vol. II., p. 356, Edinburgh. A. and C. Black, 1838.

† See Preamble, 3 & 4 Wm. IV. c. 41.

This extensive jurisdiction thus vested in the Privy Council was not, as may be supposed, very satisfactorily exercised. The Privy Council did not then, as now, consist of many great lawyers, and the few that there were had other duties to discharge and could not attend to the council. Causes of any constitutional importance used doubtless to receive a great deal of attention, and were soon decided in favour of the "powers that be," but those involving points of law, either from India or the Colonies, moved on at a very slow pace indeed. It was at last found necessary to improve the machinery of the court, and with that view Lord Brougham carried through Parliament a measure which afterwards became the Statute 3 & 4 Wm. IV. c. 41. This Act enacted "that the president for the time being of his majesty's Privy Council, the Lord High Chancellor of Great Britain for the time being, and such of the members of his majesty's Privy Council as shall from time to time hold any of the offices following—that is to say, the office of Lord Keeper or First Lord Commissioner of the Great Seal of Great Britain, Lord Chief Justice, or a Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice, or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, Judge of the Prerogative Court of the Lord Archbishop of Canterbury, Judge of the High Court of Admiralty, and Chief Judge of the Court of Bankruptcy,* and also all persons, members of his majesty's Privy Council, who shall have been presidents thereof, or held the office

* To these have been added, by 5 Vict. c. 5 s. 24, the Vice-Chancellors appointed in pursuance of that Act; by the 14 & 15 Vict. c. 83, s. 15, the Judges of the Court of Appeal in Chancery, by 20 & 21 Vict. c. 77 & 115, the Judge of the Court of Probate. As to cases under the Church Discipline Act, 3 & 4 Vict. c. 86, s. 16 of that Statute enacts that Archbishops and Bishops, members of the Privy Council, should be members of the Judicial Committee on all appeals under this Act. See McPherson's "Practice of the Judicial Committee. London. H. Sweet. 1860. We are indebted to Mr. McPherson's valuable book for the particulars of the statute cited above.

of Lord Chancellor of Great Britain, or shall have held any of the other offices hereinbefore mentioned, shall form a committee of his majesty's said Privy Council, and shall be styled the Judicial Committee of the Privy Council; provided, nevertheless, that it shall be lawful for his majesty from time to time, as, and when he shall think fit, by his sign manual, to appoint any two other persons, being Privy Councillors, to be members of the said Committee." Authority was given to the king to refer all matters he might think fit to the Judicial Committee, and to direct, by his Order in Council, that appeals from India and the Colonies should be heard by the Committee, and the Judicial Committee was provided with necessary powers to constitute it a regular Court of Justice. By Orders in Council, dated the 9th and 10th days of December, 1833, his majesty gave the necessary directions.

The first meeting of the Judicial Committee for the hearing of appeals took place on November 27, 1833, and the Committee continued to discharge its duties satisfactorily enough for some time. Sir Edward Hyde East, Chief Justice of Calcutta, and Sir Alexander Johnstone, Chief Justice of Ceylon, both retired judges, were summoned to attend, and, as Mr. Knapp says, attended the meetings of the Judicial Committee, upon all appeals from the East Indies, and most of the other appeals.*

It does not appear from Mr. Knapp's book who were the judges who usually composed the Committee. The names of Mr. Justice Parke and the Vice-Chancellor of England, frequently occur, but there can be no doubt that four Privy Councillors † at least attended the sittings of the Committee. The business of the Committee was conducted under this statute of William IV. for about ten years, and it was then

* 2 Knapp's Privy Council Reports, p. 4.

† In Mr. Edmund F. Moore's continuation of Knapp's Reports, the names of the Vice-Chancellor, Mr. Justice Bosanquet, Baron Parke, and the Chief Judge of the Court of Bankruptcy frequently occur.

found that further legislation was necessary to facilitate the hearing of the appeals. On July 28, 1843, an Act was accordingly passed (6 & 7 Vict. c. 38), whereby it was enacted that appeals, &c., brought before the Committee might be heard by not less than three members of the Privy Council. This was a very important change in the constitution of the members of the Committee, for by the statute of William IV., four Councillors formed a quorum, and we must presume that the reason of the alteration was the difficulty that then existed in finding the requisite number of judges to form the court. This Act further enacted that:

"Subject to such rules and regulations as may from time to time be made by the said Judicial Committee, with the approval of Her Majesty in Council, and save and in so much as the practice thereof may be varied by the said Acts of the reign of his late majesty or by this Act, the said causes of appeal to Her Majesty in council shall be commenced, within the same times, and conducted in the same form and manner, and by the same persons and officers, as if appeals in the same causes had been made to the Queen in Chancery, the High Court of Admiralty in England, or the Lords Commissioners of Appeals in prize causes respectively."

On August 6, 1844, another Act was passed to amend the Act of 3 & 4 Wm. IV. c. 41, and to extend the jurisdiction and powers of the Committee. In 1851, a third Act was passed, to improve the administration of justice in the Judicial Committee, and a fourth Act, passed in 1853, completes the series of statutes relating to the Committee. The Act of 1851, enacts that the Judges of the Court of Appeal in Chancery, if Privy Councillors, shall be members of the Judicial Committee, and that no matter shall be heard by the latter, unless three members are present, exclusive of the Lord President. The Act of 1853 merely removes doubts as to the powers of the Registrar of the Privy Council to administer oaths, and

provides for the performance of the duties of the Registrar in his absence.

Lord Brougham's chief object in establishing the Judicial Committee was to have judges in the Privy Council "who should be men of the largest legal and general information, accustomed to study other systems of law besides their own, and associated with lawyers who have practised or presided in Colonial Courts." He also "expected that the judges should be assisted by a Bar, limiting its practice for the most part to this Appeal Court; at any rate making it their principal object." And, most important of all, his idea was that "to counteract in some degree the delays necessarily arising from the distance of the courts below, and give ample time for patient inquiry into so dark and difficult matters, *the Court of Review should sit regularly and at all seasons.*"* Has the Committee realised Lord Brougham's object? Are Colonial judges and lawyers associated with the Committee? Is there a Bar "limiting its practice, for the most part, to this Appeal Court?" And, lastly, does the Committee—Brougham's Court of Review—sit regularly and at all seasons? Nay, constituted as the Committee is, is it possible for it to sit regularly and at all seasons "to counteract the delays, &c., &c.?" And, if not, what remedy had better be adopted to make it do so?

It will be observed that in the foregoing questions we have assumed that Brougham's ideal is the best possible ideal under the circumstances. We believe it is really so. A court of justice sitting regularly, and not by fits and starts; depending not upon migratory but stable judges, whose only duty should be to hear the cases coming before their own court, assisted by a Bar, the members of which should, as a rule, confine their practice to the court, and conducting its business in a legal, proper, and decorous

* See Speech quoted at p. 301, and Mr. McPherson's preface, p. vi. The italics are ours.

manner, appears to us to be the best court of justice that could be devised. And Brougham's court was nothing more or less than the court we have described. But to proceed.

It has been the good fortune of this Committee to be spoken highly of by very eminent authorities. Sir Roundell Palmer, speaking in the House of Commons on "The Administration of the Law," says *:

"Every one who knows how the business of the Judicial Committee of the Privy Council is administered will, I think, admit that the difficulties arising from having to deal with different laws have been by them most successfully grappled with, and that, upon the whole, a regard for substantial justice rather than mere technical accuracy has grown out of the fact that they have to administer justice in accordance with many different systems."

Mr. McPherson, no mean authority, in the same way says that:

"The Committee comprises men of eminence in every department of legal study, it sits regularly at stated periods, and every case which is ready to be heard is sure of an early and patient hearing."

We unhesitatingly subscribe to the eulogium passed upon the Committee. The ability and patience of the judges will bear the most favourable comparison with those of any other set of judges in the world. But we cannot help remarking that the constitution of the Committee is radically defective. With the exception of two retired Chief Justices of the Calcutta Supreme Court, the Committee does not now possess a single colonial judge. It hears appeals from the courts of Canada, where the French law prevails, from those of British Guiana and Ceylon, where the Dutch law is administered, from the courts of the Channel Islands,

* Hansard, Vol. 185, pp. 842—864. This speech was afterwards published in pamphlet form by Messrs. Butterworths, headed "Our Judicial System."

where a peculiar system of their own exists, and yet no judge, at least no retired judge, from any one of these courts is a member of or assessor to the Judicial Committee. With regard to the Indian judges, too, it is to be remarked that the Supreme Courts having no jurisdiction out of the presidency towns, they, although well versed in the law which obtains in the interior of the country, have not that intimate knowledge of the people themselves, which a long practice in other places than the presidency towns can alone impart, and which, we confess, appears to us to be necessary to ensure a due administration of justice. Then, again, as to the Admiralty Appeals. There is only one member of the Committee who is well acquainted from long practice with Admiralty law—we mean, the Judge of the Court of Admiralty. He does not naturally sit to hear appeals from his own court, and they are therefore heard and determined by judges who, however theoretically they may know the law, have had no practical knowledge of it.

We repeat that we do not intend to throw any aspersions upon the learned judges who usually compose the Judicial Committee. Their decisions have been very satisfactory; and they have, we may presume, at immense pains to themselves, endeavoured to arrive at correct conclusions. But, we ask, is it possible for the colonists to have much confidence in the Committee? It may be said that the number of appeals that come from the colonies satisfactorily shows that the answer to our question must be emphatically in the affirmative. It would be very agreeable to us individually to believe that such was the case, but we are painfully aware of the fact that, whether a Court of Appeal is competent or not, suitors rush into appeal and take their chance of a good wind blowing in their favour, without stopping to consider whether the Appellate Court is likely to lay down sound principles of law or not. It is enough for them that they have lost, and that there is a Court of Appeal for them to take their case

to. To them all law that stands against them is bad law, and they leave no stone unturned, if they possess the means, to get it upset. However much it may offend the *amour propre* of the profession, we cannot help thinking that the majority of the suitors who come before the courts are of the same stamp as George Eliot's "Mr. Tulliver," one of the cardinal points of whose belief was that the lawyer Wakem and all his compatriots were descended from "Old Harry." But suppose that the present constitution of the Committee is satisfactory; suppose that, although none of the members ever practised in French law, they are competent authorities to reverse the decisions of judges who have studied it from their youth upwards; suppose that the judgments of the Committee give satisfaction to the colonies—suppose all this, the fact still remains that the greatest possible difficulty is experienced to form a court. The Committee only sit three times a year, that is to say, once after Hilary Term, once after Trinity Term, and once after Michaelmas. Its sittings last about a month each time, and in this short space of time it has to decide cases from all parts of the globe. But how is it formed? Sir Roundell Palmer in the speech already quoted, says, (p. 856)—

"Nothing could be more excellent than the materials I have described, *provided, of course, that they can be brought to bear with sufficient regularity, convenience and despatch.* We have men of great learning, great experience, and important position. *But its judicial force is not such as to secure adequately the regularity of the administration of the court.* Take the case of the retired judges, &c., &c., &c. You cannot expect that retired judges, however mentally able and willing, should long be physically able to give a constant attention to duties of this description. They have come to a time of life, when they either already do, or soon must, require the rest which they have fairly earned. You cannot rely on more than occasional and precarious assistance, as a general rule, from that source. Then with regard to your present judges. The

Chief Justices, and Chief Baron, and the Admiralty and Probate Judges are so occupied in their own courts, that their attendance is generally impracticable. The Lord Chancellor and the ex-Chancellors are wanted in the House of Lords. With regard to the other judges of the Court of Chancery, the Master of the Rolls, and the Lords Justices, they have been accustomed to give a good deal of their time to that court (Judicial Committee). In Lord Langdale's time the Rolls Court used to be shut up for long periods together, while his Lordship attended the Judicial Committee. That does not so often occur now; but the Lords Justices have been often withdrawn from their own court to attend the Judicial Committee."

Indeed, it may now be said that the Judicial Committee is kept on foot by such of the judges of the Court of Chancery as are members of the Privy Council. During the sittings after Trinity Term, 1868, the Lords Justices and the Master of the Rolls alternately helped to make a court; and one week, when neither of these judges could attend, the Committee had to suspend its sittings. Excellent, then, as the materials are of which the Judicial Committee is made, they are not properly economised; and the consequence is that the Court does not possess that stable character which is so necessary to ensure success in the administration of justice. Its sittings, constitutionally irregular, are made still more so by the changing and unstable position of the judges, and the court has consequently given rise to a great deal of dissatisfaction both in this country and abroad.

As for there being a regular Bar, confining its practice entirely to the work which comes before the Committee, it is quite out of the question. The Committee sits about three months or so a year, provided it can make a court, which, as we have seen, is no easy matter. The services of counsel are only required for these three months, and it is surely too much to expect that gentlemen would be satisfied with only the fees from three months' work in court. Under these circumstances we have come to the

conclusion that the principal aim for which Lord Brougham brought the Committee into existence has been defeated. With two exceptions there are no colonial judges members of the Committee; there is no regular Bar; the Committee does not sit regularly; and there is as much delay now in the determination of a case as ever there was before the Committee was established.

That a great deal of very serious inconvenience arises from this state of things we need hardly remark. The business of the Committee goes on so slowly that it is not at all uncommon to see a case standing for hearing for at least two sittings. Indian appeals especially seem to be peculiarly unfortunate. To be ripe for hearing they have to pass through a great many shoals and quicksands. In the first place, whether the suitors are rich or not, the agents in India seem to be so fond of having their clients' money in their hands that, unless hard pressed, they do not think of remitting funds to the solicitors here to carry on the appeals. Secondly, not a few of these appeals are held over the heads of the respondents, *in terrorem*, to induce them to come to an amicable settlement. When, however, all these dangers are passed, and they are set down for hearing, they go on unheeded for a long time. These appeals are now coming in in larger numbers than ever. Instead of four courts, there are now fifteen or sixteen courts in India from appeals which are brought before the Judicial Committee. Then there are the appeals from the various colonies, and to dispose of all this heavy business the suitors have to look to judges already overwhelmed with business in their own courts, and who have, metaphorically speaking, no breathing time! Can anything be more anomalous than this? In this old country of ours we have a great many anomalies, but a more complete stumbling-block in the path of the "intelligent foreigner" than this Judicial Committee there does not exist. We expect our retired judges, without any further remune-

ration than their pension (and the pension is given for *past* services), to be retired judges only in name; and, in their old age, when they want rest, to learn new systems of law, and work as hard as a student reading for his examination! We expect our acting judges to interrupt the business of their own courts and to attend to duties which do not legitimately belong to them, and that for nothing at all! An ex-cabinet minister when he gets a pension may retire from active life without being further troubled. An acting cabinet minister is expected to attend to the duties of his own department; but a retired judge must work on in a new field, and an acting judge must be prepared to be called away to new courts. True, through the self-denial of our judges, there has not yet arrived what we may call a regular dead-lock; true, the inconvenience to a great extent has been attendant upon the judges only; but for the due administration of justice the convenience of the judges must be, at least, as much consulted as that of the public; and it is nothing but the most suicidal and shortsighted policy "to work the willing horse to death."

It will be the dawn of the future "golden ages" in this country when the reforms in "our judicial system" advocated by Sir Roundell Palmer are adopted. To curtail the House of Lords of its appellate jurisdiction, and to make only one court of appeal for all cases are obviously the best possible changes that could be desired in our administration of the law. But we are afraid it will be long, very long, before they are brought about. The fact that Sir Roundell Palmer's celebrated speech was not delivered until, by the upsetting of the Russell-Gladstone ministry, he had ceased to be the Attorney-General of England, shows how difficult the task is. It is, however, worthy of him, and we trust that he will not rest till the changes are accomplished. In the meantime, and to prevent further mischief with reference to the working of the Judicial Com-

mittee, we think some reforms are absolutely necessary. These need not change the character of the Committee, for, if Lord Brougham's idea is carried out in its entirety, all that is needful will be done. There are lawyers in England from all parts of the British empire—lawyers who have held high judicial positions in India and the colonies. If it were made worth their while they might be associated with English lawyers, and thus form a paid court for the purpose of getting through the business of the Committee.

We have no hesitation in saying that, unless all the judges of the Committee are adequately remunerated, there is not the slightest chance of the Committee becoming a regular and a stable Court of Appeal. To pay the judges is of course a matter of £ s. d., but we believe the fees from the courts in India, where stamps used in proceedings are included, yield a surplus revenue to the Government; and we do not see why this revenue should not be drawn upon for the purpose of paying for, or at least contributing to, the expenses of the Judicial Committee. A court consisting of three English lawyers, two Indian judges, and two colonial judges would inspire confidence everywhere, and if it sits regularly, as it cannot but do if the members have no other courts to attend to, it will be one of the best courts in the country. Our article has become longer than we thought it would be, and we have therefore been obliged to hurry over the latter portion of it. We trust, however, we have said enough to arouse the serious attention of the legislature to the subject. "Delays are always dangerous," and none the less so in lawsuits. The Judicial Committee, therefore, should be invested with sufficient power to cause as little delay in disposing of the appeals before them as possible; for, as Mr. Gladstone put it, "Justice delayed is justice denied."

ART. VII.—CAN A PERSON HOLDING A *JUDICIAL* OFFICE SIT IN THE HOUSE OF COMMONS?

OUR attention has been opportunely called to a subject of considerable importance—we say opportunely called to it—for, not only are the Assize Courts actually sitting, but we are also on the eve of a general election. The question we allude to is this:—"Can any one holding a *judicial* office sit in the House of Commons?" On a proper answer to this question depends the legality of the acts of certain Members of the House of Commons acting as *Commissioners of Assize*, and of the votes of several *Recorders* who are now sitting in the House of Commons. To many others who are, at this moment, aspiring, if to nothing else, to the "doubtful honors" of parliamentary life, it is a question big with importance. Let us, then, examine it with a care befitting the gravity of the subject.

Sir E. Coke, in his Fourth Institute, p. 47, says (under the head of Temporal Assistants to the High Court of Parliament):—

"None of the Judges of the King's Bench or Common Pleas, or Barons of the Exchequer, that have judicial places, can be chosen knight, citizen, or burgesse of Parliament, as it is now holden, *because they be assistants in the Lords' House;* and yet you may read in the Parliament Roll, an. 31, Hen. 6, that Thorp, Baron of the Exchequer, was Speaker of the Parliament. But any that have judicial places in the Court of Wards, Court of Duchie, or other courts, ecclesiastical or civil, being no Lord of Parliament, are eligible."

Sir Wm. Blackstone, in Vol. I. p. 175, says:—

"They (that is, the Members of the House of Commons) must not be any of the twelve judges, *because they sit in the House of Lords;* nor of the clergy, *for they sit in the Convocation.*"

Both these passages depend upon an important entry in the *Commons' Journal* of the 9th November, 1605. The following is the entry, so far as it affects the present question. It is in 1 *Comm. Journ.*, p. 257.

"Die Saturni, 9° Novembris.

"The names of the Committee for return and privileges read; and they retire into the Committee Chamber; and, returning to the House, make report by Sir Geo. Moore.

* * * * *

"Serjt. Snigg
Lord Chief Baron } Attendants as Judges on the Higher House.

"Not to serve here. If a Serjeant to serve here.

* * * * *

"2. Touching Lord Chief Baron, Burgess for South: and Baron Snigg, for Bristowe: being attendants as Judges on the Higher House, whether they shall be recalled. Resolved, they shall not."

This is the well-known entry. It declares the two barons, particularly named in it, to be incapable of serving in the House of Commons; and it declares, by implication, through them (for the reason is general and not particular), that *no* judge who attends as judge in the House of Lords can serve in the House of Commons.

The reason given for this disability or exclusion has never been considered satisfactory. As regards the clergy, it had been wholly ignored long before the Disabling Statute of the 41 Geo. III., c. 73, was passed. Indeed, it is plain to demonstration, that if a person in holy orders, be he beneficed or not beneficed, could not serve in the House of Commons, *because they sit in the Convocation*, the clergy, as a body, would be, for the selfsame reason, excluded from the House of Lords—a proposition at variance with the whole history of Parliamentary practice; except during a period of violence and bloodshed. So, likewise, as regards "the temporal assistants" to the High Court of Parliament, the reason, to say the least of it, is very unsatisfactory; indeed, it is not only now, but it has been,

almost ever since it was given, at variance with established practice; for there are many, as we shall presently see, who have received, and do receive writs of summons to attend in the House of Lords; and yet who do actually serve in the House of Commons.

But to clear this point up before we go any further, let us see who they are that do fall within the category of "temporal assistants" in the House of Lords. Sir E. Coke, 4 Inst., p. 4, says:—

"And all the judges of the realm, Barons of the Exchequer of the coif, the King's learned Counsel, and the civilians Masters of the Chancery, are called to give their assistance and attendance in the Upper House."

Mr. May, in his "Parliamentary Practice," names the Common Law Judges—that is to say, the Judges of the three Supreme Common Law Courts at Westminster, the Master of the Rolls, the Attorney and Solicitor-General—and the Queen's learned Counsel (being Serjeants), to whom writs of summons are directed. Sir William Blackstone adds to these Masters in Chancery (an order since abolished) and Secretaries of State: and concludes thus:—

"But whenever of late years they have been Members of the House of Commons, their attendance here (in the House of Lords) hath fallen into disuse."

And in a note to Christian's edition we are informed that:

"On account of this attendance there are several resolutions before the Restoration; declaring the Attorney-General incapable of sitting among the Commons. Sir Henry Finch, Member for the University of Oxford, afterwards Lord Nottingham and Chancellor, was the first Attorney-General who enjoyed that privilege."

Now, we must regard the duty of attendance upon the

House of Lords to be either a good or a bad reason for disabling or excluding those, who are so summoned, from serving in the House of Commons. If it be a good reason it must apply to all: for all are summoned. It must exclude all the fifteen Common Law Judges, all the Secretaries of State, every Attorney and every Solicitor-General, every Master of the Rolls, and all the Queen's Serjeants. But we know that it does not, in fact, exclude any of them. If it be not a good ground of exclusion (and we have seen how it has been observed, or rather set at nought by the Commons, who made the resolution), *cadit quæstio.*

This then is the conclusion we arrive at—that if it ever was more than a *new pretence* (a description of it given at the time it was made) if it ever was other than a "*new pretence,*" resorted to for a *particular* purpose, it certainly is now—and has been, almost from the very moment it was made, a rule more honoured in the breach than in the observance; for, in fact, as we have said, the Secretaries of State, the Master of the Rolls, the Attorney and Solicitor-General, and Queen's Serjeants (all of whom receive writs of summons to attend upon the House of Lords) do, in fact, serve in the House of Commons.

How are we to account for this? We can only account for it by saying—that the reason assigned in it was a "new pretence:" that it was not nor is a reason binding either on the House itself or upon any one else.

Moreover, what lawyer of reputation would stand up in a court of justice and contend that the House of Commons could, *proprio vigore,* make such a rule: a resolution, in effect, making a whole body of men incapable of a seat there? The High Court of Parliament may be "omnipotent" (to use a common but highly improper word), but the House of Commons is not! The House of Commons is but a part of the High Court of Parliament or legislative body, and it cannot give itself jurisdiction by assuming it where it really has none.

At the time the House of Commons made this rule or resolution, namely, in 1605, the Constitution of England, be it observed, had not attained that distinctness in its different parts that it has now. Between that time and this lie the Petition of Rights, the Habeas Corpus Act, the Bill of Rights; and, though last not least, the Act which made the Judges of the Superior Common Law Courts independent of the Crown. That mighty change, which was to end in a degree of civil and religious liberty unknown before in the history of man, was, indeed, at work when the resolution was framed; but it was not yet developed; and it may be, although a different reason is assigned for it, that the people, or rather their leaders in Parliament, had made the discovery (a principle regarded now as almost sacred), that to secure and preserve their rights, they must keep the *legislative* and *executive* parts of the State quite distinct and separate. Very often a very bad reason is given for a very good judgment: and we think it probable that it was so here.

Let us see what writers of authority say of this—and first of all, M. Montesquieu:

"The people (says he) can enjoy no liberty in a State, unless the *judicial power* is separated from both the *legislative* power and the *executive* power; for, if it was united to the legislative power—that is, if the same persons were to be both legislators and judges, they would have an arbitrary authority over the lives and liberties of the other members of the State. For if they passed judgments that were contrary to the laws, those judgments would nevertheless be considered as being agreeable to the laws, because the judges themselves, in their other capacity of legislators, or makers of the laws, and consequently interpreters of them, would have a right to declare that they were so. And, on the other hand, if the judicial power was united to the executive, or the person or persons who had the latter power (which involves in it all the military force in the State) were likewise to have the power of judging, such judges would be so extremely powerful that there would be no hope of

obtaining any redress against them in case they passed unjust and oppressive judgments."

M. De Lolme writes in the selfsame strain; and adds these emphatic words:—

"The judicial authority ought, therefore, absolutely to reside in a subordinate and dependent body; dependent, not in its particular acts, with regard to which it ought to be a sanctuary, but in its rules and in its forms, which the legislative authority must prescribe."

And what says our illustrious commentator, Sir William Blackstone, one of the greatest constitutional lawyers that ever lived.

"In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the Crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an overbalance for the legislative. For which reason, by the Statute of 16 Chas. I., c. 10, which abolished the Court of Star-Chamber, effectual care is taken to remove all judicial power out of the hands of the King's Privy Council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And, indeed, that the absolute power, claimed and exercised in a neighbouring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative

and executive; and if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where everything is centred in the Sultan or his ministers, despotic power is in its meridian, and wears a more dreadful aspect."

If this be the true reason why judges cannot serve in the House of Commons (and we are strongly inclined to think that it is), then it follows that *all* persons, without exception, who hold any *judicial* office are disabled. We repeat, if this be the true reason (the one expressly assigned having, *ex concessis*, utterly and entirely failed) the disability or exclusion, call it what you will, is not particular but universal, and applies to all judicial officers.

We are now called upon, having arrived at this conclusion, to reconcile the conclusion with the fact of persons holding *judicial* offices and serving in the House of Lords; to reconcile it as well with the fact of the Legislature itself, from time to time, disabling, by express enactment, certain *judicial* officers; such as County Court Judges, Revising Barristers for their districts, Recorders for their own boroughs, Admiralty, Scotch, and Irish judges, &c. To the first we say, that the House of Peers has *judicial* duties to discharge (the House of Commons having none), and having judicial duties to discharge, they must have, in the nature of things, judges amongst them. Indeed, constitutionally speaking, all peers (spiritual and temporal) are judges. Go any day into the House during the session, and you will see them sitting in judgment. This is, according to the great writers whom we have cited, a defect—a very great defect—in our system; but we say that, so long as the House of Peers retains its judicial functions, judges must be serving there in their twofold characters of legislators and judges. As regards the other matters, namely, the exclusion of some judicial officers by express enactment, we say that they are one and all Declaratory Acts; and neither in letter nor in spirit do they justify the conclusion that others not named may, by implication, serve in the House of Commons.

We are aware that, in 1853, a *Judges' Exclusion Bill* was brought in. But this amounts to nothing; for if the mere introduction of a Bill were to be regarded as any evidence of what is or what is not law, we should be in a very sorry plight! Indeed, if any inference is to be drawn from its introduction and rejection—for it was thrown out—it is this, namely, that by the law and constitution of Parliament, all judges were excluded already; and, therefore, that the Bill was not at all required. But the fact itself is worthless.

The Parliament held at Coventry (6 Hen. IV.) has always been known as the *Parliamentum indoctum*, or the lack-learning Parliament; because no "apprentice or other man of the law should be elected a knight of the shire therein." Sir E. Coke says of it: "there never was a good law made thereat." We agree with him, so far, in saying that the legal element is essentially necessary to a legislative body; and when it is wanting evils do and must arise. We want to see the law prevail. We want to see the legislative and executive powers of the State kept clear and distinct, as the law keeps them. We want to see the judges interpreters of law, not law makers. We want to see the men of the law, who are Members of the High Court of Parliament, not only pure—but, like Cæsar's wife, above suspicion.

POSTSCRIPT.

We have just learnt with pain and dismay the appointment of Mr. W. S. Seton-Karr, of the Calcutta High Court, to the post of Secretary to the Government of India in the Foreign Department. Mr. Seton-Karr, a member of the Bengal Civil Service, served with distinction in the judicial and political departments for a considerable time, and in consideration of his services was made one of the justices of the newly-created High Court in 1862. We do not stop to inquire how far it

was right to appoint a gentleman more distinguished for his politics than for his law to the highest judicial post in Bengal; but, having once appointed him, we think it would have been prudent to have left him there. We object to the appointment on two grounds. First, it is a bad policy to introduce any other ambition than that appertaining to honest and conscientious discharge of duty into the Judicial Bench. Judges, of all servants, should be made to feel that their position is the *summum bonum* of their career, and no inducement should be held out to them to make themselves serviceable to the "powers that be," in any way which may appear dubious to the public. Human nature is the same in all civilised mankind, and we are afraid we must have angels for our judges if they are to keep themselves from political subserviency and corruption, when once they are told that they may be promoted to other and more high-sounding posts and dignities. To an active mind, especially, it is no little inducement to look forward to favour which has the power of changing a judge into a secretary of state, and ultimately a lieutenant-governor. We need hardly say that we have no personal objection to Mr. Seton-Karr, and that our objection to his appointment is based entirely upon public considerations. Secondly, we think it is a bad plan to throw away a public servant on the Judicial Bench till a more congenial appointment can be found for him. This is, to say the least of it, degrading the Bench and cannot but affect injuriously the position of the judges and the administration of justice.

We cannot but say that a great blunder has been committed in the appointment under notice, and we trust it will not be repeated in future. Amongst all our shortcomings in India we have hitherto been able to point proudly to the integrity and respectability of our judges. Nothing goes down with the natives more than good judges, and for the sake of our stability in the country we hope the Bench will not again be interfered with.

Notices of New Books.

[*** It should be understood that Notices of New Works forwarded to us for Review, and which appear in this part of the Magazine, do not preclude our recurring to them at greater length, and in more elaborate form, in a subsequent Number, when their character and importance require it.]

The Law of Mortgage and other Securities upon Property. By William Richard Fisher, of Lincoln's Inn, Barrister-at-Law. London: Butterworths, 1868.

THE second edition of Mr. Fisher's work has expanded from one into two volumes: "from a work which dealt only with those parts of the Law of Mortgage which embrace the equitable remedies of mortgagors and mortgagees," into an exhaustive treatise upon securities affecting property. The short chapter on the several kinds of securities in the original work has grown to three long chapters on "Securities by Contract," "Securities which arise by operation of Law," and "Securities which are void or imperfect, or are made under statutory or other powers."

Under the title, "Securities which arise by operation of Law," Mr. Fisher has included—(1), judgments and other statutory liens; (2), liens which do not depend upon possession, such as the lien upon land for purchase-money, and partnership liens; and (3), liens which depend upon possession. This classification of liens, both Statutory, Equitable, and Common Law, under the head of "Securities arising by operation of Law" is strictly correct. For, as Mr. Fisher observes, "although judgments are often, and for many centuries have been, confessed and entered up in pursuance of contracts between debtor and creditor, yet, in contemplation of law, they always pass *in invitum*, the object of the voluntary confession being only to shorten and lessen the cost of the judicial process.* The failure, on the part of our Common Law judges, to recognize this essential condition of all liens, has caused the greatest confusion. In *Walker* v. *Birch*,† Lord Kenyon laid it down that, "the parties may, if they please, introduce into their contract an article to prevent the application of a general rule of law." But he did not perceive that a right so created ceased to be a lien in the proper sense of the word, and became a contractual right. In *Rushforth* v. *Hadfield*,‡ Lord Ellenborough decided in favour of a general lien by implied contract. "If," he says, "there had been evidence of prior dealings between

* Introduction, p. lxxvi. † 6 T.R., 262. ‡ 6 East, 519.

the parties upon the footing of [a general lien], that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms." Mr. Fisher himself forgets the distinction he has so justly made. In his introduction,* he says: "Although contracts are sometimes expressed to be made for mercantile liens, no actual liens are so conferred;" and, quoting the dictum of Lord Westbury in a recent case, he adds: "The express stipulation and agreement for a security excludes the lien and limits the rights by the extent of the express contract."† But on dealing afterwards with general liens, misled, no doubt, by the earlier decisions (he cites *Rushforth* v. *Hadfield*), he says, that "liens for general balances are founded upon *contract* or usage."‡ The only rights which are, strictly speaking, general liens, are those which arise in certain trades, where there has been a long-established custom, allowing an agent who is entrusted with goods for his principal, to retain such as are from time to time in his possession, as a security for a general balance. The right, however, does not arise by operation of law until the custom has been established by judicial decision. It then becomes a judiciary rule of law, and is judicially noticed by the Courts.§ It is quite true that a right to retain goods for general balances has been allowed, "upon evidence of the course of dealing, or even of special agreement;" and it is unluckily equally true that the Courts of Common Law have treated these rights as rights of "general lien." But it is this together with many other inexact modes of using the word "*lien*," that has made the law of lien so unintelligible and confused. This confusion has been made worse from the number of different rights which have been brought under the same class by our two systems of procedure. No term could include two rights more unlike than lien at Common Law and lien in Equity. All the conditions of their existence are different. For the validity of the former possession is essential; in every important instance of the latter it is impossible—in none is it necessary.‖ The former is a merely passive right; the latter is generally an active right. Under no circumstances can the former be enforced by sale; the usual way of enforcing the latter is by judicial sale of the property to which it attaches.¶ The first is released by taking any other security; the other may continue after another security has been taken.** The first is a charge upon the property, in the proper sense of the word; the second is, in almost every case, an implied trust.††

Here we have a conspicuous example of the inconsistent and

* *Ubi suprà.* † *Re Leith's Estate*, L.R., 1 P.C., 305.
‡ Page 161. § *Brandaõ* v. *Barnett*, 12 Cl. & F., 787.
‖ "Equitable liens are independent of possession."—Wood, V.C., in *Thames Iron Works* v. *Patent Derrick Company*, 1 K. & J., 93.
¶ Story, Eq. Jur., s. 1217.
** "Equitable liens are not, *ipso facto*, vacated by another security."—Wood, V.C., in *Thames Iron Works* v. *Patent Derrick Company*.
†† Story, Eq. Jur., s. 1215.

unmethodical arrangement of the rights created by our system of law. But the law of securities upon property, as a whole, exhibits in a striking manner the evils which have flowed from our double system of procedure, and the need there is for fixing those systems so that the whole body of English law may be dealt with on one uniform and consistent plan.

The treatise of Mr. Fisher is a valuable exposition of the existing law; but, if he would build himself a reputation more lasting and more worthy than that of a mere compiler, he will, in his appointment under the Digest Commission, deal with the law of mortgage in a new and bold manner. He will point out the absurdity of retaining rights created by an identical transaction—so essentially different as the absolute ownership created by the Common Law rules—and the mere charge created by the rules of Equity. He will urge that one or other of these two classes of rights must be made to vanish; and show that the legal rights created by the Common Law rules have been rendered practically inoperative by the controlling rules of Equity. Then, bringing together, in one uniform classification, all the rights which should properly be created by charges upon property, he will state all the propositions of the existing law, and indicate distinctly those which are mischievous, those which are needless, and those which should be retained. How great—how laborious a task this would be, no one probably knows better than Mr. Fisher. But no one is more qualified to take it in hand. If he does take it in hand—if he completes it conscientiously—he will do his country a great service, and he will gain for himself an enduring name.

An Essay on the maxim, "Ignorantia legis neminem excusat," being the "Davis'" Prize Essay for the year 1867. By George Lewis, prizeman of the Incorporated Law Society, Michaelmas Term, 1867. London: Bosworth. 1867.

This is an interesting essay on one of the most interesting maxims of our jurisprudence. The writer commences by demonstrating *à priori* the reasonableness of the rule in question, and hence he proceeds to show the importance of making the law as widely known as possible, the duty of the legislator in this respect being co-ordinate with the duty incumbent on the subject to make himself acquainted with the laws which he is bound to obey. Hence the utility of a code. The writer has no sympathy with the school of pedants (fast dying out, we are happy to say) who seem to consider that a kind of mysterious magnificence is essential to the dignity of the law. From the fact that in every age since the invention of the art of writing, legislators have had recourse to codification, Mr. Lewis infers that they have generally considered it as the only means by which they could properly discharge their duty of publishing the law clearly and universally. In the latter portion of his essay, Mr. Lewis illustrates the maxim of which he is treating by cases

of reported decisions, both in civil and criminal cases at Common Law, and in courts. He seems to think that the apparent exceptions to the rule which have been sanctioned by Courts of Equity are traceable to some other ground of jurisdiction, as actual or constructive fraud, accident, etc. We may here remark that in his account (p. 18) of the case of *Pusey* v. *Desbouvrie*, 3 P. Wms., 315, ed., Mr. Lewis has fallen into an error. Of this case Mr. Lewis says, "In that case a young woman was entitled either to a legacy of £10,000 under her father's will, or to her orphanage share, according to the custom of London. She chose the legacy, and released her brother, who was the executor of the will, from payment of the orphanage part. Afterwards, finding that this rejected orphanage part would have amounted to £40,000, she applied to the Court of Chancery to order it to be paid to her, and to set aside the release; and she did so. . . . Seeing that the brother, who thus sought to take advantage of her inexperience, appears to have been her only protector, the case may be put on the ground of constructive fraud." Waiving minor errors of detail, it must be observed, that Lord Chancellor Talbot in his judgment disclaimed imputing any fraud to the defendant, and that ultimately the plaintiff's Bill was, by consent, dismissed without costs.

In the conclusion of his essay, the author returns to the question of codification. "The English laws," he says, "like the Sibylline prophecies of old, though wise and valuable in themselves, are unintelligible to any but the initiated; instead of being arranged in even a rude order, each leaf is left to lie where the breeze of chance may happen to place it, so that even the learned often differ as to the right mode of interpretation. Yet the law holds each man to be intimately acquainted with the whole of this judicial chaos. The evils of such a system are great, and are yearly growing more serious; the necessity of simplifying the law has long been seen and insisted on by some of the ablest men the country has ever produced." We entirely concur with the author's wish that the work of codification will at last be seriously taken in hand, and completed in a manner worthy of this great nation. His opinion that England's laws are the most excellent that the world has ever yet seen, is perhaps rather due to patriotic enthusiasm than deliberate judgment. We rather believe in the immense superiority of the Roman law, considered as a system to the English law, and for the reasons stated by Austin.*

It appears that Mr. Lewis' space was limited by the rules of competition for the Davis' prize; but we must do him the justice to say that we have not often seen a greater amount of interesting matter compressed into so small a space. There is one suggestion, however, which we should wish to make. Why does Mr. Lewis, in referring to volumes of law reports, omit to give the number of the

*. Province of Jurisprudence determined: ed. 1860 (outline of the course of lectures), vol. i., pp. xciv., xcv., xcix., c.

page? We trust that this defect will be amended in a future edition of his essay.

A Treatise on the Law, Privileges, Proceedings, and Usage of Parliament, by Sir Thomas Erskine May, K.C.B., of the Middle Temple, Barrister-at-Law, Clerk Assistant of the House of Commons, author of "The Constitutional History of England, since the accession of George III., 1760-1860." Sixth Edition, revised and enlarged. London: Butterworths. 1868.

THE high reputation and the proved practical utility of Sir T. Erskine May's work, render it unnecessary for us to say anything as to its merits. The present edition has been carefully revised and considerably enlarged. It comprises every alteration in the law and practice of Parliament, and all material precedents relating to public and private business, from the date of the former edition down to the end of the session of 1867, and many even of the last session, including the latest orders concerning committees and referees on private Bills. This edition appears opportunely, when a new Parliament is about to be called into existence, with respect to whose character grave doubts and serious apprehensions are entertained by many. Of one thing we feel tolerably certain—whatever the composition of the new Parliament may be, it is not likely to disregard the law and practice which Sir T. Erskine May has so ably explained. The present edition will afford new members, who may be expected to be returned in a larger proportion than at former general elections, every information with respect to the law, privileges, proceedings, and usage of Parliament. The bottles we think are sound, and we have no fear as to the new wine bursting them. Sir T. Erskine May deserves the best thanks of all who are interested in parliamentary proceedings, for the care and attention he has bestowed in preparing this edition of his valuable work. The "Parliamentary Practice," and the "Constitutional History" are works of real utility and sterling merit, and no changes which are likely to take place will render them of less importance—the former as an admirable practical treatise—the latter as a lucid and impartial exposition of the working of our constitution during an eventful century. Their author has fully merited the position which he occupies, both officially and in public estimation.

A Practical Treatise on the Registration of Deeds and Judgment-Mortgages. By Dodgson Hamilton Madden, Barrister-at-Law. Dublin: William McGee, Nassau Street. London: Simpkin, Marshall & Co. 1868.

THE Irish Registration Act operates only as a phase of notice. It is notice, as it were, to all the world, and so renders tacking impos-

sible in that country. A registry system, short of this effect, is not worth much. But the Irish Acts do not neutralise any rule of law: whatever deed was voluntary before registration is voluntary after it; and whatever deed was void or infirm before registration continues after registration in its pristine deformity (*Underwood* v. *Courtown*, 2 Tch. & L., 65). The first chapter of Mr. Madden's work is devoted to an exposition of these doctrines. In a subsequent part (cap. 5) he considers that registration is not notice, and cites various authorities to this effect. But these only prove that the registration of an instrument is not notice for purposes *dehors* the settlement of the priorities of incumbrances affecting the particular land. The philosophy of the Acts is to make the registration of an instrument operate as notice and to no greater or less extent. The registration operates thus as notice and as notice only, although the converse proposition is more extensive; viz., actual notice of the contents of the memorial would have effects not at all confined to the settlement of priorities in respect of the land in question.

The law relating to the registration of deeds in Ireland has suffered sad havoc from the registration of judgments being subject to different laws. Hence there are frequent conflicts of legal rights which are not expressly provided for either by the Registry Acts relating to deeds or judgments. For instance, an unregistered deed takes priority of a subsequent registered judgment, unless there is a second registered deed. If there is, this second deed, taking by registration priority of the unregistered deed, carries the judgment up on its back; and thus, for merits not its own, the judgment becomes the first charge on the land. This effect, however, will be prevented if the grantees under deed No. 2 are, on account of notice or otherwise, postponed to grantees under deed No. 1. (*Lawless* v. *Kenny*, 1 H. & B., 377. *D'Arcy* v. *Chambers*, 1 Tch. & L., 467.) Part 3 and cap. 4 of the work before us treats of all these points well and exhaustively. To reconcile the jarring elements in the shape of deeds and judgments the Judgment Mortgage Act, 1850, was passed. By reducing all such incumbrances to the single denomination of deeds, in respect of their effects on land, the Act aimed at imparting science to the adjustment of priorities, and also of saving the trouble and expense of two searches—one in the office for the registry of deeds, and another in the law courts for judgments. The cure, however, has been worse than the disease (part 2, cap. 1). A judgment mortgagee of a leasehold interest is an assignee of the lease, and, as such, liable to the rent and covenants. He seems also to be inferior to a judgment creditor under the old law in a respect not mentioned by Mr. Madden, but which is of the utmost importance as it is likely to arise often in cases of settled estates. A judgment by a tenant in tail bound the issue; and, if the conuzor was tenant in tail in possession, bound also the remainder man. But a judgment mortgage does not seem to have any such efficacy, but to operate merely as an unenrolled mortgage by a tenant in tail. This *précis* of the law of registration is, however, altogether an excellent little work, and contains an account of the law on

almost every point that can arise in practice in respect of registration. It is also lucidly composed and well written in every sense, and contains a most copious table of contents and a similarly excellent index.

The English Law of Sale and Pledge by Factors and Brokers. By F. O. Crump, Barrister-at-Law. London: Stevens and Sons. 1868.

Mr. CRUMP is a young barrister of some fifteen months' standing, and he is (as he informs us upon the cover of his pamphlet) prize essayist on "The Preservation of Commons" and "The Amendment of Trial by Jury." We are similarly further informed that there is "preparing for publication," by the same author, "County Court Practice in Ejectment," and "Actions of Tort in the County Court." We are glad to hear of Mr. Crump's success as an essayist, and of his £25 prize, and we rejoice that, instead of waiting for that possible client who may or may not turn up—if he has not actually done so already—Mr. Crump has taken "the bull by the horns," and rushed into County Court authorship. It may be that in the County Court he recognises the Forum of the future; whether he does or does not, let us give Mr. Crump credit for his efforts to get on.

The present work is too slight to enable us to say much upon Mr. Crump's handywork or legal knowledge. It appears to us to be a painstaking "working up" of the leading decisions upon the subject, and to that extent we can praise it. We will further say this, that although to the general practitioner, or counsel in chambers, the work may be somewhat too diffuse (and we do not forget that there are but some forty-five or forty-seven pages in the pamphlet), yet, as a history and summary of the law upon this subject, the student will find this little book very useful indeed.

Education and Training, Considered as a Subject for State Legislation, together with Suggestions for making a Compulsory Law both Efficient and Acceptable to the People. By a Physician. London: John Churchill and Sons. 1868.

AN earnest-minded and thoughtful man has committed his views on the all-important subject of "education and training" to paper. The present *brochure* is a reproof to the unreal spirit of the age, which the author charges as the essential characteristic of our times; and while we agree in much—we might say in nearly all—he says, we venture to join issue with him upon this point.

The first portion of the work consists of statistics; according to some, the most stale of all possible subjects—in our view, the most important ally of and aid to investigation, and the most powerful of all advocates that the student of, and seeker after, truth can possess. In this, the earliest portion of his work, our author has

proved his "thesis," namely, the terrific condition of the mass of the lower orders. Want, crime, sin, ignorance—and, there ought to be added, idiotcy and insanity—are here all arrayed in dreadful battalions of tens of thousands; the remedy, or rather palliative, for this huge disease is, in the opinion of our author, compulsory education, and in that view we heartily concur.

At pages 77 and 91 the author discusses the ways and means; and we may say that, whatever may be the professional duties of the author, he has the pen of a ready and very clear writer.

This little book hardly admits of quotation; suffice it to say, that we hope the author may, at the forthcoming Birmingham Meeting of the Social Science Association, be induced to read in the ears of a worthy auditory his views upon this subject; for he has thought upon it in the spirit of one who feels, and rightly feels, the responsibility of the nation for a state of things terrible in its nature and dangerous in its consequences, and recognises as a fact, beyond all cavil or denial, that the agencies, whatever they may be, which are now at work for the amelioration of the condition of the mass of the people, are wholly impotent, utterly powerless, to contend against the growing vice and misery of our growing population.

A Selection of Leading Cases on Mercantile and Maritime Law, with Notes. By Owen Davies Tudor, of the Middle Temple, Barrister-at-Law, Author of "A Selection of Leading Cases in Equity," &c. Second Edition. London: W. Maxwell & Son; Henry Sweet, and Stevens & Son. 1868.

The editing of Leading Cases on important subjects has now become a recognized branch of legal literature. Of the great advantage which the profession derives from labours of this nature, there can be little doubt. Among those gentlemen who have devoted their learning and ability to this department, Mr. Tudor is not the least distinguished. In many respects, indeed, we think he is the most successful of our modern commentators. He puts his points clearly and concisely, he adheres closely to the subject of the principal case before him, and, while he avoids deviating into merely speculative questions, he cannot be charged with only reciting decided cases. He neither ignores difficulties, nor delights in raising doubts. The opinions he pronounces are in general such, with respect to certainty or uncertainty, as the nature of the subject warrants. His learning is great, but it is completely at his command, and ranges itself in orderly disposition and suitable proportion. It is at once solid and lucid, and being perfectly mastered by himself, never embarrasses the reader. His different selections of leading cases are, therefore, works suitable as well for reference as for study, and there are few members of the profession who have used them, who will not be ready to bear willing testimony, both to their utility and their substantial

merits. Mr. Tudor's labours have been great, but the work done is of a high character, and his volumes occupy a prominent position amongst the legal productions of the present generation of lawyers. It will be unnecessary for us to say anything with respect to the special character of the volume containing Leading Cases on Mercantile and Maritime Law, which has been for some years in the hands of the profession, and which is so well known in the legal world. Our office is merely to introduce the second edition of this selection to the notice of our readers. In this edition, a large amount of new matter has been added to the Notes, and many new cases have been cited. The decisions have been brought down to the latest period practicable before the date of publication.

Every Man's Own Lawyer, a Handy Book of the Principles of Law and Equity, comprising the Rights and Wrongs of Individuals, by a Barrister. Sixth Edition, carefully revised. London: Lockwood & Co. 1868.

We noticed this work when it first appeared about five years ago. It has been compiled with considerable care, and it may prove useful to the public for some purposes. The great objection to publications of this nature is, that although they may state the law accurately, they throw little light on its application to particular cases, and it is in this that non-lawyers are almost sure to err. A few plain rules may be of use, and it may be well to point out dangerous places to the public, but we do not think it possible, by any compilation of this nature, to dispense to any considerable extent with professional assistance and advice.

A Practical Treatise on the Statutes of Limitations in England and Ireland. By George A. Darby, of Lincoln's Inn, and Frederick Albert Bosanquet, of the Inner Temple, Barrister-at-Law. London: Maxwell & Son. 1868.

It is but doing justice to the learned authors of this book to say, that after a very careful examination of their work we think it is one of a very high order indeed. The writers have had to deal with a subject of immense importance to the suitor, and with one of technical difficulty, and they have certainly produced a work immensely above the average even of the better class of text books.

We see, or think we see, in the work before us, the advantage of joint authorship exemplified in a somewhat remarkable manner. An Equity and a Common Law barrister have put their heads together, and have used with skill and singleness of purpose their common and combined knowledge; and the result is a work which shows great erudition, unusual research, and the most unwearied industry. Now this is very great—it sounds almost extravagant—praise; but whether it does or does not we think our authors are entitled to it.

We will consider the book from the two points of view from which it must necessarily be viewed. Firstly, from the student's point of view—the pupil in chambers, who has a point to "look up," and not very much time to do it in. Whether the point arises under the Statute of James, or under that of the last William, he will find the subject treated of in two distinct portions of the work, which, in fact, to all practical purposes, are two distinct volumes—save that they have admirable cross references. If the point is one of pleading, either at Law or in Equity, this subject is clearly conceived and distinctly treated of in separate chapters.

Secondly, to the counsel in chambers the book offers the same advantages as it does to the student, but with another, and that is one which, so far as our own knowledge extends, is a very rare one. The authors have not shirked or avoided the difficulty of preparing cases. Commenting upon the divisions, and comparing and commenting upon the reports of them—this is in our judgment no small excellence; for when use of the book has convinced the practitioner of the ability and industry of its authors, he will be disposed to fortify his own view by examining that taken by them. This is no mere massing or rather jumbling together of all the cases upon a given subject; the idea of heavy text-book writers is to fling a vast crude heap of decided cases at the unhappy leader, and leave him to fish his way out of them as best he may.

The design of Messrs. Darby and Bosanquet has been to present an intelligible compendium of the law upon this subject to their readers, and this they have done by the adoption of a method, which may be described as the chronological one. The book is carefully got up, and although we have searched diligently for errors, the cases have been accurately collated, and all the reports seem to have been ransacked with the utmost diligence. The index is a little scant—the sole blemish in a book, upon which we congratulate the authors, and which we heartily recommend to the legal public.

A Treatise on the Companies' Act of 1862, with Special Reference to Winding-up, with Forms, Precedents, &c. By G. Lathom Browne, Barrister-at-Law. London: Stevens & Haynes. 1868.

The turn of the tide of speculation which usually follows a commercial crisis has already set in. Promoters are sharpening their spears, the manufacturers of prospectuses and shares at a premium have returned to their old occupation; and the sufferers from Black Friday are already forgetting their throes on that memorable day, and are ready to hatch new schemes which may reconstruct the fallen palaces and airy phantoms that formerly bewildered their fancy with visions of forty per cent. *Fervet opus*, and for this pleasant revival of speculation there must be a proportionate demand for new editions of old works on Joint Stock Companies' Law, and new works founded upon a still wider philosophy of legal lore and tactics than is to be found in Wordsworth or Shelford. Such works will always be eagerly sought for

by a public eager of evading contractual liabilities, of growing rich without labour, and of sharing the spoil, without being liable to the accidents, of war. Disquisitions, however, upon the rights and duties of directors, shareholders and creditors, compromises and forfeitures, transfers and winding-up—all these interesting topics require careful revisions by the light of recent cases. Nor is it so very long ago that all and each of these points was plunged in the most impenetrable darkness. To those who still wander in the twilight of doubt, Mr. Lathom Browne's book will afford much assistance. Perspicuous statement and felicity of arrangement characterise the work throughout. The Companies' Act, 1862, is given *in extenso*; but the leading sections are followed by appropriate notes, which are given more effectively in immediate connection with the respective sections of the Act than if incorporated with the main text, which, however, of itself seems to be sufficiently complete.

The Act of 1862 helps to swell the size of a work on Joint Stock Companies to serious proportions. It is, therefore, desirable that the purchaser of the Act in the shape of a quarto, should have some value for his money, by annotations thereon, in addition to the common preliminary matter, which is little more than a preface. This is an easy task. The compiler of such a treatise has only to transfer in his own words the judgments in leading Joint Stock Cases from the annual reports to his text. A work entirely compiled on this system, might not be a bad speculation. For, although it would be somewhat like a legal dictionary, and unconnected in its various parts, yet, as these relate to a subject with which all are more or less familiar, completeness appears to be the more requisite in such a treatise. If it gives a correct account of every case decided since 1862, and the chief of the previous cases, it will leave little to be desired.

Mr. Browne's treatise is more pretentious than this, and we by no means intend to say that he has adopted a more imposing, but less useful, course than what we have suggested. On the contrary, a didactic disquisition, such as is the work before us, will be of use not only to the practitioner and promoter, but also to the jurist who may be curious to get a glimpse of the Joint Stock verities which illumined the equity judges during the long and dreary legal night that speculators experienced for several years after the passing of the Act of 1862.

Mr. Browne very properly gives *in extenso* the able and learned judgment of Vice-Chancellor Malins, *In re Overend, Gurney, and Company, limited.* It is to be regretted that the decision of Lord Cairns, *In re the Reese River Silver Mining Company, ex parte Smith*, cast a shadow of doubt upon the coming event in the Lords respecting the great house of Lombard Street. This is chiefly to be regretted on account of the doubt which Lord Cairns' judgment is calculated to raise as to the question whether the Companies' Act, 1862, has not effected various changes in the law of debtor and creditor, beyond those apparent on the surface of the Act. The decision of the Lords, indeed, in the *cause célèbre* cited,

establishes that the incorporation conferred by that Act on companies registered under it, leaves untouched the old relations of shareholders to the creditors of their respective companies. But the judgment of the Lords does not necessarily involve the more general proposition that the Act was not intended to effect any radical change in other respects with regard to the various equities which shareholders or the companies' creditors might have previously enforced against each other. We believe, indeed, that the Act leaves untouched all the *principles* of joint stock contract as distinguished from limited liability—that it is, in short, as regards those principles, a new Consolidation Act. Yet, the judgment of Lord Cairns in *The Reese River Company's case* is well calculated to suggest doubts whether this is so, and whether his lordship may not in some future case hold that the Act constitutes a new legal stratum, interposing an impassable barrier in certain cases between the members of a company and its creditors. Mr. Browne rarely indulges in speculations upon undecided points. Few of these, indeed, now remain, so that having given us a very complete and excellent work on the law of Joint Stock Companies as it is, we should not expect to find many discursive dissertations upon what it ought to be, where the cases throw no light.

Mr. Browne, we may observe, errs in supposing that allotment constitutes membership prior to notice of the allotment being communicated to the allottee. *Bloxam's case*, "Law Journal," vol. 33, c. 519, to which he refers in support of his view, has been distinctly overruled by the Lords Justices, to the extent we have suggested, in the case of *The Peruvian Railways Company, Weekly Notes*, vol. 3 p. 221, as also, we think, in several preceding cases. However, when Mr. Brown composed that part of his work it is not improbable that the point was undetermined.

This is the only error we have detected in his excellent book. The category of cases seems short; but all the important ones appear to have been referred to. From his experience as a liquidator and a director our author has been able to offer a work of a very practical nature, and at the same time of value to the profession. The index is rather meagre; but this defect is supplied, to a great extent, by a very copious table of contents.

Digest of Cases decided in the Supreme Courts of Scotland, from 1800 to 1867, and on Appeal by the House of Lords, from 1726 to 1867. Being a new edition of the Digest from 1800 to 1852, by Mr. Shaw; and from 1852 to 1862, by Messrs. McPherson, Bell, and Lamond, advocates. Revised, consolidated, and continued to 1867, by Andrew Beatson Bell and William Lamond, advocates. Edinburgh: T. & T. Clark, 1868.

These two parts are continuations of the publication which we have already favourably noticed. They show the same industry,

care and knowledge to which we testified in our last number, but at the same time, we are sorry to add, the same miserable defects in Scottish procedure on which we have already commented. As for *pleading* there is none in Scotland—in fact, what is called a "record" in the Court of Session is simply a legal abomination. We therefore congratulate the Royal Commission which is about to issue on this subject in having an entirely untried field to work upon. and if the commission is properly constituted much good for Scotland may be anticipated. We must, however, be permitted to express our alarm at a sentence in the Lord Advocate's address to the electors of the Universities of Glasgow and Aberdeen, just published, in which he announces that it is *he* who has recommended the issue of the said commission. We mean no disrespect to Lord Advocate Gordon, but our alarm is that from such a nomination, including, as it would of course do, the Scotch, and in this matter the ignorant element, we have no security for such a commission, or rather for such properly qualified and skilled commissioners as will do justice to the subject, and teach the Scotch that which they have never yet known, the true principles and rules upon which litigation ought to be conducted.

The ability of Messrs. Beatson, Bell and Lamond only show more clearly the miserable machinery of the Court of Sessions. Fancy, under such able editorship, such a statement of a case as the following:—"A company of merchants found liable in damages for executing an order intended for another company trading under a name somewhat similar, it being proved that reference was made in the order to former orders, which might have led them to suspect that it was not intended for them."

The Companies' Acts, 1862 and 1867. Handy-book of Practical Instructions for the Formation and Management of Joint-stock Companies; by Richard Jordan, Registration Agent, 123, Chancery Lane, London. Published by the Author, 1868.

It not unfrequently happens that much information on a particular subject is accumulated by a person who is either wholly or partially ignorant of some of the simplest elements of the study thus extensively cultivated by him. Some persons can cite Latin quotations *ad libitum* who are but imperfectly initiated in the mysteries of Lily or Rudiman. Even famous mathematicians have been found who were suspected of a liability to slips on the *pons asinorum*. A practical and complete knowledge of, and familiarity with, the first principles of anything however is the *sine quâ non* of success in that department as an industrial pursuit and fund for profit, however much theoretical insight into its more complicated mysteries may be attained with only a slight knowledge of its elementary groundwork. It is not then of so much use to the promoter to know how to affect a transfer to a man of straw, to enforce a forfeiture or compromise, or do some other Joint-

stock feat, as it is for him to be thoroughly familiar with the mode of forming a company. Mr. Jordan's "Practical Instructions," will supply this information to those who are ignorant of it, and will point out the necessary stepping-stones which the promoter must carefully select so as to avoid a plunge into the troubled waters of error. This handy-book is a most useful little *brochure*, as it contains useful practical hints which usually are to be had only in connection with long legal details.

Essay on the Union of Church and State. By Archdeacon Hale. London: Butterworths. 1868.

THIS is the production of a very able man: and will be read, by lawyers as well as by divines, with interest and advantage. The author looks at the matter from a *legal* point of view; the only one, indeed, that it can be constitutionally viewed from: inasmuch as the Church was, when the See of Rome came to be finally renounced at the Reformation, "adopted" by the law. "Whatever be its doctrines (as he says), any Church is in union with the State, whose polity is regulated and defined by the municipal or Statute Law."

After discarding the hackneyed phrase of "Church and State" (a mode of investigating the truth at all times very desirable), the author gives a brief and interesting history of the connexion, which, in ancient as well as in modern times has been maintained between the *National Religion* and the *National Law* (the words he substitutes for the others). Page 10 gives, in a few brief sentences, the immediate effect of the Reformation upon the Church of England: and the true relation that was established, at that time, between the national religion and the statute law of the land. The coincidence between the divine and the lawyer (as shown in an article on the same subject in this very number), is very remarkable. The divergence, if any, is one of words only: and it is difficult to say which has the advantage. If we were disposed to find fault with this essay of the learned divine, we should say:—that it doesnot come, in so many words, to any useful conclusion, much less to that *practical* conclusion that our learned friend of the law arrives at. People now want to know, not merely what is meant by the words, "Union of Church and State," but they want to know how they will be affected by the change: in the event of any taking place. Now, according to both these writers, the power of making laws relating to religion is vested in the High Court of Parliament exclusively: and the lawyer expressly and positively asserts—what the learned divine leaves to induction—that if this be taken away, the *people*, who now have a voice in the matter, would then be deprived of it; and would be deprived of what undoubtedly is one of the greatest privileges the *people* of England possess, and undoubtedly one of the greatest blessings derived from the Reformation. In this expression of any real, *practical* conclusion, the learned divine is, we think, somewhat defective: a defect, however, which might easily be supplied in a future edition.

The American Law Review for April, 1868: Boston: Little, Brown, & Co., 1868.

Our contemporary on the other side of the Atlantic opens this number with an interesting review of the Life of Lord Plunkett by his grandson. The great Irish orator and lawyer is fully appreciated by the American reviewer. The articles on the Public Land System and the Legal Tender Acts relate to matters connected with American policy and law. There is a very able article on the liability of common carriers beyond their own route. It appears that in the United States this question is not quite settled, and that recent decisions have very much qualified, if they have not overthrown, the English decisions. There are the usual notes of cases decided in the American and English courts, notices of books, and summary of events.

The Law Examination Reporter. Numbers 10—11. London: Butterworth, 1868.

These numbers consist of Hints to Young Attorneys, Reviews of New Books, with Examination Questions and Answers. No. 11, for Trinity Term, also contains "Answers to Moot Points."

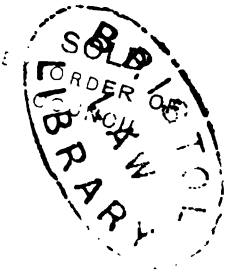
A Letter to the Protestants of the United Kingdom, on the Proposed Disestablishment of the Irish Church. By Sir J. Eardley Wilmot, Bart. London: Hatchard & Co. 1868.

We have great respect for Sir Eardley Wilmot, but we cannot agree with him in his views with respect to the illegality and unconstitutional character of the Suspensory Bill.

BOOKS RECEIVED.

A Treatise on the Law of Scotland in Relation to Wills and Succession. By John M'Laren, Advocate. (This excellent work will be reviewed at length in our next number.)

Chitty, Jun. Precedents in Pleading. Part II. Third Edition.



Events of the Quarter, &c.

UNITED LAW CLERKS' SOCIETY.

The thirty-sixth annual commemorative festival of this society was held at the Freemasons' Tavern, on June 2, under the presidency of the Right Hon. Lord Chief Baron Kelly.

The report having been read and the customary toasts drank, the Right Hon. Chairman proposed—"Prosperity to the United Law Clerks' Society;" and, in doing so, said, "Being, I think, the oldest living member of the Bar of England, and having within less than two years ceased to belong to that body, let me say that after forty-four years of constant intercourse with those members of the legal profession who constitute the class whose interest we desire to further, I know of no class in society upon whom more directly depend the interest and the well-being of the community at large. I am happy to add that I know of no class, humble as they may be deemed by many, in whom I have found a purer spirit of honour and integrity. They are ever ready to discharge their duties under difficulties, against obstacles, amidst perplexities, dangers, and temptations; and, consequently, in proposing the toast which I shall presently do, I shall call upon you to offer up your vows, and to express your warm and cordial wishes for the continued success of that class of your fellow-subjects. We all know that few men, whatever may be their rank or station in society, whatever may be their calling, can pass through a single year of life, without having directly or indirectly to seek the assistance of a legal adviser. Of course, we look in the first instance to that numerous, indeed, but yet excellent and able class of persons, the attorneys and solicitors of England. But what could they do without their clerks? Why, their clerks are the men who actually do the work. They are the soldiers and sailors who fight, whilst the officers indeed support them and offer them the benefit of their example—directing, projecting, and commanding. But, I repeat, it is to the attorneys' clerks that we must look for the actual practical business of life in which attorneys and solicitors are engaged; and it is upon them we must rely for the right conduct of that business, which all of us sooner or later, and more or less throughout our lives are engaged in. I would, therefore, say to the attorneys' clerks of the metropolis, You are a body of men who have hitherto, amidst many difficulties, and notwithstanding many temptations to do wrong, acquired a status for yourselves; a high and solid reputation. You can maintain it. You can further improve and enhance it among the people of this country only by pursuing that course which, though a few of you may indeed have departed

from, the greater number have invariably followed through life, from your earliest years down to the present time. You have distinguished yourselves for that ability which is most useful in the practical conduct of the affairs of life. You have kept the secrets of your employers; you have dealt honestly to those who have trusted you; you have conducted yourselves and expressed yourselves truthfully when you have been called upon to speak or depose to anything which has fallen within your province; aye, and upon all occasions you have shown that you are actuated by a conscientious principle of rectitude, proving that you act upon the Christian precept, 'Do as you would be done by.' You have thus acquired the confidence of your employers and the respect of the public at large. Why, then, have I occupied you for a few moments in referring to your past career, and the principles which have guided the greater number amongst you? Because, I would now presume to add, there is something further incumbent upon you. Many of you possess an ability established in the offices of your employers, having acquired their confidence, being trusted by all around you, with the prospect of rising step by step—not all of you perhaps very high—but some peradventure at some time, be it near or be it distant, to very high positions. But whatever may be your hopes, whatever may be your destiny, great numbers amongst you are now toiling along in pursuit, not so much of fame and fortune as of independence—the means of securing a livelihood for yourselves and your families. Therefore I address you to say there is one virtue—and it is a virtue, indeed—that I would exhort you to practise; and that is, the virtue of providence and economy. By a very little but constant and always operating self-denial, you may pursue a system of economy which will enable you, at a very slight sacrifice indeed, to lay up a fund in case you should yourselves be afflicted with misfortunes which may fall upon any among us. But, above all, you must secure something for helpless widows and children that you may leave behind you, if you will only resolve that you will accomplish the object which I am urging you to pursue. Save a little, but a little, every year; become members of this excellent society. I am not now speaking to those within these walls, who have anticipated all I could say, but to those who are beyond the reach of my voice, to whom my words may be repeated. I address myself to the 3,000 or 4,000 or more of the attorneys' and solicitors' clerks of the metropolis and the parts adjacent, when I urge the practice of economy and self-denial, so that something, if necessary, may be secured for yourselves, and solace and comfort for those whom you may leave behind—your widows and your children."

The subscriptions and donations having been announced, among which was one of twenty guineas from the Lord Chancellor, and other toasts having been drunk, the meeting separated.

SOLICITORS' BENEVOLENT ASSOCIATION.

Mr. Justice Hannen presided, in the unavoidable absence of the

Lord Chancellor, over the eighth anniversary meeting of this association, at Willis's Rooms, on June 10.

The half-yearly report having been read, the Chairman, in proposing the toast of the evening, "The Solicitors' Benevolent Association," said, that no one could be sure of being guarded from shafts of misfortune; and therefore, treating this association in the light of a mutual assurance society, it was well that every young man, when starting on his career as a solicitor, should contribute to the funds of a society like this; and if he should be so fortunate as to escape the necessity of an appeal to its aid, he would have the satisfaction of knowing that he has been paying, probably without inconvenience to himself, during several years of his life, to a fund to provide for the necessities of his less fortunate brethren. From whatever point of view this society was regarded, everything which exhibited prudence and generosity was a quality which every one acquainted with the solicitors of England must be prepared to say attained the highest place amongst them. No one could have associated, as he (the hon. Chairman) had done for more than twenty years, with the solicitors of London and the country generally, without knowing that there was no class of men amongst whom generosity was more signally exhibited at every turn of their career than solicitors, and no men were more willing to contribute sums of money, or their talents, to objects of real charity. On the other hand, it was found that amongst solicitors prudence was one of the highest qualities developed by them—namely, that prudence which they all relied on as their guide and support in any difficulty and emergency that might arise. He would say for his own part that the solicitors appeared to him to set an example which it would be well for the branch of the profession to which, until recently, he had the honour to belong to follow. Take, for instance, the way in which the solicitors were known to have built themselves up into a power of the realm. Beginning, as it were, with merely a law club, they had gradually raised into power that noble institution the Law Society; and they had not used it only for selfish purposes, but for the purpose of raising the character of the members of their own branch of the profession. In respect to the amalgamation of the two branches of the profession, he said—In another sense the solicitors made one body with the Bar; and indeed, though he was not sure he was not now about to express an opinion which might be opposed to the views of some gentlemen present, and he had never been afraid of being in a minority—he believed all good opinions had been in a minority once—and he must be contented to be so until that minority grew into a majority—but he did not hesitate to enunciate his opinion that the two branches of the profession might well be amalgamated. No one knew better than himself that the duties of an advocate were entirely different from those of a solicitor; but, as in many other cases, he knew of no means of drawing a sharp dividing line; they merged into one another, and a man who began his career did not know until he had been practising for years for what he might have the greatest fitness; and he believed it would be

well to leave it to a man to find out the opportunities that might arise of calling forth the particular qualities and talents that were in him, and so leave it to such occasions to develope whether or no he had a better capacity for carrying on the business of a solicitor than the profession of an advocate. He believed it was peculiar to England that the two branches of the profession were separated, and not only peculiar to England in its largest sense, but peculiar to this country; for in almost all of our colonies the two branches of the profession have been amalgamated. He was not aware of any inconvenience that arose from it; and there could be no better training for a young barrister than to devote himself to the business of a solicitor.

Several toasts having been proposed, the proceedings terminated with an announcement of nearly £600 donations.

JUDGES' DINNER.

We are delighted to see this good old rule, we cannot, indeed, say kept up (for it is not!) but reviving. We rejoice to note a remarkable instance of it; because there are few things in the legal profession better calculated to maintain a friendly feeling between the Bench and the Bar (a matter of more importance in the administration of justice than at first meets the eye) than a convivial meeting now and then. It has many advantages of a social kind; above all, it reduces the distance between the judges and the barristers, which, in the nature of things exists; and which, in the nature of things, will widen unless it be restrained by the constant renewal of some such reunions as this. It was, probably, to enable the judges to keep up (amongst other things) such laudable customs with a view to an harmonious intercourse that the legislature granted such liberal salaries to the judges. There are some who seem, from their talk, to look upon their salaries in a very different light. Be that as it may, in many instances, we say it without offence, it would be difficult to find any other reason for so liberal an allowance.

We are led to make these remarks in consequence of a friendly gathering of the kind, under the hospitable roof of the ever kind and ever generous Chief-Baron Kelly. On the 30th June, a banquet of surpassing elegance, equalled only by the great courtesy of the host, was given by him at No. 8, Connaught Place, Hyde Park, to the leaders of the Northern circuit, the circuit chosen this time by the Chief Baron.

> "*Sed quois cœnantibus unà*
> *Fundani, pulchrè fuerit tibi nosse laboro.*"

In addition to the circuit leaders, there were present, Mr. Justice Hannen, who is associated, this time, with the Chief Baron on circuit, and Mr. Justice Blackburn, who remains in town.

As we have said, it was a princely entertainment; and, when we have said that, we can say no more.

THE NEUTRALITY LAWS.

THE Commissioners appointed by Her Majesty the Queen to inquire into the state of the Neutrality Laws of England have issued their report as follows :—

"We, your Majesty's Commissioners, appointed to 'inquire into and consider the character, working, and effect of the laws of this realm available for the enforcement of neutrality during the existence of hostilities between other States with whom your Majesty is at peace, and to inquire and report whether any and what changes ought to be made in such laws for the purpose of giving to them increased efficiency, and bringing them into full conformity with your Majesty's international obligations,' have now to state to your Majesty that we have held twenty-four meetings; and having inquired into and considered the subject so referred to us, have agreed to the following report:

"The statute now available for the enforcement of neutrality during the existence of hostilities between States with whom your Majesty is at peace, is the 59 Geo. III. c. 69, commonly called the 'Foreign Enlistment Act.' The title of that Act is 'An Act to prevent the enlisting or engagement of His Majesty's subjects to serve in foreign service, and the fitting out or equipping in His Majesty's dominions vessels for warlike purposes without His Majesty's license.' And the preamble runs thus: 'Whereas the enlistment or engagement of His Majesty's subjects to serve in war in foreign service without His Majesty's license, and fitting out and equipping, and arming of vessels by His Majesty's subjects without His Majesty's license for warlike operations in or against the dominions or territories of any foreign prince, state, potentate, or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province, or against the ships, goods, or merchandise of any foreign prince, state, potentate, or persons as aforesaid, or other subjects, may be prejudicial to and tend to endanger the peace and welfare of this kingdom; and whereas the laws in force are not sufficiently effectual for preventing the same.'

"This, then, being the statute directly available in this country for the enforcement of neutrality, our duty has been to inquire and report whether it is susceptible of any and what amendments, and we are of opinion that it might be made more efficient by the enactment of provisions founded upon the following resolutions:—

"I. That it is expedient to amend the Foreign Enlistment Act by adding to its provisions a prohibition against the preparing or fitting out in any part of Her Majesty's dominions of any naval or military expedition to proceed from thence against the territory or dominions of any foreign State with whom Her Majesty shall not then be at war.

"II. That the first paragraph of section 7 of the Foreign Enlistment Act should be amended to the following effect:—If any person shall within the limits of Her Majesty's dominions fit out, arm, despatch, or cause to be despatched, any ship, with intent or know-

ledge that the same shall or will be employed in the military or naval service of any foreign power in any war then being waged by such power against the subjects or property of any foreign belligerent power with whom Her Majesty shall not then be at war: (*b*) Or shall within Her Majesty's dominions build or equip any ship with the intent that the same shall, after being fitted out and armed either within or beyond Her Majesty's dominions, be employed as aforesaid: (*c*) Or shall commence or attempt to do, or shall aid in doing, any of the acts aforesaid, every person so offending shall be deemed guilty of a misdemeanour.

"III. That in order to enable the executive government more effectually to restrain and prevent attempted offences against section 7 of the Foreign Enlistment Act, additional provisions to the following effect should be inserted in the statute: (*a*) That if a Secretary of State shall be satisfied that there is a reasonable and probable cause for believing that a ship which is within the limits of Her Majesty's dominions has been or is being built, equipped, fitted out, or armed contrary to the enactment, and is about to be taken beyond the limits, or that the ship is about to be despatched contrary to the enactment, such Secretary of State shall have power to issue a warrant stating that there is such a reasonable and probable cause for believing as aforesaid, and upon such warrant the Commissioners of Customs, or any other person or persons named in the warrant, shall have power to arrest and search such ship, and to detain the same until it shall be either condemned or released by process of law, or in manner hereinafter mentioned. (*b*) That the power hereinbefore given to a Secretary of State may, in parts of Her Majesty's dominions beyond the seas, be exercised by the governor or other person having chief authority. (*c*) That power be given to the owner of the ship or his agent to apply to the Court of Admiralty of the place where the ship is detained, or, if there be no such court there, to the nearest Court of Admiralty of the place where the ship is detained, or if there be no such court there, to the nearest Court of Admiralty for its release. (*d*) That the court shall put the matter of such detention in course of trial between the applicant and the Crown, with usual Admiralty appeal to the Privy Council. (*e*) That if the owner shall establish to the satisfaction of the court that the ship was not and is not being built, equipped, fitted out, or armed, or intended to be despatched, contrary to the enactment, the ship shall be released and restored. (*f*) That if the owner shall fail to establish to the satisfaction of the court that the ship was not and is not being built, equipped, fitted out, or armed, or intended to be despatched, contrary to the enactment, that the ship shall be detained till released by order of the Secretary of State; nevertheless, the court may, if it shall think fit, order its release, provided the owner shall give security to the satisfaction of the court that the ship shall not be employed contrary to the enactment, and provided that no proceedings are pending for its condemnation. (*g*) That if the court shall be of opinion that there was not reasonable and probable

cause for the detention, and if no such cause shall appear in the course of the proceedings, the court shall have power to declare that the owner ought to be indemnified by the payment of costs and damages, which in that case shall be payable out of any moneys legally applicable by the Commissioners of the Treasury for that purpose. (*h*) That any warrant of the Secretary of State shall be laid before Parliament. (*i*) That the proceedings herein provided shall not affect the power of the Crown to proceed if it thinks fit to condemnation of the ship. (*k*) That the following exceptions be made from this resolution:—(1) Any foreign commissioned ship; (2) Any foreign non-commissioned ship despatched from this country after having come within it under stress of weather or in the course of a peaceful voyage, and upon which ship no fitting out or equipping of a warlike character shall have taken place in this country.

"IV. That it is expedient to make the act of hiring, engaging, or procuring any person within Her Majesty's dominions to go on board any ship, or to embark from any part of Her Majesty's dominions by means of false representations as to the service in which such persons are intended to be employed, with intent on the part of the person so hiring, engaging, or procuring, as aforesaid, that the persons so hired, engaged, or procured as aforesaid shall be employed in any land or sea service prohibited by section 2 of the Foreign Enlistment Act, a misdemeanour, punishable like other misdemeanours under the same section.

"V. That the forms of pleading in informations and indictments under the Foreign Enlistment Act should be simplified.

"VI. That if, during the continuance of any war in which Her Majesty shall be neutral, any prize not being entitled to recognition as a commissioned ship of war shall be brought within the jurisdiction of the Crown by any person acting on behalf of or under the authority of any belligerent government, which prize shall have been captured by any vessel fitted out during the same war for the service of such government, whether as a public or a private vessel of war, in violation of the laws for the protection of the neutrality of this realm, or if any such prize shall be brought within the jurisdiction as aforesaid by any subject of the Crown, or of such belligerent government, having come into possession of such prize with notice of the unlawful fitting out of the capturing vessel, such prize should upon due proof in the Admiralty Courts at the suit of the original owner of such prize or his agent, or of any person authorised in that behalf by the government of the State to which such owner belongs, be restored.

"VII. That in time of war no vessel employed in the military or naval service of any belligerent which shall have been built, equipped, fitted out, armed, or despatched contrary to the enactment, should be admitted into any port of Her Majesty's dominions.

"In making the foregoing recommendations we have not felt ourselves bound to consider whether we were exceeding what could actually be required by international law, but we are of opinion that if those recommendations should be adopted, the municipal law of this

realm available for the enforcement of neutrality will derive increased efficiency, and will, so far as we can see, have been brought into full conformity with your Majesty's international obligations. We have thought it better to present our recommendations in the form of general resolutions, laying down the principles on which legislation should be framed rather than to attempt to draw up in detail the precise form of the statute. We have subjoined, in an Appendix to this report, certain papers relating to the laws of foreign countries on this subject, which have been communicated to us by your Majesty's Secretary of State for Foreign Affairs, together with a short historical memorandum prepared by Mr. Abbott for our information, and some other documents illustrative of the subject. All which we submit to your Majesty's gracious consideration.

"Cranworth, Houghton, Cairns, W. Erle, G. W. W. Bramwell, R. J. Phillimore, Roundell Palmer, T. Twiss, W. Vernon Harcourt, T. Baring, W. H. Gregory, W. E. Forster."

Mr. C. S. A. Abbott of the Foreign Office was attached to the commission, and in attendance at the meetings.

Dr. Lushington did not sign the report, as he was, from indisposition, unable to attend the meeting after June 1867.

The following are the reasons given by Mr. Vernon Harcourt for dissenting from certain portions of the report:—

"Though the undersigned has signed the report, he wishes it to be understood that he has only signed it subject to the following observations:—

"'In the main part of the recommendations of the report I entirely concur, more especially in those which have for their object to increase the efficiency of the power of the executive government to restrain attempted violations of the neutrality of the country.

"'The portions of the report, with respect to the policy of which I entertain considerable doubt, are those parts of Resolution II., section *b*, and Resolution III., section *a*, the first of which extends the punitive power of the law, and the second the preventive authority of the executive, to the *building* of ships, apart from the question of their arming or dispatch from the realm.'

"My apprehension is lest such an extension of the law should unnecessarily—and if unnecessarily then unwisely—interfere with the shipbuilding trade of the country. It is needless to enlarge on the capital importance of that trade. As a commercial question it is one of the greatest consequence. It is, perhaps, the trade in which alone Great Britain still retains an unrivalled superiority. Everything which tends unnecessarily to hamper or embarrass it must be regarded with suspicion, and adopted with caution. It is not of course argued that the interests of a trade, however valuable, should not yield to considerations of imperial necessity, and of international obligation, if there be such an obligation. But this particular branch of trade has a special national value which belongs to hardly any other. Upon it depend in no small degree those naval resources which constitute the main defence of the realm. I believe it is the

fact that at the present moment by far the greater proportion of the existing iron-clad navy of Great Britain has been constructed in the yards of private shipbuilders. These private yards have been created and are maintained at no expense to the nation by the custom of foreign states. Most of the powers of Europe rely for their naval construction on the private yards of English shipbuilders. In this respect, therefore, apart from the commercial question, the nature of this trade involves public consequences of the utmost political importance. The monopoly of the construction of the iron-clad navies of the world has become a new and gigantic arm of our maritime superiority. England has become, and is daily still more becoming, the naval dockyard of Europe. One effect of discouraging this trade must be either that foreign powers will construct for themselves, or else that some other nation whose restrictions are less rigid and whose trade is more free shall construct for them. Either alternative will deprive Great Britain of a great and special national advantage, which she now enjoys owing to her manufacturing skill and her peculiar resources in coal and iron. If England should unhappily be engaged in an European war we should lose the incalculable benefit of the control we now possess over the naval reserves of Europe. All these reservoirs of naval construction which the demands of foreign governments at present support in this country, can now, in case of need, be diverted from the foreign supply and be made immediately available for our own defence. If this trade is discouraged and possibly destroyed, the consequences are obvious. Foreign governments must build for themselves the vessels we now build for them. They will, therefore, be independent of this country in a manner which they now are not. Or they will build elsewhere, and the country to which they resort will then acquire the advantage we shall lose. This will be the first result. But the indirect effect on our own resources will be equally serious. At present, in time of peace, we are able to limit ourselves to comparatively moderate, though still enormously expensive, public establishments, because we know that in time of war the private yards will supplement our resources to an almost unlimited extent. But, if this private trade should cease or be seriously diminished, we must keep up constantly in time of peace such establishments as will be adequate to our utmost wants in time of war. The whole reserve of constructing power which we now possess in the private yards must be supplied by the public establishments. And, consequently, all that expenditure in plant, machinery, and the maintenance of skilled workmen, which is now defrayed by the custom of the foreigner in the private yards, must in future be permanently sustained out of the public taxation. Few people conversant with the subject will dispute that if the yards which now manufacture iron-clads for the world were abolished, the navy estimates must be largely increased in order to establish and keep on foot equal means of construction in the public dockyards. We have a dozen private yards in the country which could in a limited time turn out vessels as powerful as any in the English navy, and which

have in fact constructed many of the best ships we possess. Relying on this reserve of producing power we are able to economise our resources and to diminish our stock. But if these establishments cease we must always be prepared to supply their place at a far greater cost to the country. It is also deserving of consideration that the competition of these private yards against one another and with the Government dockyards, keeps up probably a higher standard of excellence than could be obtained by mere official supervision.

"It will, therefore, be seen that the question is by no means one of the interest of private shipbuilders, but does in fact involve a great question of national resource and public economy.

"It is worthy of remark that when, in the year 1817, the Congress of the United States were called upon to alter and amend their Foreign Enlistment Act, the Bill as reported by the Committee of Foreign Affairs in the House of Representatives bore the following title :—

"'A Bill to prevent citizens of the United States from selling vessels of war to the citizens or subjects of any foreign power, and more effectually to prevent the arming and equipping vessels of war in the ports of the United States, intended to be used against nations in amity with the United States.'

"By the first section, 'if any citizen of the United States .... shall fit out and arm .... any private ship or vessel of war, to sell the said vessel or contract for the sale of said vessel, to be delivered in the United States or elsewhere to the purchaser, with intent .... to cruise or commit hostilities upon the subjects .... of any prince or state with whom the United States are at peace, such person shall be punished with fine and imprisonment, &c.'

"This Bill was much discussed in the Senate, and, in the end, the first section above quoted was struck out, and the title of the statute altered accordingly. (These facts are stated on the authority of a letter of Mr Bemis, of Boston, published in 1866). The legislature of the United States have thus, it will be seen, deliberately declined to interfere with the commerce of that country in vessels of war. It may be worthy of consideration, having regard to these facts, whether the result of the proposed interference with the shipbuilding trade of England may not be to transfer to America the whole of the custom of foreign states.

"But it will be argued that if the equipping, arming, and despatching of such vessels is to be prohibited, it is necessary on the principle *obsta principiis* to extend the prohibition to the earlier stages of the transaction. That reasoning does not carry conviction to my mind; the arming, equipping, and despatching are conspicuous acts directly and obviously connected with the belligerent intent. To build is nothing unless the vessel be armed and despatched; it is in these acts that the real breach of neutrality consists. The law should lay its hand on the immediate offence, and not be astute to search out its remote sources and springs. To attempt to do so involves consequences which will be politically difficult and dangerous.

"The great advantage of the summary and extensive preventive powers which the present report recommends should be conferred on the Executive to stay the dispatch of vessels which may compromise our neutrality, is that they supply a reason which might justify us in mitigating the strictness of the penal code, rather than an argument for augmenting its rigour. The notorious indisposition of juries to enforce such penalties creates a mischief which should be avoided. We may sustain the great inconvenience of making laws which we shall find it practically impossible to execute, because they exceed in severity the standard of public opinion. The present report recommends the creation of an absolute, and I conceive, a sufficient power to stop all vessels which ought to be stopped. The case of the Birkenhead rams stopped by Earl Russell, is an instance of the exercise of the sort of power which it is the object of these recommendations to make more effectual and easy. As soon as reasonable grounds of suspicion arise, the power will be put in force But assuming the vessel to be stopped, if their remains behind a statute which makes the original building penal, how are we to justify not proceeding to prosecute the builders after the vessel is stopped? If such a prosecution is not instituted the law is brought into contempt; if it is instituted the law will probably break down—results in either case to be greatly deprecated. When juries are called upon to inflict on their own countrymen, on behalf of foreigners severe penalties for acts which are not punished but are held lawful in all other countries, is it not more than probable that popular sentiment will correct the severity of the law?

"It must be remembered that in adding the word 'building' to the penal part of the Act we are distinctly creating a new crime. We are making our own subjects liable to criminal penalties for acts which are clearly lawful by the law of nations, which are lawful by the law and practice of all nations, and which have hitherto been lawful by the law and practice of our own people. We shall have not only to enact a new crime which does not exist, but to create an opinion and conscience of criminality which it is more difficult to inspire.

"The authors of the English Foreign Enlistment Act distinctly declined to carry back the offence to a period of the transaction which in no way partook of an offensive character and had no obvious or necessary connection with an attitude of war. The American Government equally, after mature consideration, refused to adopt the alteration now proposed. They did so upon principles of policy, by departing from which we may involve ourselves in inextricable difficulties, and probably not command on the part of other nations any corresponding reciprocity. It may be urged that, whilst it is proposed to confer these extended powers, a large discretion as left to the Government to determine how far they shall be put in operation. But as a fact, this discretion will be more nominal than real; and with the view of precluding international complaints, it will be absolutely null. Whatever power is conferred, in effect creates an obligation on the part of the Government to put it in

force, and a responsibility on the part of the nation if any neglect to enforce it should occur. If the Government are authorised to interfere by prosecution and seizure at all stages of the building, then at the first suggestion of any belligerent power they will be compelled, almost without discretion, to interfere, because, should they decline to do so, their responsibility and that of the nation will be involved, even by an error of judgment, in a case where the obligation is admitted.

"Thus we shall be made liable for acts for which at present no nation would hold us responsible. The reason why it has been considered inexpedient and impossible to enforce a prohibition of the exportation of munitions of war from the neutral territory is because to do so would involve a system of repression and *espionage* on the part of the neutral government which would be wholly intolerable to the trade of its subjects. If the thing is forbidden it is the duty of the neutral government to see that the prohibition is in fact enforced. But, in order to enforce it, we must establish on every occasion of war in foreign countries a sort of belligerent excise in the bosom of our own people. And this is precisely the evil in which we shall involve ourselves by undertaking to prohibit "building" with an unlawful intent. If we create and assume this duty, we are bound to execute it; and in order to execute it we must ascertain at our own peril the intent and the future destination of every keel laid in the United Kingdom, and even in our most distant possessions. If this is done honestly and efficiently it will place the whole shipbuilding trade under a supervision of a most odious and oppressive description, which would hardly be endured even for the security of our own interests, and certainly will not be tolerated for the advantage of foreign states.

"There are those who reconcile themselves to such a course by supposing that in fact this new crime would never practically be prosecuted in its early stage. If so, then to what purpose is it created? But, in fact, if it is made a crime, the neutral government must proceed against it in its earliest inception, at the risk of being held responsible for what may happen in its further progress. There is an immense difference in this respect between the offence of arming and fitting out, which, especially in modern warfare, is a fact sufficiently obvious and patent, and may be easily detected in time to prevent the despatch of the vessel. But if all building with a certain intent is to be constituted a crime which it is part of the duty of the government to repress, then there is not a keel laid, a bolt driven, or plank sawn in any yard in the country which may not at every instant be exposing the nation to a responsibility hitherto unknown.

"The objections which forcibly strike me are these:—

"'1. We shall create a new duty which it will be difficult and probably impossible to execute.

"'2. In creating such a duty we shall incur a new responsibility by its non-execution.

"'3. The attempt to execute it will be odious to our own subjects,

and the failure to execute it will be a just ground of complaint to foreign states.

" '4. We shall be placing the trade of our own country at an uncalled-for disadvantage, as compared with that of the rest of the world.'

" Either the creation of this new offence will or will not tend to embarrass and injure the shipbuilding trade of the country. If it will not (as some believe), it would be satisfactory that this should be clearly established. I confess if I were satisfied of this, my objections to the course proposed would be in a great measure removed. But if, as I believe, the necessity of a perpetual official supervision and interference would greatly hamper, and probably ultimately destroy, this branch of our commerce, that again is a point on which I think the nation has a right to expect that we should afford them the means of forming a sound judgment. It may be that for adequate objects we should be willing to sacrifice such a trade. But it is well that we should estimate the amount of the sacrifice, being as it is wholly gratuitous and without example in the case of other nations. I regret that the Commission have not taken evidence to show how far the proposed prohibition would in fact affect this particular trade and the general naval resources of the country. I venture to think that before any legislation on this matter is attempted, such an inquiry should be instituted. If the preventive powers of detention recommended in the report are (as I believe) sufficient for all practical purposes and the performance of all legitimate duties, every argument of policy would dissuade us from carrying the law any further.

" I entirely share the desire to make abundant provision that the duties of neutrality should be honestly, fully, and effectually carried out. But in creating new duties, which do not at present exist, either in principle, precedent, or practice, it is worth while to consider whether by exaggerating the obligations of neutrality we are not creating a discouragement to its practice. We may end by making the duties of neutrality so irksome and intolerable, that on a mere calculation of expediency a prudent government would prefer to go to war. And thus we may defeat the end we have in view by the means we adopt to attain it.

" There is one condition of things for which it seems especially necessary to make provision. A contract may be made by a foreign government for the building in this country of an iron-clad in time of peace, and without any contemplation of present war. Such vessels require many months for completion and their cost is enormous. The foreign government may have paid several hundred thousand pounds by instalments during the construction of the vessel, and the property in the incomplete vessel will have passed to the foreign government. What is to be done to such a vessel in case the contracting government is involved subsequently in war? Is the vessel to be forfeited and the builder to be prosecuted because he proceeds with a contract which was perfectly lawful when it was made? If so, what chance is there for the future that any foreign

government will ever build in England, or indeed that any English builder will venture to undertake their contracts? This singular state of things might easily arise. The recent war between Austria and Prussia lasted less than two months; a vessel might have been contracted for by one of those governments with an English shipbuilder; the vessel might have been half finished before the war, and wholly completed after the war; in respect of the work done before the war and after the war, *i. e.*, for the beginning and ending of the ship, the shipbuilder would be innocent; but in respect of the work done during the few weeks of the war, *i. e.*, for the middle of the ship, he would be guilty of a misdemeanour and subject to fine and imprisonment. This may seem an extreme illustration, but it shows the necessity of providing some protection for contracts *bonâ fide* made and commenced in time of peace, unless it is intended wholly to prohibit the trade.

"There is one other matter which I should gladly have seen embodied in the recommendations of the report. A strong feeling has recently grown up against the recognition of belligerent commissions granted to vessels on the high seas, by which such vessels become at once raised to the position of lawful belligerent cruisers, though they start from no belligerent port, and, in fact, derive no support from the natural and legitimate naval resources of those on whose behalf they wage war. It seems to me that for all reasons it is wise to discourage such a practice. As there is no rule of international law which forbids such delivering of commissions on the high seas, we cannot of course refuse to recognise the title of such a cruiser to all the legitimate rights of war in places beyond our jurisdiction. But we are masters of our own actions and our own hospitality within the realm. Though, therefore, we cannot dispute the validity of such a commission on the high seas, or the legality of captures made by such a vessel, we may refuse to admit into our ports any vessel which has not received its commission in a port of its own country. By so doing we should be acting strictly within the principle of the law of nations, and our example would very probably be followed by other maritime states, and thus in the end tend to repress the practice altogether. For this purpose I should have been very glad if the Commission had thought fit to recommend that in time of war no armed vessel engaged in hostilities should be admitted into any of our ports which should not hold a commission delivered to it in some port of military or naval equipment actually in the occupation of the government by which she is commissioned. W. V. HARCOURT."

THE PROPERTY OF MARRIED WOMEN.

The Select Committee of the House of Commons, to whom the "Married Women's Property Bill" was referred, have agreed to the following special report:—

"Your committee, to whom the Bill to amend the Law relating to the Property of Married Women has been referred, have commenced

by taking evidence as to the present state of the law, the causes of complaint against it, and the nature of the proposed change; and also as to the results of a similar change in the United States and Canada; and although your committee have been unable to conclude their inquiry, owing to the advanced period of the session, they think it right, in reporting the evidence, to state the effect of it.

"The legal evidence taken by your committee shows that the Courts of Common Law and the Courts of Equity administer two distinct systems of law with reference to this subject, and are guided by entirely different principles. In the common law courts the married woman is not, in respect of property, recognised as having a legal existence independent of her husband. In contemplation of law the husband and wife are one person, and that person is the husband. The wife is incapable of contracting, and of suing and being sued. Her property at marriage vests in her husband, or passes under his control and management during their joint lives. As regards her real estate, the husband cannot sell it without her consent, and after his death it survives to her or her heirs, but pending their joint lives the husband can deal with the income as he pleases, and dispose of his interest without her consent and without making provision for her. Her personal property at marriage vests absolutely in her husband. Her leasehold property is equally at his disposal, but if he does not dispose of it during his life it reverts to the wife surviving him. In either case the husband may dispose of such property without making any provision for the future maintenance of the wife or children. Her earnings are equally at his disposal.

The Courts of Equity have, on the other hand, been occupied from a very early period in elaborating a system under which the wife may, by ante-nuptial arrangement, escape from the severity of the common law. They began by recognising the separate existence of the wife, inventing a process by which, through the medium of trustees, a separate property could be secured to the wife free from the control of her husband; in respect of this separate property they subsequently recognised that she could enjoy all the incidents of property, could contract, and be made liable on her contracts, and indirectly sue and be sued in equity. A further step was made when they held that a husband could be a trustee for his wife, and could be called to account on her behalf. Later, with a view to a better protection of the wife, and to prevent her suffering from her own imprudence, or from the undue influence of her husband, they invented a process by which the wife could be restrained from anticipating the income of her separate property. They also devised means by which, even after marriage, where the wife becomes entitled to property as next of kin, or by will, and the same would otherwise go to the husband, a portion may be claimed on behalf of the wife and her children, for a settlement, to secure her against the misfortune or improvidence of her husband. At first they acknowledged this equity to a settlement only in cases where the husband had to seek the intervention of the courts on his own behalf, and where, in return for their assistance, they felt themselves in a position to insist upon

his acting equitably on his part; but they subsequently enlarged their jurisdiction, and now in all cases in which property accrues to the wife after marriage, she is entitled, on application, to a share of it in settlement if adequate provision has not been previously made, or if other circumstances warrant it.

"Under this judicious legislation of the Courts of Equity, developed by slow degrees and under legal fictions, a system has been arrived at by which persons able to afford the expense of a settlement, as a rule, avoid the consequences and effects of the Common Law, and by arrangements before marriage, and through trustees and contracts, create a wholly different relation between husband and wife from that contemplated by the common law.

"It has been represented to your committee that the Courts of Equity, much as they have done to mitigate the Common Law, have failed in many respects through fear of pushing their decisions to their legitimate conclusion. Thus, where they allow to the wife an equity to a settlement in respect of property coming to her after marriage, they generally refuse to give the whole sum to the wife, and allow a portion to go to the husband's creditors or assignees, or to the husband himself, even when he is living apart from his wife; and if the property has reached the hands of the husband the courts are unable to deal with the case. In the case of a married woman's contracts, the Equity Courts recognise her right to contract with reference to her separate estate, but they do not recognise a general right to contract, because that would be contrary to the common law doctrine that a married woman cannot contract. The distinctions which this reasoning has given rise to are somewhat anomalous and unsatisfactory. Thus, where written contracts are made by a married woman, the courts presume that they are made with reference to her separate estate, but they do not make this presumption in the case of debts orally contracted, as by orders for goods; in which case, unless the separate estate is mentioned at the time of the contract, there is no remedy against it. It also appears that the means of recovering against the estate of a married woman, through the process of equity, are very expensive and unsatisfactory.

"It cannot be doubted that, even among persons able to afford the expense of a settlement, occasional cases of great hardship happen where through remissness or accident no settlement has been made, and where the property of the wife becomes subject to the misfortunes, improvidence, or bad conduct of the husband; or where after-acquired property of the wife goes to the creditors or assignees of the husband, instead of to the maintenance of herself or her children. Among persons of small means, to whom marriage settlements are impossible on account of their expense and the difficulty of procuring trustees, such cases are very common.

"Evidence has also been given as to the effect of the law which gives the wife's earnings to her husband. Very numerous cases of hardship occur; it is not uncommon for husbands to take their wives' earnings to spend them in drinking or dissipation. The law at present gives protection for the wife's earnings only in the case

where the husband has deserted her. It has been stated that the extension of such protection orders to the case of women whose husbands are intemperate, reckless, idle, or cruel, would be a very insufficient remedy, inasmuch as few women, while continuing to live with their husbands, would come forward to claim in public a protection which would involve giving publicity to their domestic grievances, and an application adverse to their husbands. In many cases also the protection order would be too late, as it often is in the case of desertion. The small fund which the wife has saved before or after marriage is swept off before the application can be made. On behalf of the wives of labouring men, it is urgently claimed that the only proper course will be to give them an absolute property in and control over their own earnings and savings. The evidence of Mr. Ormerod, the president of a working men's co-operative society at Rochdale, is of great interest on this point, as it shows what have been the steps taken by his society to secure the shares of married women who are shareholders in the society from the claims or control of their husbands. The means adopted are of doubtful legality; and it is stated that it would be a great disaster if it should turn out that the society is unable to prevent improvident husbands disposing of these shares or taking the interest of them.

"Your committee have further taken evidence as to the changes made in the United States and Canada within late years in this branch of the law. It appears that till these changes took place the common law of England and the rules of our equity courts prevailed in those States; objection, however, was made to the state of the law on the part of persons with small fortunes, and of women earning money by their own exertions; and now throughout the greater number of the American States and in Canada the common law has been altered, and women after marriage retain their separate property, with power to contract, and to sue and be sued, in respect of it, as if they were single. In some of the more recently-constituted Western States the opinion in favour of this change was so strong that it was made a part of the State constitution, and was not left to the discretion of the State legislature.

"Vermont was the first State to make the change, in 1840; its example was soon followed by other States. The State of New York, in 1848, gave to married women absolute control over their own property, but did not extend the protection to their earnings till 1860. Massachusetts made the change in 1857; Upper Canada in 1859. Mr. Dudley Field, of New York, in a letter given in the Appendix, states, among the reasons for the change in his State: 'A desire to give poor women the same protection which rich ones had by means of marriage settlements and trustees, a process altogether unavailable to the wives of mechanics and small tradesmen; the desire to furnish mothers with power to supply the wants of their children when the husband neglects to do so; the desire to preserve a wife's separate estate from liability for her husband's debts; and the belief that the mutual affection of husbands and wives would be more promoted by their standing upon an equality than by either being made inferior to

the other, except where it was absolutely necessary.' The change was here, as in the other States, opposed by the older lawyers, but was forced upon them by the Legislature.

"The changes are stated to have been everywhere beneficial. Mr. Dudley Field says, 'Scarcely one of the great reforms which have been effected in this State have given more entire satisfaction than this.'. Mr. Washburn, formerly Governor of Massachusetts, and now Professor of Law at Harvard University, and who allows that he viewed the change with apprehension, that it would cause angry and unkind feelings in families, and open the door for fraud, now admits that he is 'so far convinced to the contrary that he would not be one to restore the Common Law if he could; any attempt to go back to it would meet with little favour at this day.' The oral evidence we have received from members of the Vermont and Massachusetts' bars, from Mr. Cyrus Field, of New York, and from the Hon. J. Rose, Finance Minister of Canada, is to the same effect. They state that the change has given entire satisfaction; that it has not caused dissension in families; that it has not weakened the proper authority of husbands; that it has not given rise to frauds, beyond what were within reach of persons who were so minded, with little more difficulty under the old law. They further represent that it has not put an end to marriage settlements, though it has diminished their number in the case of small fortunes. Where there is a considerable amount of property belonging to a woman about to marry, it is generally conveyed to trustees for her benefit; and in devises by will careful fathers usually make a corresponding provision, and leave their daughter's portion in such a way as to prevent its being ever subject to a husband's control or liable to his debts.

"It is stated that the benefit from the change has chiefly accrued to women of small means, to whom provision by marriage settlements, through trustees, was not open, on account of the expense and difficulty. The number of such persons in America is very large; on the other hand, the cases of married women earning wages are comparatively rare, particularly among native Americans, except when the husbands are incapacitated or are unwilling to work. They are more common in the manufacturing towns of Massachusetts. Mr. Wells, Judge of the Supreme Court of that State, says:

"'The chief benefit which the law confers is not upon those who are possessed of property by inheritance or otherwise. That for which it seems to me to be most commendable is the power which it gives to women of the poorer and labouring classes to control the fruits of their own labour; many women of that class are left to struggle against the hardships of life, sometimes with a family of children, abandoned by their husbands, or, still worse, with a drunken, thriftless, idle vagabond of a man, claiming all the rights of a husband, and fulfilling none of the duties of that relation. When such men could take the hard earnings of their wives from service in the mills, or from the attempt to keep boarders, and waste it upon their indulgences, no woman could have courage to struggle long in such a hopeless effort.

"'In our manufacturing towns there are a great many women thus situated, who are saved from the most hopeless poverty and slavery by this most just provision, which gives them the right to receive and hold the wages of their own labour, and the property purchased therewith. The employment in the mills, and the opportunities to engage in the business of a boarding house, afford to such women the best possible means to support themselves and their families; they are therefore attracted to such localities. The misfortune has been, that the more ignorant and degraded men were, the more rigorously they insisted upon and exercised what were considered their marital rights. The law, by this change in the relative rights of the husband and wife, has brought to the women of the poorer classes a relief which touches the springs of hope and energy, and which, I believe, will affect their lives to a degree far beyond any influence that can be felt through property merely by those who are the fortunate possessors of pecuniary wealth.'

"It is to be remarked that the change has been more complete in the State of New York than in Massachusetts. In the latter State the wife is not able to sell real estate or shares in corporations without the consent of her husband—the husband retains his right to the personalty of the wife on her death without a will; and the courts of law having held that the wife could not be in partnership with her husband, the Legislature enacted that she could not be a partner with any third person, and that if she wishes to carry on any trade separate from her husband she must register herself as a separate trader, according to a prescribed formality; this restriction, however, does not apply to the case of simple earnings. No change has been made in the liability of the husband for his wife's debts; on this point the law remains as before, and depends, as in this country, upon the law of agency.

"In the State of New York the change has been even wider. The wife may sell even real estate without the consent of her husband; and it does not appear that any restriction has been placed upon her entering into partnership or carrying on a separate trade. It is to be observed that in this State, as in that of Massachusetts, the courts have held, upon the construction of the statutes which effected the change, that, although the Common Law has been altered so far as to prevent marriage operating as a gift to the husband of the wife's property, and to enable the wife to hold separate property, and to sue and be sued by third parties, yet it has not been expressly repealed, so as to enable husband and wife to take property by gift, grant, or conveyance from one another, or to contract with or to sue another upon contracts or for torts.

"In Upper Canada the change has not been yet extended to earnings, otherwise it is of the same comprehensive character as in New York. The statute dealt not only with future marriages, but with existing marriages in respect of after-acquired property. There is the same absence of any change as to the liability of the husband for the wife's debts. It appears that the old French law of Lower Canada, under which great facilities were given to married women to

obtain 'separation des biens,' by simple declaration before a notary at marriage, a course very commonly followed, had worked so well that it contributed greatly to the change of the English common law in Upper Canada.

"Your committee attribute much weight to the evidence from these States, because where so great a change of law is proposed, the arguments as to the results must necessarily be of a theoretical character, unless they can be drawn from experience; and if in countries with populations so similar in every respect to that of this country, with the same law up to a recent period, and where the same complaints were made against the operation of it, the Common Law has been changed without difficulty, and without causing those evils which were anticipated there, and which are feared here, there is every reason to believe that those fears are groundless, and that the same good results will follow in this country. Among the working classes the number of women earning wages is so much greater in this country than in the United States, that there is good reason to believe the results of the change will be even more satisfactory, in so far as they will extend to so many more persons.

"Looking, therefore, to the result of this experience, and to the general tendency of the provisions of equity, your committee is of opinion that a change in the law of this country, with reference both to the property and earnings of married women, is necessary.

"It does not appear to be necessary to make any alteration in the liability of a husband to maintain his wife, in consequence of such a change in the law with regard to the property of married women. A married woman living apart from her husband can only bind him for what is necessary, and her possession of property of her own, *pro tanto*, negatives the authority arising from necessity. A married woman living with her husband has an authority which, in spite of some fluctuation and uncertainty of judicial decisions, seems to be regulated by the general principles of the law of agency. Agency is a mixed question of law and fact, and the courts will give due weight to such a fact as the possession of property by a married woman without any express statutable direction.

"Other questions of importance arise in settling the details of such a measure. Whether, for instance, the poor-law liability of the father for the maintenance of the children should be extended to the mother? Whether the change should be confined to future marriages only, or should be applied to existing marriages where after-acquired property is concerned? Whether the restrictions imposed by the Massachusetts' code on alienation of property by the wife should be adopted? Whether the wife's power to contract, convey, and take by conveyance should be extended to contracts with or conveyances to or from her husband, or be limited to third parties, as appears to be the case in the American States whose legislation has been referred to? And whether, at the death of the wife intestate, any part of her personalty should go to her next of kin, or the whole to her husband only? These questions, however, require more time for discussion than your committee at this period of the session have been able to devote to

them; they therefore recommend that a select committee be appointed in the next session of Parliament for further inquiry."

The Select Committee also agreed to report the bill which was referred to them, without amendment.

SOCIETE DES ANTIQUAIRES DE NORMANDIE.—One of the most remarkable events of the day, as regards the profession, is the recent election of Mr. Sergeant Burke as Rector of this Institute. We are in the habit of reading, with interest, the election of the Rector of Glasgow, of Edinburgh, of Aberdeen, &c.; but to say the least of it, it is a remarkable event to see an Englishman chosen Rector of a foreign Institute. His inaugural lecture lies before us; and all we dare say of it is, that if it was delivered with half the power with which it is written, it must have produced a great sensation. His style and sentiment reflect no less honour upon the place of his education (Caen) than upon his own country and the profession to which he belongs. We must, however, notice, in particular, one passage in this elegant discourse. It is this—*A mon grand regret, il n'y a plus en francais d'expression qui traduise Serjeant-at-law, quoique cette dignitè soit d'origine Normandie.* It may be, we admit, that there is no literal *translation* of the words; but *Chevalier es droit* is the universally recognized version of them. There is the most express and undoubted authority for this version of the words. Independently of express authority, it is corroborated by the fact of every one of the Order of the Coif wearing for 500 years or more the open helmet. Moreover, the Heralds have, on many State occasions, assigned to them the rank of knights.

NEW SERJEANTS.—Three new Serjeants have been added to the list by Lord Cairns, namely, Cox, Sleigh, and Sargood. But, so far, there seems no indication of his lordship's intention to make any Queen's Serjeants, a circumstance, we think, very extraordinary.

LAW PRIZES.—The *Irish Law Times* draws attention to the fact, that no exhibitions or studentships are offered to law students in Ireland, like those given by the Societies of the Inns of Court here. It says:—

"The Council of Legal Education indeed, in instituting an examination for those who wish to dispense with attendance on the lectures of the professors in Henrietta-street, have offered as prize to the most successful answerer the sum of ten guineas, which would not suffice to purchase the necessary books, as the course extends over every branch of the law, those who contend for the prize being expected to qualify at least in the four branches into which the examination is divided for the mere pass-men. In England, on the contrary, exhibitions of considerable value, and tenable for two years, are given to members of the advanced classes and of the elementary classes, for proficiency in each of the following subjects:—The Common Law, the Law of Real Property, Equity, Jurisprudence, Civil Law, and International Law, Constitutional Law, and Legal History; and, finally, at the general examination the very respectable studentships and exhibitions of fifty guineas and

twenty-five guineas per annum, each respectively to continue for a period of three years, have been founded. The exhibitions and studentships have been and are held by gentlemen practising at the Irish Bar, but the regulations which require that the candidates for these prizes should have attended the several courses of lectures delivered in London, on the subjects, in which they offer themselves for examination, render them practically unattainable by the majority of Irish students. We therefore think that it would be wise on the part of the Council of Legal Education here if they would take some such step as the founding of exhibitions similar to those offered in England in the various branches of legal knowledge, in order to induce students to make themselves proficient in them."

Removal of a Colonial Judge.—Chief Justice Beaumont, of the colony of British Guiana, has been removed from the Bench. The local Court of Policy presented a memorial to the Crown, impeaching the Chief Justice on seven charges, the most important of which were — improperly and intemperately holding up the Executive Government to hatred and obloquy: vexatiously taking occasion to embarrass the colonial administration; administering harsh and vindictive punishments; using offensive, intemperate and calumnious language; illegally exercising arbitrary power; and improperly interfering with the judicial records. The case was argued for several days, and at the recommendation of the lords of the Privy Council, the Crown has recommended the removal of the Chief Justice from his office.

The Digest of the Law.—The Law Digest Commissioners have selected the three following gentlemen as the successful competitors in the preparation of Specimen Digests:—Mr. Henry Dunning Macleod for a specimen digest of the law of Bills of Exchange; Mr. William Richard Fisher for a specimen digest of the law of Mortgage, including Lien; and Mr. John Leybourn Goddard for a specimen digest of the law of "Incorporeal Rights, including Rights of Way, Water, Light, and other Easements and Servitudes." There were more than eighty competitors.

The Law in Egypt.—The attention of our Government has been called to the state of the consular system in Egypt. A plan has been submitted by Nubar Pasha to substitute for the Consular Courts a judicature composed partly of foreign and partly of native lawyers, the former to be in the proportion of two to one in all the courts. A deputation has waited on Lord Stanley on the subject, and his lordship promised his most cordial co-operation in reforming the abuses of the present system. Mr. Layard has also brought the matter before the House of Commons.

The Statutes at Large.—In accordance with the suggestions contained in a letter addressed by Sir John Shaw-Lefevre, K.C.B., to the Right Hon. Gathorne Hardy, henceforth the Acts confirming Provisional Orders under the Local Government Act, the Land Drainage Acts, the Pier and Harbour Acts, and other like Acts, will be published in a separate volume.

Incorporated Law Society.—The Annual Meeting of this

Society was held on the 10th of July. The most important subjects which have occupied the attention of the Council since the last report, has been the consideration of matters coming within the scope of the Jurisdiction Commission, the concentration of the law courts and officers, the remuneration of solicitors, the Land Clauses Consolidation Act, 1845, the County Courts' Admiralty Jurisdiction Bill, and rules under the County Court Act, 1867.

BANQUET TO THE JUDGES.—Her Majesty's judges have been entertained by Mr. Alderman Stone and Mr. Sheriff McArthur at a banquet in the Haberdashers' Hall, Gresham-street West. The hall was tastefully decorated for the occasion with flowers and banners, bearing the arms of the different masters who have served in connection with the company. The royal standard and union jack were suspended on either side of the banner of the Haberdashers' Company, which was placed over the cross table, bearing the motto "Serve and obey." After the usual loyal toasts had been drunk, Mr. Sheriff Stone gave "Her Majesty's Judges," which was replied to by the Lord Chief Baron.

THE BUST OF PLOWDEN.—On Wednesday, June 10th, there was a grand day at the Middle Temple, on which was unveiled the bust of Edmund Plowden, a celebrated lawyer, who distinguished himself for his sound law and logic in the reign of Elizabeth. The bust is from the design which was executed in his lifetime, namely, three centuries ago, and is the present of Mr. Robert Ingram, one of the oldest members of the society, and the work of Mr. Morton Edwards. Sir R. J. Phillimore presided, supported by many members of the Bar, and the bust was uncovered amidst much applause.

DEATH OF LORD CRANWORTH.—This learned law lord, we regret to hear, expired at his residence, at Holywood, on Sunday, July 26, after three days' illness, in the 79th year of his age. The *Times*, in its remarks on Lord Cranworth's career, distinguishes him as follows: "A sedulous schoolboy, a successful, if not a distinguished, student at the University, an advocate of trusted reputation, a judge of the first rank, both on the Common Law and the Equity sides of Westminster Hall, distinguished as a lawyer by his freedom from the prejudices of his profession, and as a politician, by his perfect temper and consistency, Lord Cranworth earned the position he held with the approval of all men."

EXAMINATIONS AT THE INCORPORATED LAW SOCIETY.

Easter Term.

At the final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinction :—Thomas William Harris, (equal) George Solomon Joseph, B.A., Charles Kidson, and Arthur Vizard.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books :—To Mr. Harris, the Prize of the Honourable Society of Clifford's Inn ; Mr. Joseph, the Prize of the Honourable Society of New Inn ; Mr. Kidson and Mr. Vizard, Prizes of the Incorporated Law Society.

The Examiners also certified that the following Candidates, under the age of 26, whose names are placed in alphabetical order, passed examinations which entitle them to commendation :—John James Dumville Botterell, John Wollaston Mountford, John Scott, and Edward Holme Woodcock. The Council have accordingly awarded them Certificates of Merit.

The examiners further announced to the following Candidates that their answers to the questions at the examination were highly satisfactory, and would have entitled them to Prizes or Certificates of Merit if they had not been above the age of 26 :—Brabazon Campbell, Frank Chalk, John Roscorla, Charles Edward Sharman, and Charles John Henry Taylor.

The number of Candidates examined was 92 ; passed, 85 ; postponed, 7.

Trinity Term.

At the final Examination of Candidates for Admission on the Roll of Attorneys and Solicitors of the Superior Courts, the Examiners recommended the following gentlemen, under the age of 26, as being entitled to honorary distinctions :—To William Preston Willins, Thomas William Bischoff, Edward John Bridgman, William Henry Symes, Stephen James Walker, John Thomas Sutcliffe, and Richard Mills English.

The Council of the Incorporated Law Society have accordingly awarded the following Prizes of Books :—To Mr. Willins, the Prize of the Honourable Society of Clifford's Inn ; Mr. Bischoff, the Prize of the Honourable Society of New Inn ; Mr. Bridgman, Mr. Symes, Mr. Walker, Mr. Sutcliffe and Mr. English, Prizes of the Incorporated Law Society.

The Examiners also certified that the following Candidates, under the age of 26, passed examinations which entitled them to commendation :—Frederick Fox Cartwright, John Charles Chalk, Cannings Collins, Charles Gasquet, Frederic Johnson, Francis John Forsell Kirby, George Middlewood, Alfred Edward Smith, William Alexander Smith, Charles Henry Twynam. The Council have accordingly awarded them Certificates of Merit.

The number of Candidates examined was 122 ; passed, 109 ; postponed, 13.

BAR EXAMINATIONS.

At the general examination of students of the Inns of Court, held at Lincoln's Inn Hall, on the 19th, 20th, and 21st days of May last

The Council of Legal Education awarded to Rooke Pennington, Esq., student of the Inner Temple, a studentship of 50 guineas per annum, to continue for a period of three years.

George Sangster Green, Esq., student of Lincoln's Inn, an exhibition of 25 guineas per annum, to continue for a period of three years.

George Washington Heywood, Esq., student of the Middle Temple, certificate of honour of the first class.

Henry Cooper Abbs, Esq., student of the Inner Temple; Catchick Wise Arathoon, Esq., student of the Middle Temple; Edward Bickers, Esq., student of the Middle Temple; John Brook-Smith, Esq., student of the Inner Temple; Tom Collins, Esq., student of the Middle Temple; John Stuart Colquhoun, Esq., student of the Middle Temple; William Henry Craig, Esq., student of Lincoln's Inn; James Ackworth Davies, Esq., student of Gray's Inn; Frederick Victor Dickens, Esq., student of the Middle Temple; Henry Edward Vavasœur Durell, Esq., student of the Middle Temple; Alexander Barclay Penn Gaskell, Esq, student of the Inner Temple; Herbert Richard Hodson, Esq., student of the Inner Temple; James Edward Horne, Esq., student of the Inner Temple; John Alexander Jackson, Esq., student of the Middle Temple; Robert Jardine Esq., student of Gray's Inn; Henry Keeble, Esq., student of Gray's Inn; Thomas Davis Mitchell, Esq., student of the Inner Temple; James Baird Moffatt, Esq., student of the Middle Temple; James Francis Oswald, Esq., student of the Middle Temple; James Simson, Esq., student of Lincoln's Inn; Henry George Tuke, Esq., student of the Inner Temple; and Jonas Daniel David Vaughan, Esq., student of the Middle Temple—certificates that they have satisfactorily passed a public examination.

Trinity Term.

The Council of Legal Education have awarded the following exhibitions to the under-mentioned students, of the value of 30 guineas each, to endure for two years:—

Constitutional Law and Legal History—William Garvie, Esq., student of Lincoln's Inn.

Jurisprudence, Civil and International Law.—Cornelius Marshall Warmington, Esq., student of the Middle Temple.

Equity.—John Arnell Creed, Esq., student of the Middle Temple.

The Common Law.—Charles Henry Turner, Esq., student of Lincoln's Inn.

The Law of Real Property, &c.—George Nichols Marcy, Esq., student of Lincoln's Inn.

The Council of Legal Education have also awarded the following exhibitions of the value of 20 guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition:—

Equity.—Thomas Brett, Esq., student of the Middle Temple.

The Common Law.—Richard Halliday, Esq., student of the Middle Temple.

The Law of Real Property, &c.—Thomas Brett, Esq., student of the Middle Temple.

CALLS TO THE BAR.

Easter Term.

Middle Temple.—Edward Selby Campbell, Esq.; John Maskell, Esq., B.L., of Madras; Louis Samson, Esq., B.A., Christ Church, Oxford; George Caledon Alexander, Esq., B.A., Oriel College, Oxford; James Michael Errington, Esq., B.A., Trinity College, Dublin; John Cameron Macgregor, Esq., and Arthur Reginald Rudall, Esq.

Inner Temple.—Edward Heneage Wynne Finch, Esq., B.A., Cambridge; William Frederick Lawton, Esq., B.A., Cambridge; Henry Randolph Finch, Esq., B.A., Oxford; Richard Leckonby Hothersall Phipps, Esq.; Francis William Maclean, Esq., B.A., Cambridge; Joseph Francis Leese, Esq., B.A., London; Philip Thresher, Esq., B.A., Oxford; Cranstoun Kerr, Esq., Oxford; Frederick Alexander Whitaker, Esq.; and Henry Kingsmill, Esq., jun., M.A., Dublin.

Lincoln's Inn.—Richard Hillebrand Morgan, Esq, B.A., Cambridge; Charles Colin Macrae, Esq., B.A., Oxford; Henry Waldemar Lawrence, Esq., B.A., Cambridge; George Borthwick, Esq., B.A., Cambridge; Henry George Middleton Kirby, Esq., B.A., Cambridge; George Bernard Harvey Drew, Esq., B.A., Cambridge; Richard Everard Webster, Esq., B.A., Cambridge; Frederic Robert Wickham, Esq., M.A., Oxford; Richard Warwick, Esq., LL.B., Cambridge; John Khelat Darley, Esq., B.A., Dublin; William Charles Webb, Esq.; Pherozeshah Meherwanjee Mehta, M.A., Bombay University; and William Ralph Benson, Esq.

Gray's Inn.—Robert Percival Evans, Esq.; John Rose, Esq.; Charles Baker, Esq.; Richard White, Esq.; and Arthur Davenport, Esq.

Trinity Term.

Inner Temple—Thomas Shedden, M.A., Cambridge, Esq.; Arthur Brandreth, Esq.; George Hampden Cameron-Hampden, B.A., Oxford, Esq., Charles Grove Edwards, B.A., Oxford, Esq.; John Henry Forster, M.A., Oxford, Esq.; James Edward Horne, M.A., Cambridge, Esq.; James Round, B.A., Oxford, Esq.; George Hollis, B.A., Cambridge, Esq.; John Brook-Smith, M.A., Cambridge, Esq.; Edward Ridley, B.A., Oxford, Esq.; Lawrence Daniel Kirby, B.A., London, Esq., Henry Cooper Abbs, Esq.; Thomas Duncan MacDougal, Esq.; Robert Freke Gould, Esq.; Herbert Richard Hodson, London, Esq.; Henry John Lowndes Graham, M.A., Oxford, Esq.; Alexander Barclay Penn Gaskell, Esq.; Frederick John Marsden, Esq.; George Lewis Garcia, London, Esq.; Charles Thomas Boothman, London, Esq.; and Robert George Arbuthnot, M.A., Cambridge, Esq.

Middle Temple.—George Washington Heywood, Esq., holder of a certificate of honour of the first class, awarded by the Council of Legal Education, Trinity Term, 1868; Thomas Stephen Whitaker, Esq.; David Greenhill Bruce-Gardyne, B.A., of Trinity College, Oxford, Esq.; Robert Joseph Crosthwaite, B.A., of Brasenose College, Oxford, Esq.; Edward Henry Selfe, B.A., of Christ Church, Oxford, Esq.; John Alexander Jackson, B.A., of Queen's College, Oxford, Esq.; Alexander M'Neill, of Trinity College, Dublin, Esq.; John Morris Maskell, B.A., of Trinity College, Cambridge, Esq.; Thomas Collins, M.A., of Christ's College, Cambridge, Esq.; James Thomasin Foster, LL.B., of St. Peter's College, Cambridge, Esq.; Henry Thorowgood Hunt, Esq.; Charles Edward Moore,

Esq.; **Edward Arkwright Bruxner**, B.A., of Exeter College, Oxford, Esq.; **Charles William Reynolds**, of St. John's College, Cambridge, Esq., **Mortimer Neville Woodard**, Esq.; **Edward Julyan Dunn**, of Brasenose College, Oxford, Esq.; **William Sydenham Gantz**, Esq.; **Thomas Smith Gleadowe**, B.A., of Magdalen College, Cambridge, Esq.; **Jean Theodore Paul Edmond Rondineau**, Licentiate and Doctor of Laws, of Paris, Esq.; **Catchick Wise Arathoon**, Esq.; **Charles John Wilkins**, Esq.; **John Buckingham Pope**, of Magdalen College, Cambridge, Esq.; **Charles Edward Gregg Fisher**, of Christ's College, Cambridge, Esq.; **Henry Edward Le Vavasœur Durell**, Esq.; **John Stuart Colquhoun**, Esq.; **James Baird Moffatt**, of the University of Glasgow, Esq.; **Lewis Jean Arthur Michel**, B.A., LL.B., in France, Esq.; **Gideon Pulteney Johnstone**, Esq.; **Arthur Hamon**, Esq.; **Arthur Green**, Esq.; **Louis Mallet-Paret**, Esq.; and **Wilmot Lane**, Esq.

Lincoln's Inn.—**Archibald Henry Simpson**, B.A., Cambridge, Esq.; **Alexander William Crichton**, Cambridge, Esq.; **Cecil Clare Marston Dale**, B.A., Cambridge, Esq.; **Henry William May**, B.A., Oxford, Esq.; **Arthur William Crowley-Boevey**, B.A., Oxford, Esq.; **Walter Bissett**, B.A., Cambridge, Esq.; **John Thomas Smith**, LL.B., Melbourne, Esq.; **Henry John Tweedy**, B.A., London, Esq.; **Thomas Theophilus Forbes**, University of Calcutta, Esq.; **John William Cooper**, LL.B., Cambridge, Esq.; and **William Sloan**, of Madras, Esq.

APPOINTMENTS.

The Right Hon. John, Baron Romilly; the Right Hon. Spencer Horatio Walpole; George Markham Giffard, Esq., a Vice-Chancellor; Edward Howes, Esq.: Arthur Hobhouse, Esq., one of Her Majesty's Counsel; Jacob Waley, Henry Thring, Edward Parker Wolstenholme, Esqrs, Barristers-at-Law; John Young, and William James Farrer, Esqrs.; to be Her Majesty's Commissioners to inquire into the operation of the Land Transfer Act, and also into the present condition of the Registry of Deeds for the county of Middlesex.

The following have been appointed a Royal Commission to inquire into and consider the legal condition of Her Majesty's natural-born subjects who may part from and reside beyond the realm in foreign countries, and to report how, and in what manner, having regard to the laws and practice of other States, it may be expedient to alter and amend the laws relating to such natural-born subjects, their wives, widows, children, descendants, or relations. And also to inquire into and consider the legal condition of persons being aliens, entering into or residing within the realm, and becoming naturalized as subjects of the Crown, and to report how far and in what manner it may be expedient, having regard to the laws and practice of England, of foreign States or otherwise, to alter or amend the laws relating to such persons, or persons claiming rights or privileges through or under them. The Earl of Clarendon, Mr. Cardwell, M.P., Sir R. J. Phillimore, Judge of the Admiralty Court, Baron Bramwell, the Attorney-General (Sir T. B. Karslake), the Advocate-General (Sir Travers Twiss), Sir Roundell Palmer, Mr. W. E. Forster, M.P., Mr. Vernon Harcourt, and Mr. Montague Bernard.

Mr. C. S. A. Abbott has been appointed Secretary to the Commission.

Mr. Justice Hannen, and Mr. Thomas Tilson, Chairman of the Surrey Sessions, have received the honour of knighthood at the hands of Her Majesty.

Mr. Edward William Cox, Mr. W. Campbell Sleigh, and Mr. Sargood have been raised to the degree of Serjeant-at-Law.

Mr. C. J. Prideaux, Q.C., has been appointed to the Recordership of Helston, in succession to Mr. Serjeant Cox, and the Recordership of Portsmouth, vacated by the death of Mr. Poulden, has been given to Mr. Serjeant Cox.

Mr. Thomas George Fardell, Barrister-at-Law, has been appointed Registrar of the Court of Bankruptcy, in place of Mr. Harris, who has resigned owing to ill health.

Mr. William Henry Cooke, Q.C., has been appointed to the judgeship of County Court Circuit, No. 32, vacant by the death of Mr. J. T. Birch, and Mr. Bagshaw has been appointed Judge of the Clerkenwell County Court.

Mr. Benjamin Babington, of the Chancery bar, has been appointed to the Royal Commission to inquire into the operation of the Land Transfer Act and the Middlesex Registry of Deeds.

Mr. William Forsyth, Q.C., M.A., of Trinity College, has been appointed Commissary to his Grace the Chancellor, in the room of the Right Honourable Lord Justice Selwyn.

Mr. John R. Davidson, Q.C., has been elected Chairman of the Durham Quarter Sessions, in the room of Mr. W. S. Grey, Barrister-at-Law, resigned.

Mr. Almaric Rumsey, Barrister-at-Law, has been selected to fill the post of Assistant-Solicitor to H.M. Customs, vacant by the retirement of Mr. Beverley.

Professor Montague Bernard, B.C.L., M.A., and Mr. J. R. Quain, Q.C., LL.D., have been elected Examiners in Law and Legislation in the University of London for 1868-9.

Mr. Hodgson, Solicitor, of Birmingham, has been elected by the Corporation to the office of Clerk of the Peace, vacant by the death of Mr. George Edmonds.

Mr. Thomas Hugh Oldham, Solicitor, Gainsborough, has been appointed Coroner for the Kirton-in-Lindsey district, in the county of Lincolnshire.

Lord Chief Justice Bovill has appointed his son, Mr. William Bovill, to the Clerkship of Assize on the Western Circuit, vacant by the death of Mr. Thomas Edward Chitty.

IRELAND.—Mr. Thomas Rice Henn, Q.C., has been promoted from the Chairmanship of Quarter Sessions for the county of Carlow to that of the county Galway, rendered vacant by the death of Mr. Robert Longfield, Q.C.

Mr. James Pierce Hamilton, Barrister-at-Law, has been appointed to the Chairmanship of Carlow.

Mr. Charles Andrews, Q.C., has been appointed Crown Prosecutor for the county of Sligo, in the room of Mr. Walter Bourke, Q.C., resigned; Mr. William Allen Exham, Q.C., Senior Crown Prosecutor for the county of Kerry, in room of Mr. Thomas Rice Henn, Q.C., resigned, and Mr. John Letablere Litton, Barrister-at-Law, Supernumerary Crown Prosecutor for the county of Longford.

The Right Hon. Mr. Justice Morris has been appointed Commissioner of National Education in Ireland, in room of the Right Hon. Patrick, Lord Bellew, deceased.

The following Barristers have been called to the Inner Bar:—Mr. Acheson Thompson Henderson; Mr. Arthur Stanley Jackson; Mr. J. Faviere Elrington, LL.D.; Mr. James Pierce Hamilton; Mr. Robert Johnston; Mr. Henry Concannon, LL.D.; Mr. Edward T. Ffrench Beytagh; Mr. Peter Barlow; Mr. John B. Murphy; Mr. William Bennett Campion, Professor of English Law, Queen's College, Galway.

The Hon Society of the Benchers of King's Inn have appointed the

Hon. David Plunkett, Barrister-at-Law, to be a Professor of Constitutional and Criminal Law, in room of Mr. T. H. Barton, Barrister-at-Law, whose term has expired; and Mr. James Slattery, Barrister-at-Law, to be Professor of the law of Personal Property, Pleading, and Evidence, in room of Mr. Piers White, Barrister-at-Law, whose term has also expired.

Mr. Michael Leahy, Solicitor, Newcastle, West, has been appointed Sessional Crown Solicitor for the county of the city of Limerick, in the room of Mr. P. J. Murphy, Solicitor, deceased.

Mr. Henry Watson, Solicitor, has been appointed Distributor of Stamps and Forms for the High Court of Chancery.

Mr. Thomas F. Yeo, late assistant to the Clerk of the Rules of the Court of Exchequer, has been appointed Clerk of the Rules of the Court of Queen's Bench, in room of Mr. Christopher Nelson Duff, deceased.

AFRICA.—Mr. Edward Dwyer has been appointed a Puisne Judge of the Supreme Court of the Colony of the Cape of Good Hope.

Mr. Edward Thomas Wylde has been appointed Registrar or Prothonotary and Keeper of Records of the Supreme Court of the Colony of the Cape of Good Hope.

CANADA.—Mr. R. G. Dalton, Barrister-at-Law, has been appointed Clerk of the Crown and Plea, Queen's Bench, in the place of Mr. Lawrence Heydon, deceased.

INDIA.—Sir Charles Robert Mitchell Jackson, Knight, late a judge of the High Court at Calcutta, has been nominated by the Secretary of State for India, President of a Commission to inquire into the mismanagement of the Bank of Bombay.

Mr. Charles Owen of the Inner Temple has been appointed Senior Magistrate in the Straits Settlements, to reside at Singapore.

Mr. Charles Barry Hobhouse, of the Bengal Civil Service, has been appointed a Judge of the High Court of Calcutta.

Necrology.

April.

23rd. James, G. Alexander, Esq., Solicitor, aged 32.
26th. Birch, T. Jacob, Esq., Judge of the Norfolk County Court, aged 60.
27th. Longfield, Robert, Esq., A.C, Law Adviser to the Crown for Ireland, aged 57.
27th. Williams, J. H., Esq., Solicitor, aged 58.
28th. Riccard, J. E. J., Esq., Solicitor, aged 82.

May.

2nd. Bromehead, E. Arthur, Esq., Solicitor, aged 54.
3rd. Robinson, John, Esq., Solicitor, aged 39.
3rd. Bartley, C. Pitt, Esq., Solicitor, aged 76.
4th. Chitty, T. Edward, Esq., Barrister-at-Law, aged 41.
5th. Robson, W. F., Esq., formerly Solicitor to the Admiralty, aged 61.
5th. Burchell-Herne, H. Harper, Esq., Barrister-at-Law, aged 73.
5th. Temple, Christopher E., Esq., Barrister-at-Law, aged 26.
7th. Brougham, Right Hon. Lord, aged 90.
7th. Hicks, Leonard, Esq., aged 87.
10th. Toller, S. Bush, Esq., Q.C., aged 63.
10th. Beck, J. Grant, Esq., Solicitor, aged 47.
14th. Bayly, Robert, Esq., Barrister-at-Law, aged 62.
14th. Morton, Alexander H., Esq., Solicitor, aged 31.
14th. Hellyer, W. Varlo., Esq., Barrister-at-Law, aged 82.
20th. Lockhart, Edgar H., Esq., Barrister-at-Law, aged 27.
21st. Savage, John, Esq., late Master of the Supreme Court at Madras.
21st. Savage, John, Esq., Solicitor, aged 70.
24th. Gibson, T. Lewis, Esq., late District Judge of Kandy, Ceylon, aged 53.
25th. Clowes, E. Norris, Esq., Solicitor.

June.

10th. **Douglas**, J. Shalto, Esq., Deputy Advocate General, Mauritius, aged 47.

12th. **Poulden**, George, Esq., Recorder of Portsmouth, aged 65.

12th. **Smith**, George, Esq., Solicitor, aged 72.

19th. **Cream**, Charles, Esq., Solicitor, aged 52.

20th. **Claridge**, Sir John T., formerly Recorder of Prince of Wales's Island, Singapore, and Malacca, aged 76.

22nd. **Smith**, F. E., Esq., Solicitor, aged 56.

26th. **Long**, George, Esq., formerly Metropolitan Police Magistrate.

July.

7th. **Stone**, John, Esq., Barrister-at-Law, aged 78.

9th. **Allcock**, W. Penn, Esq., Solicitor, aged 54.

10th. **Johnson**, Henry, Esq., Solicitor, aged 48.

18th. **Gardiner**, John, Esq., Solicitor.

19th. **Bullen**, Edward, Esq., Special Pleader, aged 55.

26th. **Cranworth**, Right Hon. Lord, aged 78.

28th. **Temple**, Stephen, Esq., Q.C.