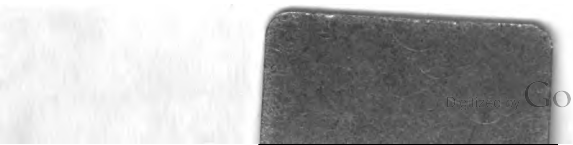

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CONTENTS OF N° I.

CONTENTS OF N° II.

THE

LAW REVIEW.

ART. I.—SCIENCE AND STUDY OF JURISPRUDENCE.

It seems difficult, in casting our eye over the map of the sciences, not to place Jurisprudence in the highest rank, if we do not, indeed, allow it the first place. None requires more enlarged understandings, more sagacious minds, in its cultivators; none draws its materials from more various sources; none assumes for its successful study an ampler body of knowledge, whether of books or of men: but above all, its importance to the interests of mankind is beyond that of every other branch of learning; it is more eminently practical than any; its concern is with the whole order, the peace, and the happiness of society.

If it be alleged that we thus place it above morals, the answer is plain, — Jurisprudence belongs to that great division of science; and not only does it form by far the most important portion of moral science, but it is the point to which all the rest converge, — the application of those speculative doctrines to use. Nor can it be urged that the labours of those who instruct mankind in their duties, of the teachers of moral lessons, rank higher than the labours of the jurist, in practical value, when we reflect how little their exertions could ensure virtuous or even innocent conduct were they not backed by the sanctions of positive law, and their lectures enforced by the action of human tribunals.

In truth we have only to consider what is the great end of society, the object for which men congregate in bodies, and frame plans of polity to govern them and to protect them. The conservation of rights, the security of life and of property, is the purpose of this union; and to obtain that inestimable

blessing, natural liberty is cheerfully sacrificed. Now Jurisprudence is the science which teaches how those rights may be preserved, that security obtained; and consequently it really instructs us in that which forms at once the object and the bond of the social system; it is eminently the social science.

It might at first sight be supposed that the peculiar circumstances of different races of men, different occupations in which their industry was engaged, and different structures of government under which they lived, would render any general principles inapplicable to all cases, and, requiring a different legal system for each, would also require a different juridical science. And no doubt these diversities must occasion varieties in the detail, materially affecting the application of any general principles. Nevertheless, that there are such principles, that they run through all systems of law, and that they constitute a science not various and multifarious but one, and universal, is beyond dispute. It is true that the lawgiver in any state must consider the subjects he has to rule, their habits and pursuits, the polity established among them, in framing his general rules for their guidance and governance. But it is equally true that this very consideration, this adaptation of the laws to circumstances, is connected with general principles, and so becomes the subject of scientific inquiry; and it is equally true that there are many principles which are quite universal in their application; many virtues which laws must possess to be useful, and many vices which they must shun to avoid being hurtful, in whatever country they are enacted, for whatever people they are framed.

The general division of the subject is now to be traced, and it is applicable to all laws, all systems of Jurisprudence. But first we must consider the most general distribution of all, because that divides Jurisprudence itself into two kinds. Laws may relate either to the subjects of states, or to states themselves; to the community consisting of individuals, or to the community consisting of nations: to countries, as England, France, Germany, Italy, or to all nations, that is, to the country whereof England, France, Germany, Italy, are members. The law which rules and protects the subjects of each individual country, dealing with their relations towards each other as members of the same community, subject to the

same government, is termed the Municipal Law: the law which rules and protects the different countries or states, dealing with their relations to each other as members of the great community of nations, which has, however, no ruler, is called the Law of Nations, and sometimes, of late years, International Law. Both of these branches of law are the subjects of Jurisprudence; but it is more usually conversant with the former, because the latter cannot well be altered or moulded in any way, there being no legislative body or supreme power which can deal with its provisions.

A third species of law has often been spoken of, but incorrectly, the Law of Nature. It is undoubtedly true that certain feelings are implanted in us by nature, that is, by the constitution of our minds, and that these feelings incline us to love justice, and hate wrong; it is equally undeniable that all laws ought to accommodate themselves to such feelings, and be made adapted to this constitution of our nature. But there is no law of nature in the proper sense of the word. It may be very true that prior to all human institutions, independent of all positive enactment, our minds prescribe a certain conduct; our conscience, our feelings teach us to avoid certain things as wrong, and do certain things as right and fitting. But the same feelings dispose us to do things which never can be enjoined by any law whatever, as to relieve and help our neighbours, and to seek our own happiness in so far as we can procure it without doing an injury to others. A law, any thing that can be in propriety of speech called a law, implies a command given by some power which can enforce its orders by punishing disobedience to them. The Municipal Law is the command of the sovereign power in any state, a disobedience to which is punished by that power through its officers. The Law of Nations is the command which the general assent of them all has given to each to regulate its conduct towards the others, and the disobedience of which is punished by those others. There is here no supreme power whose officers execute its orders to avenge the breach; but the injured party is supported by the rest in retaliating the injury or seeking redress. In the most perfect system that support would be given by the whole community of nations appointing one to punish the refractory state,

and exact reparation to the injured party instead of leaving the task to the injured party itself. In Greece there was a league of nations each represented in the Amphictyonic Council, which had this kind of international police for its object. But its operations were imperfect, as must ever happen from the tendency of might to encroach upon right when the parties are powerful bodies and not individuals. Nevertheless, although the control exercised by the Law of Nations be imperfect, and although the infraction of its provisions can only be punished by the revenge of those whom it has injured, there is such a law, and it is enforced. No such thing can be predicated of the Law of Nature.

Thus we may affirm with confidence that law is always the creature of positive institution. It is either that rule which the particular state lays down for the government of its subjects, in their mutual relations to each other as individuals; or that rule which the common consent of civilised states lays down for the government of those states in their mutual relations to each other as communities. But these kinds of law are grounded upon the natural feelings of mankind in great part, though in great part also they are grounded upon views which take their rise altogether in the artificial frame of society. Even in as far as they are founded upon the natural feelings common to all mankind, what is loosely termed the Law of Nature, they are wholly different from those feelings, from that law, as a machine is different from the mechanical powers, the principles on which its construction depends. It would be about as correct to call these powers or principles a machine, as to call those feelings a law.

Another error has been of frequent introduction into the general subject of Jurisprudence. The appellation of Law of Nations has been given very incorrectly to the law which is common to all nations, those rules which all systems adopt in framing municipal laws. In a word, the writers have by Law of Nations meant the law of all nations, not the law which regulates their mutual relations, and which stands in the same connection with the community composed of different states, in which municipal law stands to the community composed of different individuals. In that sense, the Law of

Nations approaches nearly to that which is inaccurately called the Law of Nature.

The divisions of municipal law are now to be considered. It consists of two great branches, Rights and Remedies. Every right has a correlative wrong; that is, every right may be violated, and this violation being an injury to the party having the right, he is entitled to be restored or indemnified for the breach; the law provides for his obtaining restoration, or, if that be impossible, compensation. But another right exists on the part of the community, or rather of each of the members whereof it consists,—the right to prevent a repetition of the wrongful act, either by incapacitating the offender, that is, disabling or disinclining him to repeat his offence — or by so dealing with him as to disincline others who witness the treatment which he has received, from following his example. This leads to another division of law into Civil and Criminal. Certain rights are by the law declared to be vested in individuals; to enforce them or to force a remedy for the breach of them, is the province of the Civil branch of law. Certain acts are by the law declared to be crimes; to punish them is the province of the Criminal law. Hence a third division, though of a subordinate nature; — law may either declare what are men's rights, and what are crimes; or it may lay down the course to be taken by the individual who seeks redress for a violation of his rights, and by the state for punishing those who have committed crimes. The one of these is Civil, the other Criminal Procedure. Hence a system of law must always consist of four branches; Civil Law — Criminal Law — Civil Procedure — Criminal Procedure: in other words — Rights — Crimes — Actions — Prosecutions.

It is usual, and it is convenient further to divide civil law into two branches, as it deals with Rights of Persons, or rather rights respecting persons; and Rights of Things, or rather rights respecting things. Nothing, indeed, can be more incorrect, more contrary to the analogy of the language, we may say, with all respect, more slovenly, than the phrases rights of persons and rights of things. All rights are, and necessarily must be, rights of persons, that is, rights possessed by persons. The right of the heir to succeed to his ancestor in the possession of a real estate, or the right of a devisee or legatee to take the

land devised or the chattel bequeathed, are as completely the rights of those persons as the right of the husband over his wife, or of the parent over his child, or of the master over his servant. Again, if the rights of persons include all that have been termed rights of things, inasmuch as all rights must belong to persons, the rights of things exist not at all, inasmuch as no thing can have any rights. But those who use these phrases, most inaccurately, and were it not Blackstone of whom we are speaking, we should be compelled to say most ignorantly, phrases taken by a mistranslation of the Roman law phrases, *jura personarum* and *jura rerum*, really mean to say rights relative to persons, or rights regulating the relation of persons to one another, and rights relating to things, or the relation of persons to property. It must be further observed that this twofold division, like many others in all branches of science, indeed like the divisions of the sciences themselves, is more recommended by its convenience than by its logical precision. For though the rights arising out of the relation of master and servant be classed as rights of persons, or a right relating to persons, no classification ever brings under this head the rights arising out of the relation between landlord and tenant. And if it be said that this is because the latter right depends wholly upon property, not upon persons, how can the same argument be used to exclude from the personal branch of the subject the case of those tenants so well known in the Roman law and the feudal law, and the South of Europe at the present day, the *Coloni Partiarii*, and *metayers*, tenants who receive both the land and the manure, and the seed corn, and often the implements of husbandry from the landlord, rendering a half or other portion of the crops as a rent? It would be difficult to place these tenants in a class different from gardeners, if wages should be paid by a part of the fruit and vegetables raised on the ground; or from clerks, if salary were paid by a small share of the profits, and whom the law now regards not as partners, or from mariners who have a venture in the ship's voyage for their pay. It thus happens that after treating of the relations between persons under one head, with a view to many personal considerations, we are obliged afterwards to deal with their relations with a view to rights of property.

The divisions of the law which we have now stated must of necessity apply to every system of Jurisprudence. There can be none in which men's civil rights are not recognised; none in which the infraction of these rights is not made the subject of redress or restitution; none in which their enforcement is not provided for, either by previous order of the tribunals, or by subsequent proceedings for their violation; none in which crimes are not visited with punishment. But other subdivisions may be made of branches of the subject, and these may vary in different systems. Thus one country may have no such proceeding as enforcement of rights by command of the judge, but may leave the party to obtain restitution or compensation, or may make the wrong an offence against the public, and visit the wrong-doer with punishment. Another may have both the process of previous command and subsequent remedy, and may even add the penal sanction for example's sake, to secure such rights from violation by the same or by other wrong-doers. Again, one system may draw the line between executory and executed contracts, and give only in the former case the remedy of an order to execute, and in the latter case alone a remedy for the breach, or it may give both the order to execute and a compensation for the refusal. So generally, one system may have the distinction between law and equity, which to another may be unknown. So among prospective remedies or remedies against litigation, and the loss of evidence and uncertainty of title, one system may possess the admirable provision of the Scotch law, the action to have the right of a party declared conclusively, at his own cost, though no one now disputes it; another system, like the English, may be without such a remedy; and one system, like the English, may have the proceeding to preserve (*perpetuate* as it is termed) testimony, which in others may be wanting. Actions in these different systems would thus be differently classified and arranged. So in one system no length of possession may be held sufficient to give a conclusive title; while in another the peaceable possession of a few years may be conclusive against all mankind without any colour of another title. Rights as well as remedies may thus be variously arranged in different systems of law.

There are not only the general divisions to which we have referred, common to all systems; but there are certain things which every system must have how imperfectly soever, and how variously soever these things may exist in their details.

The first of these necessary and essential parts of all systems is a provision for the Promulgation of the Law, and of all additions to it or alterations in it which may from time to time be made by the supreme power, the legislature of the state. The means appointed for this purpose may be exceedingly various; they may be in some systems very complete and effectual; in others they may be as scanty and imperfect as possible; yet in all there must be some such means provided; because there can no system exist in which men shall be allowed to excuse their delinquencies, and avoid the performance of their duties, by alleging their ignorance of the law.

The most effectual of all provisions with this view is the Digest of the law into a Code, or written body, correctly arranged, clearly expressed, and thus accessible to all who are called upon to comply with its enactments. Even as regards civil rights, and the remedies for their violation, the lawgiver is bound to let his provisions be clearly known. But upon criminal matters nothing can be more monstrous than to punish men for the breach of laws which they have previously had no means of knowing or clearly comprehending. It is true that there are various degrees of clearness and perspicuity, and that it may not be possible to make any system so plain that all whom its sanctions assume to bind shall certainly apprehend them, and safely regulate their conduct accordingly. But the more nearly any code approaches to this point, the better does the lawgiver discharge his duty, and the less ground of complaintdoes he leave to his subjects. Great departures too, from this course, or falling very far short of this point, may always be avoided. Thus every state may have some digest of its laws, and a periodical revision or extension of it to register the changes that have been made since its promulgation. Every state may avoid the prodigious absurdity and injustice of some half-civilised countries, in which the laws are committed to the care of one body of men, ex-

clusive depositories of their purport. Every state may avoid the having its laws in such a confused state, so little arranged in order, so encumbered with various enactments on the same matters, so inartificially framed, and so carelessly extended or altered, or with so little reference to previous provisions, that the law may be said really to be committed to the exclusive care of a single body in the community, the lawyers, and that no one can, without their help, form an accurate notion either of his rights or his duties. Every state may avoid such cruel mockery as that of a tyrant posting up his laws so high that no one could read them, a mockery somewhat imitated, though in a different way, by other rulers. Every state may avoid such absurdity as the English Parliament committed when it created some dozen or more of capital felonies, and only gave five days' notice to the whole empire before the act came into operation.[1]

2. All systems of Jurisprudence must have Courts of Justice, civil and criminal; though these may be constituted and may proceed to try causes or offenders in a great variety of ways, and may approach near to or recede far from a soundly framed judicature.

The principles which ought to govern the formation of a Judicial Establishment, are those which tend to secure the performance of the judicial office with learning, ability, and integrity, and which tend to obtain for the suitors the decision of their causes with as little delay and expense as may be, regard being had to the careful and deliberate investigation of the truth. These principles are applicable to two branches of the judicial system, the civil and the criminal; and as regards the criminal, they are applicable likewise to two branches, for it consists of two parts, which under any government must both be formed, though they may be more or less kept separate. These two parts or branches are, the police and the adjudication; the former comprising the prevention of offences by vigilance or summary process of

[1] Stat. 43 Geo. 3. c. 58. commonly called Lord Ellenborough's act. The offences most likely to be committed in Kerry or Tipperary, and the remote Western Islands, were made capital, and tried as such before the act could reach those distant quarters; and yet the offences, when committed, were supposed clergyable.

restraint, the tracing offenders, and the bringing them to trial; the latter comprising the trial of offences. The execution of the sentences belongs to the executive government, as does properly the police department itself, rather than to the judicial establishment. Hence a more accurate division would perhaps be to hold the police, and the execution or infliction, to be two appendages of the judicial department, the one previous to trial, the other subsequent to it.

The principles by which a good Judicial System may be most certainly framed appear to be these. They are fourteen in number.

1. As many judges should be appointed as the bar can furnish of well qualified persons, and as the demands of the suitors require for dispatching their business without delay in the civil courts, and trying the supposed offenders without longer imprisonment than is absolutely necessary.

2. The courts should be locally situated so as to bring justice home to every one's door, and neither put the suitor nor the supposed offender to the inconvenience and charge of a distant trial.

3. Each court should be so constructed as to throw upon the judges individual responsibility, and yet to consist of more than a single judge, in order to secure full consideration and prevent mistakes. Four is found in practice to be the best number, unless in a court of the last resort, where an odd number is preferable.

4. The division of judicial labour should be attended to, by committing certain great branches of judicature to different courts; but care should be taken to avoid too minute a subdivision. Carried to a certain length, this division of labour secures expertness; carried too far, it contracts the understanding.

5. The judicial office should be holden for life, unless in the case of bad behaviour.

6. Judges should be incapable of receiving any promotion, either by holding other offices, or by being raised from one judicial place to a higher.

7. Ample salaries should be given to the judges, regard being had to prices and to the habits of the upper classes in society; and no fees should be received by them, except small

ones in respect of business dispatched, and in the multiplication of which they themselves have no voice or influence.

8. No patronage whatever should be vested in any judge.

9. No judge should be suffered to hold any political office, or have any share whatever, or any connection whatever, direct or indirect, with the government of the state.

10. The judicial power should be kept wholly distinct from the legislative as well as the executive power; no judge should be suffered to sit in any legislative assembly, or hold any executive offices, or belong to any administrative council.

11. The expense of the judicial establishment should be defrayed by the state, and not by the suitors; that is to say, the suitors should not pay for the establishment by which their causes are tried, either by fees (excepting only the very trifling ones afore mentioned to secure dispatch), or by stamps, or other taxes on law proceedings. But this does not apply to the aid claimed from courts of justice in administering the estates or other interests of private individuals, and which should be paid for like other agencies.

12. A due watch should be kept on the ordinary courts of the country, by allowing a review of their decisions on appeal. The court of appeal should be sufficiently numerous to have lawyers in it of various qualifications; some should belong to the ordinary courts for the purpose of securing expertness; some should not belong to them, for the purpose of securing sufficient attendance without inconvenience to those inferior courts.

13. The judges should be named by the executive government alone, without any other interference; and by some one answerable to the legal profession, without the interference of party or political influence.

14. All courts should sit and give their judgments, in public, the fullest liberty being allowed to the public of attending their proceedings, with only a discretion to exclude strangers in such few cases as, from regard to decency or to the peace of families, require it. In proportion as the proposed system in any country shall be constructed upon these principles, it will prove useful, pure, and efficacious towards its great purpose, the protection of rights and the punishment of crimes.

The other branch or appendage, the police department, is not subject to these principles. It is purely executive, and

should be in the hands of persons responsible to, and removable by the government. Its expense in great towns should be paid by the state; in county districts and smaller towns, partly at least by the inhabitants either contributing money or service to the preservation of the peace. But in every case the command of the police force, whether regular or composed of the inhabitants, should be vested in persons named by and responsible to the executive government. No judicial function whatever should be held by any police functionary, nor any police function by any judicial magistrate. These principles should govern a good police; to which we may add, that great caution and abstinence should be used in the employment of spies or informers, in order to avoid both the unnecessary breach of private confidence, and the risk of those worthless creatures seducing persons into offending for the purpose of gaining a profit by betraying them.

Such are the general principles of all jurisprudence as applicable to the two great branches, Promulgation of the Law, and Execution of it by the constitution of Judicatures. In what manner these judicatures ought to proceed with a view to attain the ends of justice forms the other great branch of the subject, and it divides itself into two parts: the law laying down the right, and defining the wrong, with the penalties annexed to the breach of the one and the commission of the other, and the method of procedure for enforcing and compensating, and for punishing the wrong. Each of these subdivisions is again divided into two, the one comprising civil, the other criminal, matters on a procedure.

It is not the purpose of this article to exhaust any of these subdivisions of the subject. But there are certain general principles applicable to them all — and in abiding by which, any given system of Jurisprudence will approach to perfection, or will be imperfect in proportion as it departs from them. And first, respecting Civil Rights.

1. The law should be the same to all classes of the community: in its eyes all men should be equal: it ought to give each individual the same rights and the same remedies in respect of the same actions, exertions, sufferings, possessions.

2. The law ought carefully to protect every one in the enjoyment of his labour and his property, enable him to deal

with them according to his own view of his interest and according to his own pleasure, help him in the performance of all contracts which he may make respecting them, and enable him to obtain protection against any incroachments and compensation for any injuries done to him in respect of either his labour or his property.

3. The law ought to prevent any burthens from being imposed upon men beyond what the necessities of the state require, and ought to refuse all preferences, all exclusive privileges to one person or one class, either in respect of the persons or the properties of others.

4. The law ought to render the transfer of property and the hiring out of labour easy and safe, and ought to make the titles secure of the parties acquiring and the parties transferring.

5. The law ought to provide for the transmission of property after the owner's decease, regulating its descent if he have made no distribution of it, preventing him from capriciously fettering its transmission or enjoyment, aiding him to a reasonable extent in disposing of it prospectively, and protecting both him from deception in making his disposition, and those who come after him from uncertainty in the rights conveyed to them.

6. The law ought to protect the rights of a personal as well as those of a proprietary nature, so that no one shall be slandered in his reputation, or injured in his person, or constrained in his liberty, or interfered with in his marital or parental capacity, providing due compensation to him for all such injuries.

Next, as regards Criminal Acts.

1. No act should be pronounced criminal which the common and natural feelings of mankind do not reprobate; that is, as soon as their understanding of the nature and consequences of the act in question is complete.

2. No punishment should be inflicted upon any offender, which is manifestly repugnant to the general sense of mankind, either from the amount or the kind of the suffering it gives.

3. The object of all punishment is both to incapacitate or to disincline the offender from repeating his offence, and to deter others from following his example. If, in addition to securing these principal objects, a profit can be obtained to

the state, it will be so much the better; but no part of these main objects should be sacrificed to the attainment of this, which is only incidental.

4. No greater amount of punishment should be inflicted than is necessary for securing the community against a repetition of the offence, either by the criminal, or by others. Thus, to put a man to death, or imprison him for life, is unjustifiable, if by making him suffer from fine or solitary imprisonment he may most probably be prevented from desiring to offend again. So, to deter others from committing a small offence, it is sufficient to show them that a moderate suffering will be the consequence.

5. No punishment should be inflicted which occasions greater suffering really to be endured than is apparent and visible to the beholders.

6. Punishments are to be preferred which are easily comprehended in all the suffering they occasion, and easily remembered by those who see them.

7. Punishments are to be preferred which are divisible or apportionable, which are invariable, certain or equal, being the same in their effects upon whomsoever they are inflicted — which are exemplary and striking — which are simple — which are remissible in case of good behaviour, or of error discovered in the conviction — which fall in with the sense and feelings of the community — which tend to the reformation of the offender — which press as lightly as possible upon all others than the offender.

8. In estimating the fitting or the justifiable amount of punishment, care must be taken that it is sufficient to counteract the motive to commit the offence, by inflicting an evil greater than the advantage of offending — that where the offence has proceeded from confirmed habit and practice of delinquency, the advantage derived from a course of such conduct should be taken into the account, and not merely the gain of the particular offence — that the temptation existing to commit different crimes at once, a more severe punishment should be denounced against the greater — that the more pernicious the crime is, the greater should be the punishment — that the nominal amount of the punishment should be so adjusted as to secure the same real amount for the same offence, the crimi-

nality being different — that an addition should be made to the punishment in consideration of the uncertainty or remoteness of the prospect of its infliction.

9. In awarding any punishment, care must be taken that a proportion be kept to the nature of the offence, and the minds of men be not bewildered, or their feelings outraged, by seeing the same punishment inflicted for different crimes, still more by seeing the greater punishment for the lesser crime.

10. In choosing the kind of punishment, care must be taken to avoid such as have a tendency to hurt the character of the beholders, by either exciting cruel or savage feelings, or calling in their aid to execute the law otherwise than by their presence, or turning their sympathies in the delinquent's favour, or making them undervalue the guilt of the crime, or inclining them to hate or contemn the law.

These are the general principles upon which every penal code should be constructed; and they are such as plainly will condemn many of the provisions in all the systems of penal legislation which have been framed; but it is most pleasing also to reflect that they are in the present age much more generally borne in mind, and much less frequently departed from by lawgivers, than in any former period of history. Towards them all, the attempt should be made to bring the criminal law of every civilised community; and in proportion as the code of any state approaches this point, it will deserve the respect of the philosopher, the jurist, and the world.

The procedure in obtaining restitution of rights, or compensation for their infraction, or in bringing offenders to punishment for crimes, depends upon the constitution of the courts, whereof we have already treated, and upon the rules laid down for bringing actions, for instituting prosecutions, and for trying the one and the other description of causes.

Those rules having for their object the procuring as speedy and as cheap a remedy — as speedy and cheap an acquittal or conviction — as the nature of the cases will permit, ought to be devised, so as to throw no impediments in the way either of bringing or defending actions and prosecutions. The trial, having for its object the ascertaining of the truth, ought to be conducted in the manner most likely to bring

forward whatever can elucidate the facts, and secure an accurate application of the law.

1. It is necessary that the case of the party complaining should be previously stated in writing, in order that the opposite party may know what he has to answer.

2. It is necessary that due notice should be given of the trial, in order that the party complained of may come prepared for his defence.

3. It is necessary that the nature of his defence should be stated by him in writing, in order that the party complaining may not be taken by surprise and defeated for want of proofs in reply, which, had he been warned, he might have procured.

4. It is necessary that, if any answer to the defence is to be proved by evidence, that answer should be stated also in writing, to prevent a surprise upon the defendant.

5. This alternate statement in writing should go on as long as any new matter of fact is brought forward by either party; and at each stage the opposite party should be entitled to deny the legal inference from the facts alleged, and only be called upon to disprove or deny the truth of those facts after they shall have been decided to be material, that is, sufficient to support the legal inferences built upon them.

6. The same principles apply generally to the prosecution of offenders, though it is hardly ever necessary to require the particular statement of the defence, unless when the party means either to deny that the offence was committed, or to rest upon his legal right of acting as he is charged with having done, or to show that he acted under the influence of disease, or to prove that he was acting under compulsion, or to affirm that he was absent at the time from the place. In such cases, upon receiving notice in writing of the charges against him, he should be called on to specify his defence.

7. All persons should be allowed either to conduct their own cause, or to employ advocates; and full power should be given to these of urging whatever topics of law or fact best serves the purpose of the parties. In the case of persons too poor to afford employing advocates, the courts should assign them such help, on reasonable proof of poverty.

8. A prosecutor should be appointed on behalf of the

State, to conduct all prosecutions for crimes, and he should have deputies in local courts at which he cannot himself be present.

9. In the trial, whether of crimes or of actions, the judge or judges — professional persons — should be aided by men not of the profession, and of two descriptions: persons of skill, where nice matters in any trade or other employment arise; and persons of respectability, to decide upon the disputed facts of all cases, or the amount of compensation in actions for infraction of rights where restitution is impossible.

10. The court in every case ought to hear only the testimony of persons who speak from their own knowledge: no hearsay evidence ought ever to be admitted. It is no exception to this rule to admit proof of reputation in such cases as custom, boundary, and character, because the witnesses speak of the fact within their own knowledge — that fact being the existence of the reputation. Also, in certain other cases, declarations of persons deceased may be admitted, when they were made under an apprehension of death supplying the sanction of an oath. In police inquiries, when the question affects not the final judgment of the case, but only the discovery of evidence, or the commencement of proceedings, the rule excluding hearsay of course cannot apply.

11. The testimony of witnesses ought not to be rejected on account of their infamous character, or of their having an interest in the event of the trial, or on account of their connection with one of the parties. These circumstances should affect their credit, but not work their exclusion.

12. All freedom should be given to witnesses to be sworn according to the religion they believe, and its forms, the oath being administered of which the obligations may appear to the witness the strongest.

13. All freedom should be given to the parties to examine and sift the evidence each of his adversary; and each should examine his own witnesses in the way most likely to bring out the statement in the words of the witnesses, and not in those of the party or his advocate examining them.

14. No party, as a general rule, should be suffered to bring forward any witness at a venture, taking the chance of his testimony proving favourable, and prepared to discredit him

should it fail him. Nor should any party, as a general rule, be suffered to cross-examine his own witness. But this rule ought to be relaxed in cases of surprise and trick, as where a party has stumbled upon an adverse witness unknown to himself, and especially where means have been used to deceive him, either by the opposite party, or the witness himself.

15. As testimony at first hand from witnesses is alone to be taken, and never hearsay, so the best kind of evidence is always to be required; thus, if a bargain has been reduced to writing, it can be proved only by the written document; and all originals must be produced, and not copies or parole entries of their contents, unless the originals have been lost or destroyed, and without the procurement of the party seeking to prove their contents.

16. The law ought in all cases to encourage the reducing contracts to writing, by giving advantages in every instance to such proof, and by requiring it peremptorily in cases of any importance.

17. An opportunity should be afforded of registering all documents of importance, whether wills, or gifts, or contracts, or conveyances, or other muniments of title. Parties should be enabled to register every instrument, and to prove its contents by office copies, authenticated by the public officers, unless when any question turns upon the writing or appearance of the original, which should then be required to be produced. But either party should be entitled, at his own cost, to produce the original in cases where proof by an office copy is allowed. Parties should be induced to record documents by the law giving a preference to instruments so registered; and in cases of conveyance, the registration should be enforced, by giving posterior lenders, purchasers, or grantees, the prior claim, if their title has been first recorded.

18. In case of any miscarriage through the judge's fault at a trial, means should be afforded of reversing the decision, whether upon a question of evidence, or upon any direction given by the judge; and in case of manifest error in those who decide on the fact, a new trial should be allowed. But no relief should be given against the consequences of any oversight committed by the party or his advocate.

19. In all criminal cases a power of pardoning or partial remission of the sentence should be vested in the Executive Government; but this should be most cautiously and sparingly exercised, even on the application of persons unconnected with the proceeding, almost always under the advice of the Judge who tried the cause, never without fully consulting him.

20. Compensation should be made to a person tried and acquitted, unless where the acquittal was owing to technical mistake, or where there existed no doubt of the guilt, but the strict legal proof failed.

Such are the general principles which should govern the Code of Procedure, civil and criminal, in every civilised country, and by departing from which the penal regulations of any country will become defective. But the head of procedure cannot be kept wholly separate from the head of rights and wrongs, actions and crimes; because the course of legislation respecting these will in every case materially affect the course of procedure respecting them. Thus the provisions touching contracts, or conveyances, will materially tend to make the remedy under them more or less expeditious, more or less certain, more or less expensive. So the provisions respecting offences will tend to make the prosecution, the trial, and the conviction of offenders more or less expeditious and more or less certain. Every one knows how greatly the severity of a penal code tends to facilitate the escape of criminals, both by disinclining parties injured to complain and produce proof, by disinclining witnesses to disclose all they know, and by disinclining courts to convict.

The general principles of jurisprudence which we have now gone through are of universal application. It is even quite possible that the codes of all civilised nations should be constructed upon them, whatever be the difference of their governments, of their other institutions, of their religions, of their climates, of their characters, of their pursuits and occupations, of their foreign as well as domestic policy. There is no conceivable state of civilised society which would exclude their application, none in which the stability of the government and institutions of the country would not be promoted by their adoption, none in which the prosperity and happiness of

the people, as well as the security and ease of their rulers, would not be greatly augmented by the operation of a legislative system thus framed. It is possible that an absolute or oriental despotism should be supposed unable to exist in its full force when the judges were named for life, and all judicial proceedings were public and independent. But still, even in such a state, the judicial system which we have been describing as perfect might co-exist with the arbitrary power of the sovereign; he might be suffered by the constitution to treat individuals as he pleased, and to change the laws at his pleasure; and yet if the perfect system was allowed to act wherever he did not interpose his authority, the greatest benefit would accrue to all the orders of the community, and a great security be derived to the throne itself.

It must, however, be remarked, that in every country the laws have a tendency to become, in harmony with the circumstances of the state, accommodated to the form of its government, modified by the character and habits of the people, though in their turn they re-act upon the government and the people. Thus in monarchies the laws naturally tend to the descent of lands according to the rule of primogeniture; in republics they as naturally tend to a more equal distribution of real property. In aristocratic communities, land is apt to be regarded by the law differently from chattel interests. In both monarchies and aristocracies, there is a tendency to bestow privileges on particular classes, even in the ordinary transactions of commerce and of landed possessions. Governments have interfered in these and numberless other instances in the declaration of rights and remedies, as well as in the prevention or punishment of crimes, with a view to mould the laws according to the spirit of the political institutions, and to draw from the laws a support to those institutions. So the pursuits and character of the people have left their stamp upon the course of legislation; a mercantile nation's code differing from one wholly or almost wholly engaged in agriculture; a humane people giving its code a far milder aspect than the laws of a cruel and sanguinary nation. These modifications do not affect the soundness of the grand fundamental principles, nor even limit their possible application.

The history of Jurisprudence remains to be shortly considered.

In ancient Greece the materials of the study were exceedingly scanty. Sparta had no written laws; it was a part of the unnatural, absurd, and barbarous polity of Lycurgus — that is, of the early polity of which all the provisions are ascribed to him, its last collector and founder — to prohibit absolutely the reducing of the laws to writing. In Athens there were a considerable number of written laws; but as all their tribunals except the Areopagus were composed of great multitudes rather than presided over by benches of judges, the force of the law, except in extreme cases, could be but feeble, its application quite uncertain and precarious, its study as a system wholly impossible. We accordingly never perceive in the Greek writers, whether orators, historians, or poets, any thing like a reference to Jurisprudence as a subject of learning, or to the occupation of the lawyer as one for which men were qualified by previous training, except only in the rhetorical art, or indeed to the profession of an advocate as separated from the general vocation of an orator, that is, a statesman, a political adventurer.

The Romans, somewhat late in the Republic, applied themselves to Jurisprudence as a study; but they had much earlier taken pains to provide the materials of this learning. At the beginning of the fourth century after the foundation of the city, the old laws were reduced to writing by a Supreme Council appointed for the purpose, together with such additions as they deemed expedient, chiefly borrowed from the Greek laws and customs. Ten tables were thus formed, afterwards increased to twelve, and were the foundation of the Roman law. But a fruitful source of legal enactments was provided in the *single seated justice* (to use Mr. Bentham's expression) of the Roman courts. The prætors, the greatest judicial officers, sate alone; one for the city, the other for the country districts: and upon entering into their annual functions, they promulgated an edict, or body of the rules which they intended to follow in deciding causes. These edicts in a great measure consisted of what were termed *translatitious* provisions, or those which were taken from the edicts of the preceding magistrates, and were thus handed down from one

age to another. In part, however, they embraced new provisions adapted to the changing circumstances of society. The lawyers came by degrees to regard those edicts as so important that they wrote commentaries upon them; and the science of Jurisprudence was thus founded. It seems exceedingly difficult, considering the multitude of those works, of the edicts, of the senate's decrees or *Senatus Consulta*, of the people's decrees voting in tribes, or *Plebiscita*, to understand Cicero's boast in answer to some one who taunted him with his imperfect legal knowledge. He retorted by threatening if he heard such jibes repeated by technical men, that he would learn the law in a month when he happened to be unemployed, and so beat them all on their own ground. It is certain that in after times the number of the law books had enormously increased, and to their massive volumes and inextricable confusion we owe the great work undertaken by the emperors in the fifth and sixth centuries of our æra, when the works on Jurisprudence were said to have become "the load of many camels" (*multorum camelorum onus*), and yet the people were so ignorant of the subject, that if the name of any great jurisconsult was mentioned in society, it was supposed to designate some uncommon fish. Theodosius, in 435, caused the first Digest, called after him the *Theodosian Code*, to be made; and Justinian, in 530, commissioned Tribonian and other lawyers to prepare the Pandects, or an abstract of the whole civil law in fifty books, arranged under titles, and consisting of dicta taken from above fifty of the text writers. Ten years were allowed them to finish this task; they accomplished it in three; and a few weeks before the promulgation of the Digest thus formed, in 533, they published the Institutes, a more general and popular treatise on the whole law, in four books, remarkable for the admirable arrangement of its parts, the symmetry of the whole work, and the great clearness of the language in which the entire law is explained. The Emperor gave also to the world a Code of imperial law subsequent to the Digest: and these, with the Authenticæ or Novels, subsequently added from the Imperial rescripts, or answers of emperors to cases laid before them, but which under that most arbitrary government had the full force of

laws, compose the body of civil law (*corpus juris*), which was commented upon in after times and formed the groundwork of the municipal law in most of the countries of Europe.

But after the Roman empire was overrun by the Northern nations, their rulers and magistrates gradually formed legal systems for their own guidance. The principles of the civil law entered largely into these, but they were mingled with and modified by the customs and the habits of the Barbarians. Indeed so early as the latter part of the fifth century, and between the compilation of the Theodosian and Justinian Codes, the Visigoth Code appears to have been framed. It was in existence as early as 470, although extended and improved in 506, united with the Roman law in 652, and finally promulgated in its complete form by the Council of Toledo in 693. The Burgundian laws were digested about 501, the Salic soon after, then the Ripuarian; but all these continued long unwritten, the Salic and Ripuarian till the beginning of the seventh century. In 644 the Lombard laws were digested by Rotharis, although they received great augmentations under his successors; and, next to the Visigoth Code, they were held in more estimation than any of the Barbaric systems of Jurisprudence.

Generally, however, throughout Europe, the civil law afforded the foundation of the legal structures. They formed the subject of all speculations and all lectures on Jurisprudence for many centuries; they monopolised the name of law; and to this day they have very high authority in almost every country, unless on matters which have been regulated by the arrangements of the law that grew out of the feudal system.

In recent times the study of Jurisprudence has made great progress. The able and learned authors who have handled the subject, no longer confining themselves to the mere learning of the Schools, the arguments derived from mere authority of former writers, and from the institutions of lawgivers, have examined with boldness but with judgment the principles upon which the science is founded, and upon which systems of law ought to be constructed. Hand in hand with their enlightened and useful speculations have proceeded the efforts of governments to digest and arrange their laws in

systematic Codes. Frederick II. as early as 1750 gave one, though a very defective one, to his states, which was greatly improved and finally promulgated in 1794 by his successor, under the title of *Land-recht* — or National Law. The example was followed by Austria as early as 1753, and the work was completed in 1811, under the title of *Gesetz-buch* — or Book of Laws. In 1802 the most elaborate Digest of any age was given to France by Napoleon, consisting of Five Codes, civil, criminal, civil procedure, criminal procedure, and commercial. Great progress had been made under the Republic in preparing the first of these; and indeed, beside the old evil justly complained of in France, that there were above 300 different local laws existing in the country, the mass of enactments during the revolutionary times rendered a digest absolutely necessary. If the law writings of Rome had reached the bulk of many camels, the mere text itself of the Revolutionary laws seemed to approach this bulk; for in less than three years and a half nearly nine thousand laws had been passed. In 1833, a penal code was published for Bavaria. About the same time the Austrians gave a code in the Italian language to their dominions in Lombardy and Venice. Some years later a civil and a criminal code were promulgated in the Sardinian states. Finally, in America considerable progress has been made in the same important undertaking. Louisiana, New York, and South Carolina already possess codes; and the other states, to use their own phrase (borrowed however from the mother country[1]), are progressing in the same direction. Nor can any one who observed what passed in our own parliament last session upon Lord Brougham's motion, doubt that the able and learned Report of the Law Commission[2] will ere long be adopted. In fact, the Criminal Code was introduced and read a first and a second time.

The vast importance of the science of Jurisprudence needs not be dwelt upon any further. The interest which all lawgivers have to make themselves acquainted with its principles appears too manifest to require any illustration. But all

[1] As in Shakspere, —

> "Let me wipe off this honorable dew
> That silverly doth *progress* on your cheeks."

The use of *progress* as a verb is frequent with the writers of this age.

[2] Messrs. Starkie & Ker.

men, especially all proprietors of land, of capital, of money, have a direct interest also in obtaining a general acquaintance with the law they live under, and promoting by all the means in their power both its study and its improvement. In former times legal learning was deemed so much a necessary branch of education with the upper classes of this country, that Fortescue records the singular fact of 2000 sons of landed gentry (*filii nobiles*) being in his time students of the different Inns of Court and of Chancery. That was in the reign of Henry VI.: in Elizabeth's time not above half the number were so entered, and the Inns of Chancery afterwards became confined to attorneys and solicitors.

The object of the work of which this discourse serves for an introduction, is to promote all discussions connected with this department of science and of literature. And the manner in which it is proposed to render this assistance to the great work of making sound principles more accurately and more generally known, of furthering the improvement of the law on right grounds and with due care and due knowledge, and of checking the prurient and reckless desire of change which would adopt all manner of propositions merely because they offer something new, whether there be any value or even any safety in the suggestion or no, will be understood by looking at the prospectus of this work, but especially by attending to the execution of the plan in the present number.

ART. II.—RESISTANCE TO THE GRADUAL IMPROVEMENT OF THE LAW.

Est modus in rebus; sunt certi denique fines,
Quos ultra citraque nequit consistere rectum. HORAT.

Παν το περιττον ακαιρον. *Gr. Anth.*

IT is assuredly no part of our object in this paper to dwell upon the praise of moderation, the golden mean; a topic quite as threadbare as it is fertile. But inasmuch as there is no one department of human exertion in which a neglect of it is more fatal than in the political, and more especially in efforts for amending the law, and improving the legislation of any country advanced in civility and refinement, we deem that it will not be foreign to the purposes of this work nor useless in tendency, if we expatiate a little upon the peculiar necessity of moderation, and the dangers of unreflecting haste and extravagant attempts in the great work of law improvement.

It may safely be asserted that as the circle of the sciences presents no one subject of speculation or of study which demands more sound, practical judgment than Jurisprudence, so there is none upon which more temperance is required to guide the conduct of those who would alter the established system with a view to its improvement. In truth Jurisprudence is eminently a practical science; its subject is all that men do, or suffer, or contrive; *Quicquid agunt homines.* It is also a subject to which a vast number of men are continually directing their attention, in which the community at large always feels a deep interest. Two consequences follow from hence; both the too long delay of needful reforms excites general and very great discontent in the country, and any error committed in the alteration of the law becomes at once generally known, because generally felt, and leads to a distrust of all improvement. Nor is it of any use to explain the causes and to point out the risks and the obstacles attending an im-

provement refused, or the accidental and temporary nature of the circumstances accompanying the operation of an improvement granted. The public mind is closed against all such arguments and appeals; and the clamour continues strong and general for a change in the one case, and against it in the other.

If any one would form to himself an adequate notion of the effects, so contrary to the design, produced by pertinacity in refusing needful improvements, he has only to recollect the constant opposition made to all change in the law by Lord Eldon during his long reign over the department of justice and jurisprudence in this country. His repugnance to any improvement of the system was quite general and quite inflexible. No new measure proposed was so insignificant as not to fill him with alarm, rouse all his opposition, and call forth all his resources for resisting it. There seemed no proportion ever kept between the importance of the proposition and his hostility to it. Action and re-action were here not at all equal, and opposite; for the reaction was always in truth great though the momentum and force of the moving body were ever so small. It seemed as if he regarded the whole system as an arch, so that each stone was as material to its support as the key stone. It was as if he believed the whole existing institutions to be connected like important portions of the same fabric, which must crumble to pieces if any one fragment were moved from its place. He appeared to consider all existing laws as finally established like the laws of nature, and that whoever would counteract or attempt to alter them committed a sacrilege and deserved the fate of Salmoneus.

> Demens! qui nimbos et non imitabile fulmen
> Ære cornipedum et pulsu simularet equorum.

How often has he bemoaned the necessity of making some change to suit the political exigences of the times! But also how much more bitterly has he bewailed his cruel fate when compelled to yield to numerical force without any such necessity! On a pernicious and costly excrescence being lopped off the trunk of the legal tree, and the sap obtaining only the freer scope as well as the life of the great plant itself being preserved from decay, he advised the Lords, with all solemnity and in a pathetic strain, to hasten home with their

counsel and solicitors and protect their titles if they could, for there was a rude shock given to them all, and it might prove fatal. Yet the change thus demanded directly and inevitably tended to make all titles much more clear and much more secure.

Now the consequence of this was the delay of all improvement in our laws during the long incumbency of this great lawyer and powerful minister of justice. How the system should ever have attained its present dimensions, which it had only done through ages of continual change, he never stopped to inquire. As he found it, so was he resolved to leave it; and all improvement was stopped, all removal of the most glaring and pernicious abuses was suspended, all getting rid not only of ancient mischiefs, the growth of a barbarous age, and of things which, being fitted for those times that gave them birth, had become for that very reason wholly unsuited to our wholly different times; but also all the abuses which had crept in by departure from the better policy of older days, and which disfigured the system, were now to be regarded with veneration, and perpetuated with a preserving and a pious care.

But meanwhile the world was not standing still like the Chancellor: while he continued moored to the rock of his faith, and plunged into the deep stream of legal learning, the tide was flowing on — even the tide of legal notions and learning in jurisprudence was flowing on—and while he remained fixed, its stream dashing and breaking against him, his stationary position served to measure the rapidity of its course, which, had he moved on with it, would have been less perceptible. What has been the consequence? It has, since he ceased to reign, carried all before it, borne away many barriers which more timely and judicious yielding to its force would have saved, by giving these obstacles a more slanting position. In a word, the progress of legal change has been beyond all dispute accelerated prodigiously since his time, and has become much more swift than it ever could have been, had he betimes bent to its power. What might have been only a stream, now wears the aspect of a torrent, when the waters pent up by Lord Eldon were, on his removal from office, suffered to burst forth.

We take it to be extremely probable that no such vast and

sweeping changes would ever have been contemplated, and hold it quite certain that they never could have been effected, but for the impatience, the ungovernable impatience excited by Lord Eldon's strenuous and uniform resistance to all improvement continued for so many long years. Only let us look back to Sir Samuel Romilly's modest and cautious attempts to amend the law in the earlier part of Lord Eldon's reign. A bill to make freehold estates liable to the payment of simple contract debts, to make every man do what every man of common honesty does as a matter of course, to prevent a country banker from buying 100,000*l.* worth of land with his customers' money, and then die and leave it to his children, or his mistress, or his bastards, was opposed by Lord Eldon and his party so stoutly, so vehemently, even so sentimentally, that it was on this occasion they brought forward (Mr. Canning, that great master of jurisprudence, and grave authority in matters of legislation, being their mouthpiece) the celebrated phrase, soon made the anti-reform watchword "the Wisdom of our Ancestors." Yet a person about as correct as Mr. Canning, or any of his Anti-Jacobin associates, though perhaps less ready at a squib and a parody, a certain Lord Chancellor Bacon, had long ago treated this topic as the very grossest of all blunders, as a practical bull, so to speak, a confounding the age of the world with the age of men, and ascribing to those who were our juniors that wisdom which we only can possess who have gleaned it from an experience much larger because much longer than theirs.

Well; Sir S. Romilly was all his life unable to carry that one scanty measure. He was equally unable to obtain a relaxation of the law which punished with death the stealing of five shillings in a shop and the robbing of a bleach-ground. He passed from the scene of his useful labours, though it was also the scene of his fruitless attempts to amend the criminal law, which he left as he did the civil, in the state he found it in. Lord Eldon survived him twenty years; but these are to be divided into two periods, his official life and his retirement from power. During the nine former, he kept the law as Sir S. Romilly had in vain endeavoured to improve it; and like him he left it as he had found it. But on quitting the world he left it as completely changed as if some great moral wave had come over

the whole, and left a new world of jurisprudence in the place of the old which it had overwhelmed. That freehold estates should have been, and without even a single remark in either House of Parliament, subjected to legal process for payment of simple contract debts, was little indeed, though it was the change which some twenty years before had made those enlightened statesmen, the Cannings, and Percivals, and Liverpools, stand aghast — the men whose glory it was to live a century or two behind their age. Not only this was carried through all its stages without the Cannings having found any successor in raising the cry of danger to the many, and appealing to ancestral wisdom — appealing from reform and experience and knowledge, to rudeness and ignorance and childhood — but in two or three years time, and long before Lord Eldon descended to the tomb, resting from his labours to retard all improvement, the whole law of real property was so changed, that it is nothing like an exaggeration to say, had Mr. Fearne, or Lord Mansfield, or even Lord Kenyon been permitted to revisit the scene of their former glories, they would have believed they were in a country newly planted, and fresh peopled, living under an unknown law. But not only was such a reverse experienced by all attempts to uphold the ancient law of property; all that related to pleadings, and to actions, and much of the Law of Evidence, was within the same eleven years wholly swept away. The Mercantile Law had kept pace with the other branches of our system in its advances; Bankruptcy was placed upon an entirely new footing; and arrest on mesne process being wholly abolished, it was plain that imprisonment for debt was doomed to a certain and speedy destruction. Nor had the Criminal Law fared better than the Civil. Instead of it being any longer found possible to resist the abrogation of capital punishment for the petty offences of stealing to a small amount, or robbing certain much exposed articles of commerce, the punishment of death had ceased to disfigure the Statute Book in any but two or three excepted cases, and the more sanguinary species of inflictions had wholly vanished from our laws. So large a change had never been effected upon the jurisprudence of any country in a century as had now in the course of seven or eight years been effected on the

English law; and a foundation was further laid on which it was manifest a superstructure would almost immediately be reared, for rooting out all the remaining abuses in our system, and for finally digesting it in a general, accessible form, a Code of Civil and Criminal Jurisprudence. It may further be affirmed that no such wholesale changes had ever before been accomplished in tranquil times; they resembled rather a revolutionary movement of legislation than the progress of legislation during a period of peace, and in the ordinary course of an unchanged constitution.

Such was the real and the final operation of the course pursued by Lord Eldon in resisting all improvement; in rejecting with horror all change regardless of its motive, its nature, its tendency, — in shrinking from all innovation as revolutionary, worshipping whatever had been done in less enlightened ages, and attempting, vainly attempting, to stop the march of Time, whom the wisest of men, the most illustrious of Lord Eldon's predecessors, had sagely described as the greatest innovator of all. But Lord Eldon must not be regarded as the only one of those shallow persons who thus by their unreflecting and ignorant efforts to combat nature, gave so striking an example of men frustrating their own designs, and bringing about, by their resistance, far more sweeping changes than any they set themselves to oppose. The fears excited by the excesses, the most guilty and most lamentable excesses, of the French Revolution, had so possessed the minds of men for some time in this country, that they had become averse to all improvement in our polity, and regarded every alteration of any established institution as a step towards anarchy. Instead of endeavouring wisely and honestly to moderate a feeling which had a real foundation and a rational origin, but was carried to an excess nearly as wild as the lust of change to which it was opposed, a party among us deemed it the wiser and the more honest course to use every means in their power for working upon it, exciting it to still greater extremes, and making it spurn all those bounds of temperate caution within which their duty clearly was to have confined it. Splendid parliamentary declamation, eloquent popular writing, gorgeous pulpit rhetoric, were all employed in boundless profusion, and with perfect success, to

influence the public mind and make all ears deaf towards the more still voice of reason and common sense. Lighter missiles were showered upon the people with the same design and from similar magazines and allied batteries. Then began to flourish the Canning school, shining in the false glare of a sparkling, a clever, a pointed, a witty, but a meretricious eloquence; abounding in brilliancy, in solid wisdom as defective as in sound knowledge or pure and honest and conscientious principle. It was their rule to laugh at all improvement as childish and needless, to point the finger of contempt at all speculation as pedantry, to deride as vulgar all the refinements of science which were far above their comprehension; and, sitting in the scorner's chair, to cry down all genius which was not in the hire and service of their patrons. The progress of the age in which they lived, these men never would deign to observe. At a time when every art and every science was making such rapid strides onward that the masters of one year had become the pupils of the next, it pleased them to fancy that the science of all others the most important to mankind's interests, the art of all others most calculated to be their blessing or their bane, the Science of Jurisprudence, the Art of Government, were to stand stock still amidst the rapid tide of universal improvement. They were made merry with those who, wiser than themselves, and content with a true philosophy as well as gifted with a more poetic fancy, foretold, strongly foretold, the future progress of the arts of life, and they have left upon record their elaborate ridicule of a great writer whose vaticinations they found it easier to parody than to warm themselves at the fire of his genius. Darwin[1] was

[1] It may safely be affirmed that after all their laughing at Darwin these wits would have found it more difficult to write the magnificent passage of Cambyses' march, than he to write the sapphics upon Knifegrinders, or even the new Morality, with its *reverent* parodies on the Canticles. But we are now only referring to the fine and truly prophetic verses on Steam.

> Soon shall thy arm, unconquered Steam, afar
> Drag the slow barge, or urge the rapid car!
> So mighty Hercules o'er many a clime
> Waved his vast mace in virtue's cause sublime,
> Unmeasured strength with every art combined,
> Awed, served, protected, and amazed mankind.
>
> *Botanic Garden*, vol. i. p. 289., published in 1788.

laughed at and parodied who predicted what to them seemed wild and senseless, — the time when steam should be used to plow the ocean and traverse the highways. It would have seemed more senseless had any prophet in Jurisprudence foretold the time when the most abstruse lore of ancient lawgivers should be swept away, and the cruelty and the slavery of their enactments cease to deform our Statute Book; — the time when the ocean should become the scene of our unfettered commerce, and the felon who made the highway unsafe should no longer be hung in chains upon its margin. This legal revolution, which they so little dreamt of, when they so strongly resisted every little legal improvement, is in truth the work of their hands.

These wits had their day; they have passed away; the feathers have flown; but they have left much to serve as a lesson how future politicians err by disregarding the signs of the times; and how violence ever proves most fatal to the cause which it is invoked to sustain. But for the Eldons, the Cannings, the Percevals, their successors never could have carried, never have hoped to carry, never would have ventured to propose the vast alterations in our jurisprudence which have been accomplished within a very few years.

But it will be said that we who profess friendly feelings towards amendment of the law have little reason to complain of what has so greatly helped this cause. We make answer, that we are friends to temperate and well-conducted improvements in all systems already established, and among others most especially in the system of all others most important to society, and any mischance befalling which operates the widest mischief. We therefore would have greatly preferred a more slow and gradual alteration than has been made, being certain that if those changes had been spread over a greater number of years, they would have received more sifting scrutiny, and would have been made more safely and with more perfection.

It is not to be denied, that when the former resistance to improvement had begotten a vehement impatience for it, a clamour arose for payment of the arrear so long delayed, and a kind of morbid anxiety to alter the legal system took possession of the public mind, even invading the more sober temper of the profession itself. When so much that is good

and unexceptionable has been effected, it would be invidious to scrutinise too nicely the errors which have crept into the new laws, errors hardly to be avoided when every thing was to be done all at once. But many sound lawyers lament the obscure provisions of several parts of the Church Nullum Tempus Act, and the Wills Act: No one can see any use in the sacrifice of a real or natural principle to the love of symmetry in the Act letting in the half-blood, whereby estates are carried in directions the most remote from all the desires and designs of landowners: Most practitioners wish that greater care had presided over the new rules of practice and pleading: All must blame the neglect of giving the trader no remedy against the salaries and other stipends of his customers, when every one of these (in the common course of business) is exempted from personal liability; and few are much pleased, unless great surprise always yields pleasure, with finding a statutory enactment abolishing contingent remainders. The catalogue might easily be extended of the defects and oversights which were owing immediately to the wholesale law amendments recently made, but were in reality imputable to the stubborn resistance of all change which had worked up the community to a kind of impatience towards all existing law. But enough has been said to illustrate our first position, and to show the magnitude of the evil first noted in the beginning of this paper, the too great slowness to amend the defects in our Jurisprudence. Proceed we now to consider the other evil, that which is, as we have seen, so apt to arise out of the former, too great impetuosity in adopting changes proposed in the established system.

It was a remark of Lord Bacon, distinguished by his wonted sagacity and fancy, a combination in him more singularly felicitous than in all men besides, that propositions have wings, but operation and execution have leaden feet.[1] But it asks not his profound sense to tell us, though his imagination would have nobly illustrated, the advantages which are derived from the leaden foot, when the wing would hurry us away from the path of cautious, practical wisdom. Whoever

[1] Remains, 367.

views the case in its different aspects must be aware how deliberately and circumspectly all changes in the law ought to be undertaken, and how carefully and tenderly executed.

In the *first* place. When any law has long been in use, its operation must have affected the state of society, and even if it was originally ill-contrived, this state must have become so much adapted to it, that a change cannot be made without unsettling many relations which have taken deep root and grown up to maturity. Interests will be affected by the alteration which justice as well as policy require us gently to deal with; for they have possibly been called into existence, certainly much increased, by our own measures, and to remove their foundation, or shake their props, or withdraw the clamps and screws that fasten them, is neither just nor prudent.

Secondly. There has been a like adaptation of other branches of our Jurisprudence to the given law which we are supposing had been imprudently, even hurtfully, introduced. All these other laws, with the effects which they have produced upon society, must be affected by the repeal.

Thirdly. It often happens that a counteraction has been provided for the evil effects of a bad law long operating. Other laws may have mitigated the mischief, or men's contrivances may have met its hurtful tendency with institutions calculated to disarm or to diminish its evil influence.

All these considerations show how cautiously we ought to touch existing laws which have long been in force. But another consideration ought never to be absent from the mind of the lawgiver when he is introducing any change, and it should be as constantly present to him when he is making a wholly new law as when he is repealing or altering an old one. For let us observe,

Fourthly, How limited are the faculties of men in their attempts to see into futurity, and provide for events that are to happen after their own day. But all laws are made with a view to the future, and we have little power indeed of foreseeing how they will work. After all care has been taken in framing a legislative provision, hardly has it begun to operate when some circumstance occurs which had never been thought of, for which no provision had been made, of which no account had been taken. This happens every day; and

it is enough to make us most cautious in all our legislative steps. The less able we are to see before us, the more anxiously ought we to look behind us and around us. The more thick the darkness which hangs over all in one direction, the more sharply should our eyes be pointed towards all in those other directions, all in the regions which shine in the light of history, all on each side of us which it is our own fault if we do not accurately discern.

These considerations are plain and obvious. They require no elucidation from the experience of past times. But if they did, the history of all countries would easily and copiously afford it, and of our own most of all, because we have more laws newly made than all the rest of the world besides. But we have said enough to excite the attention of those who are wellwishers of the great science of Jurisprudence, and to make them join knowledge and caution with zeal for amending our legal system. To which we may add in one word, the incalculable mischief done by rash and ill-conducted changes in bringing to contempt all law amendment, and thus retarding the progress which they are anxious to accelerate.

Such are our doctrines, and by these we shall always be guided in the conduct of this work. [1]

[1] We have mentioned and illustrated the effects produced by such men as Lord Eldon, and those like Mr. Perceval and Mr. Canning who seconded him for party purposes. The remarks above made have no application to Mr. Pitt and Mr. Dundas, statesmen of a higher order. The former was no enemy of improvement; the masterly Indian Reports of the latter place him among the greatest and most judicious reformers. They amused themselves with the Canning school; they belonged not to it. Even Mr. Canning, the Coryphæus of these party anti-reformers, himself used to differ widely with Lord Eldon on some subjects connected with improvement. The sound doctrines on trade of Mr. Huskisson greatly influenced him, and for a time he was liberal on the Catholic disabilities. He had, however, a violent relapse on this last question upon re-entering office in 1823: and he removed Lord Wellesley from Ireland in 1827, in order to avoid making his Government appear constructed on the principle of Catholic Emancipation.

ART. III. — OF THE DISTINCTION BETWEEN LAW AND FACT.

An Analytical Digest of all the reported Cases determined in the House of Lords and the Courts of Law from 1756 *to* 1843, *and a full Selection of Equity Decisions.* The Third Edition, by R. TARRANT HARRISON, Esq., of the Middle Temple. London, 4 vols. 1844.

THE above useful work furnishes much statistical information, important to all who are interested in the present state and future progress of the law of this country. The fourth of four considerable volumes is occupied entirely by an Index of the mere names of the cases referred to in the three preceding volumes, which last also contain brief abstracts of the points determined. The number of cases is about 44,000; they comprise most of, though not all the *reported* cases[1] which have been decided from the year 1756, when Lord Mansfield first began to preside as Chief Justice of the King's Bench, to Easter term, 1843, including a space of eighty-seven years. The average number of cases annually decided and reported thus appears to be about 500; but it is probable that the present rate of increase is treble that amount, or 1500 per annum. This vast and accelerated increase in the mass of precedents, which constitute so material a part, although but a part, of the *corpus juris*, naturally suggests the necessity, at least the expediency, of inquiring into the causes which produce a series of authorities so rapidly divergent.

Those questions naturally invite the earliest attention, and are in their own nature most important, which concern the practical application of the first great elementary principles of

[1] The compiler states that the Index does not include all the equity cases, but only a selection.

justice. Our present inquiry will be confined to a subject on which a conflict of opinion has been manifested, and which has given birth to numerous decisions — the distinction between matter of law and matter of fact.

The well-known elementary rule, "ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores," very clearly defines the provinces of the court and of the jury. Be questions of law and fact ever so intimately connected by legal definition or allegation, although the terms of the issue to be tried involve both, yet, upon the trial, the distinction is usually made without confusion or difficulty, the power and duty of the jury being directed and confined wholly to the question of fact, and their decisions being expressed either simply by means of a special verdict, to which the court afterwards applies the law in giving judgment, or being embodied in a general verdict, in which case, although such verdict comprise matter of law as well as matter of fact, as where they find a defendant guilty of a conversion, or a criminal guilty of theft, their office is still confined merely to the facts. For, in delivering a verdict which contains matter of law, they act only according to the direction of the court, that the facts, if proved, constitute a conversion in law in the one case, or a larceny in the other. So far the application of the general rule is plain and clear; nor could it well be otherwise, so long as the functions of a jury were confined simply to the finding of mere facts, as distinguished from such conclusions as will presently be noticed. Doubts which arise whether a particular question be one of law or fact, as contradistinguished from each other, seem to concern only such general conclusions from facts as are essential to a conclusion in law, but which do not themselves depend upon the application of any rule of law.

It will be proper to premise a few remarks on the origin of such questions.

The administration of the law consists in annexing defined legal consequences to defined facts. The facts so defined must be expressed in terms of known popular meaning, or be capable of translation into such terms by virtue of legal interpretation. If technical expressions were not so convertible into ordinary language, they could not be explained

to a jury so as to enable them to apply those expressions, and embody them in a general verdict; nor could the court, a special verdict being found by a jury, detailing facts, in ordinary popular terms, determine their legal quality. But where facts are numerous, various, and complicated, the law cannot be defined by an enumeration of particular and minute facts or circumstances, but yet may be capable of sufficient definition by means of conclusions drawn from facts, however complicated such facts may be. Thus, the right may be made to depend on the question or conclusion whether an act has been done in reasonable time, whether due and reasonable caution has been used, or due and reasonable diligence exerted; for such questions or conclusions, although not the subject of testimony by eye or ear-witnesses, are capable of ascertainment, in a popular sense, by the aid of experience and knowledge of the ordinary course of human affairs.

The consideration then presents itself, how these questions stand in relation to the general elementary rule concerning questions of law and questions of fact: whether all such conclusions are to be referred either to the judge or to the jury; and, if not exclusively to either, how the distinction is to be determined.

Such questions seem properly to be questions or conclusions in fact; they are conclusions or judgments concerning mere facts, founded by the aid of sound discretion upon experience and knowledge of facts, that is of the ordinary affairs of life, and of what is usual or probable in the course of those affairs. Such conclusions are formed, and the relations which they determine exist independently and without the aid or application of any rule of law. What is reasonable or unreasonable, usual or unusual, diligent or negligent, probable or improbable, is the same, be the legal consequences annexed what they may; such consequences may be altered at the will of the legislature, whilst those conclusions and relations remain unchangeable. A conclusion or judgment in law always involves the application of some rule of law, that is, the annexation of some legal artificial consequence to an ascertained state of facts; but those now under consideration are wholly independent of any legal rule or defi-

nition; the very absence of any such rule or definition constitutes the necessity for resorting to them: for when the law defines what is reasonable, diligent, or probable, the conclusion by any other rule, or according to any other mode of judging, is immaterial. In the absence of any such rule, the conclusion, so far from being founded on any legal rule or judgment, is one of the foundations on which the legal conclusion is constructed.

When, therefore, conclusions concerning facts, but which are essential to a legal judgment, are expressed in popular terms the sense of which is not controlled or restricted by any legal rule or authority, they must, it seems, be regarded as conclusions in fact. And when such terms are used, but are to a limited and partial extent restricted by technical rules, they must of course, to the extent to which they so are limited, be questions of law, but beyond those limits must still be understood in their natural and ordinary sense as conclusions in fact. And therefore, when a doubt arises in any such case, whether the question or conclusion be one of fact or in law, the real question seems to be, whether there exists any rule or principle of law which controls or limits the plain and natural import of the terms, and so converts what is apparently a question of fact for the the jury into a question of law to be governed by the technical rule. It may not, perhaps, be deemed irrelevant in this place to observe that the same reason does not exist for abstracting matters of fact from the decision of the judge which applies to the excluding a jury from the decision of matters of law; the latter rule is properly founded on the presumed incapacity of jurors so to decide. Judges, on the contrary, are qualified in an eminent degree to decide on matters of fact, in consequence of their knowledge and experience in ordinary affairs necessarily arising from forensic habits and long practice. At present, however, the question is, not whether the general elementary rule be founded in consummate wisdom, but as to the proper application of the rule consistently with its principle.

But however desirable it might possibly be to refer to the judge, and not to the jury, those conclusions which seem to us to be mere conclusions in fact, the advantage cannot

be attained to, but at the price of violating the general elementary rule.

It is now proposed to notice a few of the numerous instances in which questions have arisen relating to the application of the elementary rule, and briefly to examine to what extent the positions above advanced are consistent with the applications of that rule.

The branch of the rule which confines the decision of matters of law to the judgment of the court seems to have been inflexibly applied.

The construction of all acts of parliament, of all written instruments which possess any artificial or legal force or authority, and which do not operate simply as mere evidence tending to the proof of a fact, belongs undoubtedly to the court.

The inspection of all records, and of all matters determinable by such inspection, is also a matter peculiar to the decision of the court. It falls also within the province of the court to decide, in all litigated cases, whether the particular facts alleged in order to establish a claim or charge, are sufficient to satisfy the general terms or requisites of the law on which right or liability depends. So it is for the court in all cases to decide on questions of variance, and to determine whether the facts which are proved, or which the evidence tends to prove, satisfy the averments on the record, and which are put in issue by the pleadings.

So it is a well-established rule that questions occurring collaterally in the course of a trial are determinable by the court, although they involve questions of fact. For, as has already been intimated, even an encroachment on the elementary rule, in referring matter of fact to the decision of the court when it is essential to a decision in fact, is not so much open to objection as an enlargement of the functions of the jury in referring any question of law to them would be; the ordinary exclusion of the former being founded principally on considerations of legal œconomy and convenience, not on incapacity. Thus all questions as to the competency of witnesses, the reception of secondary evidence of the contents of a written instrument on proof of the loss of the original, of evidence of a declaration made by a party *in extremis*, are to be

decided by the court, and not by the jury. The last of these instances involves the consideration of a simple fact of a nature peculiarly fit for the consideration of a jury — the belief of the declarant that his dissolution was impending. This, however, and such other facts as are usually for the decision of the courts in order to warrant their interlocutory judgments, are usually so simple as regards proof, and in their own nature so little subject to conflict, that they form no material exceptions to the general rule.

The numerous decisions upon the question of reasonable time accord mainly with the general elementary rule, and with the positions above advanced: in the absence of any special rule applicable to particular cases, the conclusion is one of mere fact to be made by a jury. The law cannot prescribe in general what shall be a reasonable time by any defined combination of facts: so much must the question depend upon the situation of the parties, and the minute circumstances peculiar to individual cases, which, from their multitude and variety, are incapable of such a selection as is essential to a precise and particular law. If a man has a right by contract to cut and take crops from the land of another, it is obvious that the law can lay down no rule as to the precise time when they shall be cut and removed: all that can be done is to direct or imply that this is to be done in a reasonable and convenient time; and this must necessarily depend on the state of the weather and other circumstances, which cannot, from their nature and multiplicity, form the basis of any legal rule or definition. The question as to reasonable time was much considered in the case of Eaton v. Southby.[1] The plaintiff in replevin pleaded to an avowry, justifying the taking of goods as a distress for rent in arrear, that he took the growing crops under an execution, and afterwards cut the wheat, and let the same lie on the premises until the same, in a course of husbandry, was fit to be carried away; and that the defendant distrained the same before it was fit to be carried away. It was objected by the defendant, on demurrer to this plea, that the plaintiff ought to have set forth how long the corn lay on the land after it

[1] Willes, 131.

was cut, that the court might see whether it was a reasonable time or not. But the court decided that the objection was untenable; for though in Co. Litt. 56 b. it is said that in some cases the court must judge whether a thing be reasonable or not, as in the case of a reasonable fine, a reasonable notice, or the like, it would be absurd to say that in a case like the present the court must judge of the reasonableness; for if so, it ought to have been stated in the plea not only how long the corn lay on the ground, but what weather it was during that time, and many other incidents which it would be ridiculous to insert in a plea. And the court was of opinion that the matter was sufficiently averred, and that the defendant might have traversed it if he had pleased, and then it would have come before a jury, who, upon hearing the evidence, would have been proper judges of it. In the case of Bell v. Wardell[1], the defendant pleaded in justification, to a declaration in trespass, a custom for the inhabitants of a town to walk and ride over a close of arable land at all *seasonable* times: the plaintiff replied *de injuriâ*, and the defendant demurred. And the court held that seasonable time was partly a question of fact, and partly a question of law; and that as the custom was laid, if it were not a seasonable time, the justification was not within the custom; and that though the court may be the proper judges of this, yet, in many cases, it may be proper to join issue upon it, that is, in such cases where it does not sufficiently appear on the pleadings whether it were a seasonable time or not.

Before a precise and definite rule had been established on the subject, the question as to reasonable notice of the dishonour of a bill of exchange, the question was held to be one of fact for the consideration of the jury.

And the question whether a party has been guilty of laches in not presenting a bill payable at sight, or a certain time after, has been held to be a question for the jury where no established rule of law prevails; Fry v. Hill.[2] So it has been held to be a question for the decision of a jury whether tithes have been removed within a reasonable time.

[1] Willes, 202.

[2] 7 Taunt. 397.

Facey v. Hurdom.[1] The same has also been held as to the removal of a distress; Pitt v. Shew.[2] And although the question whether a particular covenant was an usual covenant in a lease might at first view seem to be of a legal character, yet it has been held to be one proper for the determination of a jury. Doe v. Sandham.[3]

Upon inquiries concerning homicide, where the question arises whether the party charged used due and reasonable care to prevent mischief, it is ordinarily one for the decision of the jury.[4] Thus it was left by Mr. Justice Foster as a question for the jury to say whether the prisoner on such a charge had not reasonable grounds for believing that a gun which went off accidentally in his hands was not loaded. In the case of death from the administration of a violent drug, without any intention to injure, it is a question for the jury whether the prisoner was guilty of gross negligence.

There are numerous decisions and dicta to the effect that reasonable time *may be* a question of law, and that it *is* a question of law in all cases where any such rule has been laid down, and perhaps also in all cases where a rule warranted in legal principle *can* be laid down. The former general position is so notorious, that the instances require no particular attention; it being clear in principle, as has already been observed, that expressions of known popular meaning used in the definition of a right or liability must *primâ facie* be understood in that sense, and that whenever that meaning is controlled by a legal rule, which either alters or limits the sense, or renders the case an absolute and peremptory exception to the general elementary rule, defining the provinces of the court and jury, the technical rule must prevail.

Questions as to reasonable fines, customs, and services have frequently been held to be for the decision of the court.[5] "Quam longum (tempus) esse debet non definitur in jure, sed pendet ex discretione justiciariorum:" and this being

[1] 3 B. & C. 213., and see the observations of Bayley and Littledale Js. in that case.

[2] 4 B. & A. 206.

[3] 1 T. R. 705., and per cur. K. B. Hil. Term, 1828.

[4] See Fost. 264, 265.

[5] Co. Litt. 56. b. 4 Co. 27. Litt. s. 69.

said of time, the like, says Lord Coke, may be said of things uncertain, which ought to be reasonable; for nothing that is contrary to reason is consonant to law.[1] A reasonable time for countermanding a writ was held to be a question of law.[2]

In many instances where no doubt could exist upon the question of reasonable time, whether it were to be referred to one tribunal or another, the courts have, of their own authority, decided the question, there being, in truth, no such doubt as would justify the trouble and expense of a trial by the country, and the merits being so clearly in favour of the determination one way that a finding by a jury on the other would have seemed to be extravagant. Power having been given to the lessor's son to take a house to himself on coming of age, it was held that he was bound to make his election within a reasonable time; that a week or a fortnight was reasonable; a year unreasonable; Doe v. Smith.[3] The court held, on demurrer to a plea justifying an imprisonment on a suspicion of felony, that the detention of the prisoner for three days to give the prosecutor an opportunity for collecting witnesses was an unreasonable time; Wright v. Court.[4] It was held by the court that six days was a reasonable time for removing the goods of a lessor by his executors after his death; Stodden v. Harvey.[5] A lapse of five days after intelligence of the loss, and before notice of abandonment was given, was held by the court to be too long; Hunt v. Royal Exchange Assurance Company.[6]

The terms negligence and gross negligence are terms of popular import, and involve conclusions drawn from conduct and circumstances which ordinarily are mere conclusions in fact, being independent of the application of any rule of law. The question of negligence is therefore usually one of fact for the jury; but the question may be one of law, and is so where the case falls within any settled rule or principle of law; and where no such rule or principle is applicable, the conclusion seems to be one of mere fact. A medical practitioner is bound to exercise a reasonable and competent degree of art and skill; and in an action against such a person by a patient in respect of damage from improper treatment,

[1] Co. Litt. 56. b. [2] 1 B. & P. 388. [3] 2 T. R. 436.
[4] 4 B. & C. 596. [5] Cro. J. 204. [6] 5 M. & S. 47.

it is a question for the jury whether the injury is attributable to the want of that degree of skill; Lanphier v. Phipos.[1] In an action against an attorney for negligence in the conduct of a cause, it is a question for the jury whether the defendant has used reasonable care. This question was so left to the jury by Abbott Lord C. J. in the case of Reece v. Righy.[2] This, it is observable, is a strong instance manifesting the extent to which such questions are to be regarded as questions of fact: a question as to the conduct of a cause by a legal practitioner might, at first sight, seem to be rather a matter of legal consideration than a question for "lay gens." Where the master of a vessel filled the boiler of a steam-engine with water at night in winter, and a frost ensuing the water was frozen, and a pipe burst, and water in consequence escaped and did damage, it was held that the jury were warranted in finding that the loss was occasioned by the negligence of the master, and not by the act of God; Siordet v. Hall.[3]

In an action by a merchant against his agent for negligence in not insuring goods, Lord Mansfield directed the jury generally that if they thought there was gross negligence, or that the defendant had acted *malâ fide*, they should find for the plaintiff, otherwise for the defendant; Moore v. Mourgue.[4] But conclusions of this description, like all other general conclusions, may be governed by rules and principles so far as they extend. If mice eat the cargo, and thereby occasion no small damage to the merchant, the master must make good the loss, because he is guilty of a fault; yet if he had cats on board he shall be excused.[5] Wherever any promise, duty, or course of conduct, whether express or implied, is prescribed by law, the mere omission to perform it must, in point of law, amount to negligence without any conclusion of negligence in fact.

Whether particular acts or conduct occasion nuisance or hurt to another is also an ordinary conclusion of fact, in-

[1] 8 C. & P. 475.
[2] 4 B. & A. 202.
[3] 4 Bing. 607.
[4] Cowp. 479.
[5] Roccus, 58. Abbott on Shipping, 241. The rule and exception (observes the author), although bearing somewhat of a ludicrous air, furnish a good illustration of the general principle.

dependently of any law which gives a remedy for, or punishes the author of, such nuisance or hurt. And in this popular sense these terms are usually to be understood when essential by definition or otherwise to a legal claim or liability without any legal restraint or limitation. But if a new market be erected near to, that is, within twenty miles of, a pre-existing legal market, and be held on the same day, the conclusion that the former is to the nuisance of the latter has been deemed to be a mere conclusion or inference of law. But it may be within that limit, and yet not necessarily a nuisance; "et poterit esse vicinum et infra prædictos terminos et non injuriosum."[1] It is in such a case a question of fact for the jury whether the new market be to the nuisance or detriment of the owner of the pre-existing market or not, according to the ordinary and popular meaning of the term nuisance or hurt. But if the new market were erected beyond the limit of twenty miles, the law would not infer that it was a nuisance, although held on the same day.

Malice, in the ordinary popular sense of the term, means simply an evil disposition of mind to cause misery, hurt, or suffering. The law, however, distinguishes between malice in law and malice in fact. The former terms import a legal inference, but it is one which is made by the law wherever a hurt or damage is wilfully done without any lawful authority or excuse. It is founded, therefore, on that which is ordinarily mere matter of fact, the wilful doing of a hurtful act which is prohibited to be done except where the law sanctions the doing. The adjudication, therefore, that any act is maliciously done in a legal sense, involves the conclusion that the law does not sanction the act. It frequently, however, happens that the law does not prohibit the doing of an act altogether, although its tendency may be to cause hurt or annoyance, but only *sub modo;* as where it is not done *bonâ fide*, but, on the contrary, with the disposition to occasion hurt, pain, or suffering, that is, where it is done of malice in fact or malice in the ordinary popular sense of the term. Thus the law prohibits the malicious publishing of a writing hurtful to the character of another person: if such a writing

[1] Fl. b. 4. ch. 28. s. 13., Com. Dig. Market, C. 3.

be in fact published wilfully and moreover without any thing to warrant or excuse the act, malice is a mere inference of law from the facts; but if the publication had been on an occasion which would have furnished an excuse, provided the act were done *bonâ fide* with a view to the occasion, then the question being as to the existence of an actual malevolent design to injure would be a question of malice in the ordinary popular sense of the term. In all such cases the question of malice in law involves the question of malice in fact.

A peculiar and technical meaning is annexed to the term malice in the law of homicide. By constructive malice, or malice in law, is meant (according to Mr. Justice Foster) that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit, and carry with them the plain indications of a heart regardless of social duty and fatally bent upon mischief.[1]

The terms of this description seem to be too indefinite to furnish any certain rule or test for mere legal decision; and, expressed as they are in popular terms, they would rather seem to describe matter of fact for a jury than matter of law for the court. It must, in every such case, be an important and material question, in point of natural justice, whether the accused did not wilfully place the life of the deceased or some other person in jeopardy by a wilful act or unlawful omission. If he did so, the case seems properly to fall within the description of one regardless of social duty, fatally bent upon mischief. If he did not so wilfully put life in peril, it is difficult to suppose any case which would properly fall within this description of malice.[2] It may be observed that this doctrine of constructive malice, which thus makes the inference of malice to be one of law, to be drawn by the court from the circumstances, without any inference in fact as to the mind and disposition of the accused in doing the act, has not been free from inconvenience in practice; and that in some instances the court, for want of such, a conclusion, in fact, has been unable to pronounce any judgment.

[1] Foster Disc. 256.

[2] See the observations on this subject in the Fourth Report of the Criminal Law Commissioners.

The question of fraud admits of a distinction analogous to that incident to malice, viz. of fraud in law and fraud in fact. It was observed by Lord Ellenborough, in the case of Doe v. Manning [1], that fraud or covin is always a question or judgment of law upon the facts; but a fraudulent intention is usually a question of fact. Upon an issue taken generally on an allegation of fraud it is a question of fact, and there being in such case no fraud in fact there is none in law; per Buller J., in Pease v. Marlow.[2] Whether the taking of a tenement was in fraud of the laws relating to settlements of the poor is a question of fact: so it is a question of fact whether a bill of exchange was obtained by fraud. Grew v. Bevan.[3]

The cases which have been referred to, and many others which might be cited, seem, for the most part, to consist with the positions already advanced: it remains to advert to a class of cases in respect of which much doubt has been expressed. These have arisen on the question whether probable cause, the negation of which is well known to be essential in an action for a malicious prosecution, be a question of law or fact. As regards the term probable itself, it is no doubt one of known popular meaning; and if we look to the nature of the inquiry which this conclusion involves, it is one to which the powers of the jury are well adapted, and which are exercised by juries in analogous cases. The deciding whether the probabilities raised by the evidence in criminal cases be sufficient to warrant a verdict of guilty, and in other instances to determine on which side the probability preponderates, constitutes one of the most important duties of the jury. It is seldom, indeed, that questions of probability can be measured by any legal rule or test, or are capable of any other decision than by the sound sense and discretion of those who inquire. The existence of all those circumstances which tend to crimination are undoubtedly matters of fact; and the law has no better means of fixing the precise point when the force of such evidence shall be sufficient to warrant a prosecution than it has for determining by rule what shall be sufficient to warrant a conviction. Where, indeed, any rule of law intervenes, and perhaps where any such rule can be laid

[1] 9 East, 59. [2] 5 T. R. 80. [3] 3 Starkie's Ca. 134.

down, that rule must, as in all analogous cases, prevail. According, however, to several modern authorities, the question, in the absence of any such rule, is a conclusion of fact for the jury.

In the case of Davis v. Russell [1] the judge directed the jury to consider whether the circumstances afforded the defendant *reasonable ground* for supposing that the plaintiff had committed a felony, and whether in his situation they would have acted as he had done; and the court held that the direction was substantially correct.

Best J., in giving judgment, observed, that it was for the jury to say whether they believed the facts, and if they believed them, whether the defendant was acting honestly.

In the case of Beckwith v. Philby [2], Littledale J. directed the jury to find for the defendants if they thought on the whole that the defendants had reasonable cause for suspecting the plaintiff of felony. And Lord Tenterden said, whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury.

In the case of Macdonald v. Rook [3], it was held, that the judge was warranted in leaving the question of want of probable cause to the jury, that question depending *on a chain of facts;* and Tindal C. J. observed, there are some cases, no doubt, in which a judge may be expected to tell the jury whether or not a defendant had probable cause for proceeding against a plaintiff, as in the case of a threatening letter or the like; but where the probable cause consists *partly* of facts and partly of *matter of law,* a judge would be warranted in leaving the question to a jury.

In Isaacs v. Brand [4], Lord Ellenborough intimated his opinion, in point of law, that a charge made by a principal thief on his apprehension against a party for receiving the goods did not authorise an arrest by the officer without a warrant, but left it to the jury to say whether there was probable cause or not.

[1] 5 Bing. 354.
[2] 6 B. & C. 637.
[3] 2 Bing. N. C. 217.
[4] 2 Starkie's C. 167.

In the case of James v. Phelps [1], the defendant had prosecuted the plaintiff, under the stat. 7 & 8 Geo. 4. c. 30. s. 6., for maliciously and feloniously obstructing a mine, and the plaintiff was acquitted on the ground that he effected the obstruction under a claim of right by his employer, and by the employer's direction. It appeared in evidence, on the trial of the action, that there had been disputes between the defendant and the employer on the subject before the obstruction, and that the defendant knew from the plaintiff that the obstruction was intended as an assertion of the employer's alleged right. The judge at the trial nonsuited the plaintiff; but it was decided by the Court of Queen's Bench that the judge was not justified in such a case in nonsuiting the plaintiff, or directing a verdict for the defendant, on the ground of there being reasonable and probable cause, but that the question was for the jury, and a new trial was granted. Lord Denman, in giving judgment, observed, that "Malice is a question which must go to the jury. The question whether there be or be not reasonable or probable cause may be for the jury or not, according to the particular circumstances of the case."

It is clear, however, in the first place, that the question of probable cause is subject to several legal rules.

The question as regards the defendant is whether *he* had probable cause to excuse or justify what he did; and the existence of facts which alone, if known and acted upon, would warrant the conclusion of probable cause cannot support it if they were unknown to the defendant, or though known, if he also knew other facts which shewed that there was, in truth, no probable cause. Sir Anthony Ashley's case.[2]

So in an action against a magistrate for a malicious conviction, the question is not whether there was in fact probable cause for convicting, but whether *he* had probable cause for convicting. Burley v. Bethune.[3]

There are also authorities, which show not merely that probable cause is a conclusion of law in particular instances,

[1] 11 Ad. & Ell. 453., 3 P. & D. 231.

[2] 12 Co. 92., Haw. B. 2. ch. 12. s. 15.

[3] 5 Taunt. 580.

but generally, however numerous and complicated the facts may be.

In Johnstone v. Sutton [1] it was said, that the question of probable cause is a mixed question of law and fact, that whether the circumstances alleged to show it probable or not probable existed is matter of fact, but that whether, supposing them to be true, they amount to a probable cause, is matter of law, and that upon this distinction the case of Reynolds v. Kennedy [2] was decided.

In the same case that of Candell v. London [3] was also referred to, where Buller J. had decided to the same effect. The same doctrine is also laid down in Buller's Nisi Prius, 14.

In the case of Davis v. Hardy [4], which was an action for a malicious prosecution for embezzlement, the judge nonsuited the plaintiff, and the court refused to set the nonsuit aside.

In the case of Blackford v. Dod [5] the action was brought by the plaintiff, being an attorney, against the defendant, for a malicious prosecution, on a charge of sending a threatening letter, which was produced and read at the trial: the judge nonsuited the plaintiff, on the ground that there was reasonable and probable cause for preferring the indictment; and the Court of King's Bench held that the nonsuit was correct, that the evidence did not raise a question of fact for the jury. There are also many other cases where the court has decided on the question of probable cause, many of which were capable of decision as matters of law, falling within the rules noticed in the case of Panton v. Williams.

In the case of Panton v. Williams [6] it appeared that Panton had indicted Williams and two others for having forged a will: Williams, after an acquittal, brought an action for a malicious prosecution; Panton pleaded not guilty; and on the trial a great mass of evidence was produced as to the existence of probable cause. Lord Denman C. J., before whom the cause was tried, having summed up the evidence, directed

[1] 1 T. R. *545.*
[2] 1 Wils. 232.
[3] 1 T. R. *520.*
[4] 6 B. & C. *225.*
[5] 2 B. & Ad. 179.
[6] 2 Q. B. 169., in the Exchequer Chamber, in error from the Queen's Bench.

the jury that it was not a question of law, in a case of that sort, whether there was reasonable and probable cause, but that it was altogether a question of fact for the jury. The counsel for the defendant tendered a bill of exceptions on this ruling, (*inter alia,*) and the jury found a verdict for the plaintiff, with 300*l.* damages.

Tindal L. C. J., in giving judgment, thus expressed himself: — "Upon this bill of exceptions we take the broad question between the parties to be this — whether in a case in which the question of reasonable or probable cause depends, not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge so to do."

The following were the points principally relied upon in argument and in the judgment. That in the cases of Coxe v. Wirrall[1] and Pain v. Rochester[2] the defendant in each set forth in his plea the facts and circumstances which induced him to indict; and the plaintiff having in each case demurred, the court had to determine as a matter of law, and not the jury as a matter of fact, whether the statement in the plea did or did not form a sufficient excuse. And that in the last of those cases, on its being objected that the plea amounted to the general issue, the court held it to be a good plea "per doubt del lay gents," for that the defendant confessed the procurement of the indictment, but avoided it by matter in law; and that although the course of pleading had been altered, the rule of law that the question belonged to the judge, not to the jury, remained unaltered. That the case of Sutton v. Johnstone, the authorities there collected, and the decision of Buller J. there cited, proved incontestably that what is reasonable or probable cause is matter of law. That on examination of the later cases it would be found

[1] Cro. J. 193.

[2] Cro. Eliz. 871.

that although there had been an apparent, there had been no real departure from the rule. That in some cases the decision had turned upon the question whether other facts which furnished an answer to the prosecution was not known to the defendant; in others, upon the question whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not; and that in others the inquiry had been, whether, from the conduct of the defendant himself, the jury would infer that he was conscious that he had no reasonable or probable cause: that in all such cases, and others which might be suggested, the knowledge, belief, and conduct of the defendant were so many *additional* facts for the consideration of the jury, so that nothing was left to the jury but the truth of the facts, and of the inferences to be drawn from such facts, they receiving the law from the judge. That there could be no distinction drawn between cases where the facts were few, and those where the facts were numerous; and that although it might be more difficult in the latter case to bring before the jury all the combinations of which numerous facts are susceptible, the task was not impracticable, as it rarely happened that there were not some leading facts in each case which present a broad distinction to their view without having recourse to the less important circumstances brought before them.

With respect to the inferences drawn from the course of pleading, according to the older cases, it is observable that such authorities do not by any means prove that the question of probable cause is *always*, and in the absence of any specific rule or principle, adequate to the decision, to be regarded as a question of law, but only that such a rule or principle was applicable in the particular instances. It seems, however, to be pretty clear, that formerly *all conclusions* as to what was reasonable, or the like, were considered to be questions of law for the decision of the court, and of course the pleadings were framed accordingly, and they now prove no more than that such questions were dealt with as questions of law. Lord Coke seems to have argued thus: All laws must be reasonable, and therefore what is reasonable is matter of legal determination: this, however, is by no means a necessary, or, as it seems, a just inference; it consists not only with

reason, but with law, that matter of fact should be decided by a jury: this is what the great elementary rule which we have chosen for our text requires; and the question resolves itself ultimately into this — whether the conclusion of probable cause be in its own nature one of fact or of law. According to the older authorities, the questions not merely of reasonable and probable cause, but of reasonable time, and other such conclusions, seem, as already intimated, to have been regarded as questions of law.

The rule has already been adverted to — "Quam longum esse debet (tempus) non definitur in jure sed pendet ex discretione justiciariorum." And this position as to reasonable *time* was to be also applied to *all things uncertain* which ought to be reasonable; for nothing that is contrary to reason is consonant to law.[1] It was therefore held, that every such question should be determined by the judges, in order that legal consistency and uniformity might be preserved. The difficulty attending this doctrine, and the inconvenience which must necessarily result from a multiplicity of legal decisions on matters so uncertain as to *exclude* legal definitions, had been then experienced but in a small degree, in comparison with that which has been felt in modern times. It was then, and has afterwards been, as it seems, too hastily inferred that, because in particular instances reasonable time has been deemed to be a question of law, it was to be so treated in all. In the case of Darbishire v. Parker[2] Lawrence J. expresses himself to that effect, because, in the case of Tindal v. Brown[3], the jury found merely the circumstances. It has already been seen that this general doctrine has been shaken by many more recent authorities. Lord Coke's comment on the very case mentioned in the text of Littleton, s. 69., is materially impugned by modern authorities. It is there laid down generally, that "executors shall have reasonable time to take the goods of their testator from his mansion; and this reasonable time shall be adjudged by discretion of the justices before which the cause dependeth, — for reasonableness in this case belongeth to the wisdom of the law." A court would, no

[1] Co. Litt. 56. b. [2] 6 East, 18. [3] 1 T. R. 167.

doubt, at the present day, under particular circumstances, pronounce upon such a question without the aid of a jury: they might hold that an hour was too short, a year too long a time to be reasonable[1]; but in a case of real doubt the question would probably be considered to appertain to a jury. Several authorities have already been cited which militate against the more ancient doctrine. In the case of Tindal v. Brown, to which Lawrence J. refers in Darbishire v. Parker, the court held that there was sufficient foundation for *laying down a legal rule*, then but imperfectly established, as to giving notice of the dishonour of a bill of exchange. Lord Mansfield there observed, that "what is reasonable notice is partly a question of fact and partly a question of law. It may depend in some measure on facts, such as the distance which the parties live from each other, the course of post, &c.; but whenever a rule can be laid down with respect to this reasonableness, *that should be decided by the court, and adhered to by every one for the sake of certainty.*" Lord Mansfield does not say that reasonable time ought *always* to be an inference of law from the facts, but only that it is to be such where a *rule of law can be laid down* as to reasonableness.

So, according to the judgment of Lord Kenyon in Hilton v. Shepherd, and Hope v. Alder[2], where no acknowledged rule or principle of law defines the limits between reasonable and unreasonable, the question seems to be one for the jury under all the circumstances of the case.

In the case of Smith v. Doe dem. Lord Jersey[3], Abbott C. J. said, "I conceive that, in this as well as in all other cases, courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature, or prevailing usage, the judges may be able to decide the point themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite." General as these observations are, they are available to show that the learned judge did not consider such questions to be exclusively

[1] See Doe v. Smith, 2 T. R. 436.; Stodden v. Harvey, Cro. J. 204.
[2] 6 East, 14. and 16.
[3] 2 B. & B. 592.

questions either of fact or of law; and they clearly tend to the distinction between cases where a general rule can be laid down by reason of the generality of their facts, or an actually existing usage which requires only legal sanction to be a law, and all others, which depending on a multitude of special facts and circumstances, are for the decision of a jury.

As it appears to be clear, from the decisions and dicta, to which we have referred in the course of the preceding observations, that the more ancient doctrine on this subject cannot be now generally sustained, we cannot but regret that it was found to be necessary to decide the case of Panton v. Williams upon authorities deemed to be *incontestable*, without much consideration whether the question of probable cause was in its own nature to be regarded as one of fact or of law, or whether the rule as there laid down was to be considered as generally applicable to all general conclusions from facts of the like description, or as founded on considerations peculiar to the particular class.

We propose to conclude with a few observations as to the comparative advantages or disadvantages likely to result from referring such conclusions to one of these modes of decision rather than the other, and on the question which course best consists with the important elementary rule on the subject, disregard of which would probably be attended with much inconvenience. There can be no doubt that where a plain practicable rule can be laid down for the decision of such questions, although it be of an arbitrary and artificial character, as in the case of putting an end to a tenancy by a six months' notice to quit, instead of leaving reasonable notice in each case to be decided upon its own circumstances, according to the ancient practice[1]; or that of substituting a general rule as to the time of giving notice of the dishonour of a bill of exchange, in place of a decision on the peculiar facts of each case, such a rule is useful and beneficial. It is plain, on the other hand, that to refer such questions to the decision of the court, when they depended on a multitude of facts and circumstances too numerous, and of too complicated a nature to be susceptible of any definite and convenient rule,

[1] Temp. H. 8.

would be attended with inconvenience; legal, but almost imperceptible distinctions would be multiplied to an excessive and indefinite extent. Under such circumstances uniformity of judgment would be impracticable, and many conflicting decisions would necessarily result. Whenever the court decided upon circumstances the decision would become a precedent and rule of law; and as each decision would afford room by comparison for a great number of distinctions, the obvious effect would be to multiply precedents to an inconvenient and unlimited extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting, in others, the inference of the jury in point of fact, substantial justice is administered, and the law is relieved from the perplexity occasioned by nice and subtle distinctions.

The practice of referring the question of probable cause to the court in *all* cases, although no rule or principle of law be applicable, is open to much objection.

A class so constituted is in truth, as regards the general elementary rule, of an anomalous character. Described as every such conclusion is, in popular terms, and capable of being decided in that sense by a jury, it is *primâ facie* a question of fact: it would seem, therefore, to be anomalous to deal with it as a question of law where there was no law to govern it, although undoubtedly, whenever any such rule is applicable, the popular sense of the term merges as it were in the legal sense, and the elementary rule applies as in other instances of applying a legal rule.

It would be necessary, in pleading it as a defence of an action of trespass, to state *all the circumstances* which might possibly be necessary to enable the court to draw the conclusion. It might be requisite, therefore, in some instances, to set forth on the record a great body of circumstantial evidence, consisting of those numerous and varied combinations of minute circumstances which tend in evidence to conviction on a criminal charge. Trials on such charges often occupy many days; and upon an action for a malicious prosecution it would, in a doubtful case, be as impolitic to omit the allegation of any circumstance tending to criminate the plaintiff as it would be to omit proof of it in evidence upon the

trial on an indictment. The question of probable cause frequently depends on evidence as to personal identity, similarity of handwriting, the tracing of footsteps, and other like *indicia*, and sometimes not merely on the fact of similarity, but even on the *extent and degree* of similarity, an adequate and correct statement of which on the record, in order to enable the court to judge of the effect which such evidence ought to produce on the mind of the prosecutor, would be impracticable. In some instances even an actual view or inspection may be essential to a decision on probability.

Where the court had to decide on demurrer to the plea, they might have to decide the whole question of right, yet not by virtue of any law or principle, but merely according to their own opinion as to what was probable or improbable in fact. Upon a writ of error brought, the question in ordinary cases is, whether the law has been rightly applied to the facts stated on the record; but where the judgment was founded on the ruling of the court, on the conclusion as to probable cause, without the aid of any rule of law, there could not be any question raised as to the correctness of the judgment in point of law, the judgment not having been founded on any such rule.

The practice of referring any class of such questions to the court would impose on the latter the frequent burthen of deciding in the same cause many questions of this nature in order to meet the state of facts which might ultimately be found by the jury. Where the number of witnesses, and of facts and circumstances, were great, much labour would thus be incurred in exhausting all the different combinations which might possibly result, and, which is very material to the present purpose, it is obvious that such cases would breed precedents to a most inconvenient extent. It is indeed necessary in ordinary cases that, to enable a jury to find a general verdict, the court should state the law, to enable them to apply it to the facts: this, however, requires only an exposition of the known existing law, which governs the right or liability in question, and seldom requires that such multiplied phases of the case should be exhibited to the jury as would be necessary for their instruction as to a general con-

clusion, such as probable cause, when it was governed by no general law, but the effect of each combination of facts depended on the mere discretion of the court.

It may, perhaps, be said, that although the ordinary rule may be that reasonable time and other such conclusions should be for the jury, yet that in particular instances, such as that of probable cause, the question may, by virtue of a special positive rule, be for the decision of the court as it is in respect of matters of fact arising collaterally in a cause. It is obvious, that if this were held, it would still amount only to a dispensation with the rule, or to an exception from it in respect of the particular class of cases. The questions or conclusions thus referred to by the court would still, when they were not governed by any rule of law, be in their own nature questions of fact, such as in analogous cases were decided by a jury. The consequence would be to establish two classes of facts, one for the decision of the jury, the other for that of the court — a course which could not be practised without danger of confounding the functions of the court and jury, and the risk of compromising general rules and principles.

Difficulties and anomalies of the nature above described furnish a strong argument for the expediency of a rule by which all such conclusions, that is, all general conclusions concerning facts expressed in popular terms, which conclusions, although essential to a legal judgment, do not depend on the application of any technical rule, should be governed — that is, that they should be dealt with as conclusions or questions of fact. Without going to the extent of asserting that a jury is in all cases the best tribunal for the decision of matters of fact, it may safely be laid down as a sound rule of legal policy that questions of Law and Fact should be kept distinct from each other, and that their confusion would be attended with evil consequences, not the least of which would be much uncertainty, much vexatious litigation, and, of course, large additions to the existing mass of perplexed and conflicting decisions.

Purposing, at a future opportunity, to revert to this subject, we shall conclude these observations by citing the emphatic remarks of Lord Hardwicke[1]: "It is of the

[1] R. v. Poole, Cas. Temp. Hardw. 28.

greatest consequence to the law of England and to the subject that the powers of the judge and jury be kept distinct; that the judge determine the law, and the jury the fact: and if ever they come to be confounded, it will prove the confusion and destruction of the law of England."

ART. IV.—THE LAW OF FEES AND COSTS: No. I.

1. *Lehre vom Ersatz und Compensation der Kosten.* C. J. KUNTZ. 8vo. 1828.
2. *Des Frais de Justice en Matières criminelles, correctionelles, et de simple Police.* A. DE DALMAS. 8vo. 1833.
3. *The Book of Costs in the Court of Queen's Bench, Common Pleas, and Exchequer.* 8vo. Second Edition. By OWEN RICHARDS. 1844.

IN our own country, and in many other parts of Europe, valuable works have of late appeared, on the expense of judicial proceedings under different systems of law; but we are not aware of any attempt that has been made to treat the subject as one of *comparative jurisprudence,* that is, to show the diversities of practice on this point, which have existed not only in different countries and at different periods, but between different tribunals of the same country, at the same time; to trace these historically; and thence to deduce principles by which the fitness of any proposed measure for regulating law expenses, under a given state of circumstances, may safely be tested. The works above noticed, and many others, especially by German writers, afford ample materials for such a disquisition; and, considering how favourable the prevalent philosophy of the day is to the inductive process in all matters of science, we are somewhat surprised that no jurist has thought of applying that process to the science of the law, on a point which comes pretty closely home to "the business and bosom" of every man that has ever ventured into a court of justice. This defect, so far as our limits will permit, we propose to supply in the present article.

It is an undoubted axiom of public law, that, "next to the care of religion, one of the principal duties of a nation relates to justice." And how is that duty to be discharged? Not only must the nation "direct its utmost attention to cause justice to prevail in a state," but more particularly "it must take proper measures for having it dispensed to every one in the most certain, the most speedy, and the least *burthensome* manner." (*Vattel*, L. 1. s. 158.) A burthen on some one or other there must be: it must fall either on the state or on the individuals concerned, or on both. Now, we think that the great principles of public law which Vattel, in this part of his work, has so ably developed, clearly lead to three plain rules:—

1. That the state, so far as it is able, should furnish its individual members, in every case, with the best means of obtaining justice.

2. That every individual so assisted in the maintenance or recovery of his rights should contribute toward the burthen thereby occasioned, not only his share as a member of the state, but a further portion in respect of the special benefit which he receives.

3. That whatever addition to the expense or trouble of administering justice is occasioned by the crime, the fault, or the misfortune of an individual, should, if possible, be thrown on that individual.

How far, and with what effect these rules have been followed in different ages and countries, is the question of *Comparative Jurisprudence*, which we here propose to investigate. Not that we mean to review all or even the principal institutions or usages which bear upon it. That would be a boundless, and at the same time an unsatisfactory task. Nations differ so much in their circumstances, past or present, that what might be a very reasonable, or at all events a very intelligible rule for one people or one age, would be for another altogether useless and absurd. We shall select our examples, therefore, from the practices first of some Continental Nations; secondly of different dependencies of the British Crown; and lastly of our own country at different periods of its history.

The subject, as we have said, must be treated historically.

If we would understand either our own or foreign institutions or usages, we must, in the words of Bacon, "legum præteritarum mutationes et series consulere et inspicere." The very idea of administering justice is to the savage mind (which is the infancy of national intellect), something vague and indefinite. The individual complains of injury, and calls upon his fellow-barbarians

"To wrong the wronger till he render right,"

and if his prayer is heard, justice or what passes as such, is summarily administered by the strong hand of a powerful individual, a dominant class, or an unorganised multitude. Here is no distinction of criminal and civil jurisdiction; no venerable magistrate presiding in the seat of justice; no careful scribe to record what passes, and to preserve the documentary evidence; no messenger to cite or arrest the defendant, much less, on either side, a counsel "learned in the law," or a vigilant and experienced solicitor. All the proceedings are *de plano*, and execution is contemporaneous with judgment.

As civilisation begins to dawn, a system of judicial order gradually arises; first, a *judicial establishment* is formed; and then means of *legal assistance* are supplied to the litigants. The elements of a judicial establishment are offices destined to the exercise of three distinct functions; the *decisorial*, which is that of a judge; the *commemorative*, that of a registrar; and the *coercive*, that of a summoner, or other executive officer. Again, in order to afford adequate means of legal assistance, the state must recognise one or more classes of persons, as entitled to appear for, advise, or defend the suitors in a cause: and after the officers of the establishment and the legal assistants have been duly remunerated, there still remains a considerable branch of expense for the preparation of *pleadings*, and the production of *proofs* oral or written.

The organisation of a judicial system is at first extremely simple; but as society advances in its progress, new arts and inventions, new wants and wishes, new rights and duties, demand correspondent provisions. It becomes necessary to

separate jurisdictions and to vary forms of procedure. Judicial establishments ramify into a great diversity of offices. The decisorial function is exercised in one manner by a *prætor*, in others by a chancellor, a *podestà*, a judge of the common, ecclesiastical, or admiralty law, a justice of peace, a coroner, a juror; or it is delegated wholly, or in part, to an assessor, a master in chancery, a *juge rapporteur*, &c. The commemorative function is exercised by a registrar, a *tabellio*, an *exceptor*, a *greffier*, a prothonotary; and the coercive by a marshal, a *nuncius*, a summoner, a *huissier*; each of these officers having his appropriate duties to perform. Again, legal assistance is rendered by advocates, *patrocinatori*, serjeants, barristers, *avoués*, solicitors, &c., with distinct rights and privileges: these form the *legal profession*, of which, as the services are indispensable to the well-being of the whole community, so the whole community is interested that they should receive a fair remuneration. Lastly, the new combinations of circumstances which, in a highly artificial state of society, are daily arising, require a correspondent variety in the modes of pleading, and in the nature and quantity of the evidence, documentary or oral; all which considerations must be taken into account in estimating the expenses, which, in such a state of things, inevitably attend the due administration of justice.

At first sight it may appear that the accumulated burthen of a judicial establishment, a legal profession, and a technical system of plea and proof, must render the administration of justice more costly to men in a highly civilised, than in a savage state; but the truth is widely different. If we pay more in purse than our rude forefathers, we pay infinitely less in person. If questions of right and wrong are multiplied, the wealth and the enjoyments out of which they arise are augmented in a far greater degree. Above all, we possess the calm and confident security of living under the perpetual protection of *law*; which, like another Providence, guards our days and nights with unsleeping vigilance. "Quid enim est *jus civile?* Quod neque inflecti gratiâ, neque perfringi potentiâ, neque adulterari pecuniâ possit. Quod si non modò oppressum, sed etiam desertum, aut negligentiùs adservatum erit, nihil est, quod quisquam sese habere certum,

aut a patre accepturum, aut relicturum liberis, arbitretur." (*Cicero*, Cæc. s. 26.)

But though a fair price ought to be cheerfully paid for services so indispensable, the amount is to be scrupulously guarded from excess; and though justice duly administered be a security, not alone to the litigant, but to every member of the state, for the enjoyment of his rights, yet the best friends of the law will be anxious that its burthens (be they light or heavy) should be equitably divided between the individual and the community.

We shall have occasion to see that this equity of distribution has not always been observed. Meanwhile, it may be proper briefly to advert to the various *modes* of remunerating legal services, and the *funds* from which such remunerations are ordinarily drawn. As a judicial establishment is purely a creature of the state, its members may indeed be required to act gratuitously. Thus, the duty of judging gratuitously in matters of fact, is thrown on jurors, in England; but this depends on political considerations; viewed in a financial light, it can only be regarded as a partial mode of taxation, subjecting a certain class of the citizens to a burthen, which properly belongs to the country at large. Where payment is made for such services, it is either by a *salary* from the state, or by *fees* from the individuals benefited, or partly by one mode and partly by the other. As to the *legal assistants* of a suitor, these, being originally no other than his personal friends, received at first no pay: when they were recognised by the state as public bodies, and invested with exclusive rights to employment, they became, in some sort, public officers, and their payment, instead of being wholly left to private contract, was subjected to regulation by positive law, or known usage. *Written pleadings* and *documentary evidence* must always be a source of expense, for their preparation and transcription; but as on the one hand this expense is often moderated by legal restrictions, so on the other hand it is frequently enhanced by fiscal imposts. And lastly, the *parol evidence* may be rendered still more costly, if a great number of witnesses are to be brought from a distance to the place of trial, or examined by commission at their own resi-

dences; but this depends as often on the self-will of the suitor, as on the necessities of the case.

The funds from which the remuneration of legal services is drawn, are either supplied by the state, or by the litigants, or else they are taken directly from the object in dispute. The state defrays the charges, which it assumes, either out of its general revenue, or out of sums contributed by the administration of justice. In the first line of these contributions, may be placed the *fines* and *forfeitures* exacted by criminal tribunals, or by civil tribunals exercising *quoad hoc*, a quasi-criminal jurisdiction. Next to these come the *fees* charged on suitors, in the course of a cause, and carried over to the account of government: then the *stamps*, which, in recent times, have been imposed on legal documents; and, lastly, the fees on admission and practice, or sums deposited (as in France) by way of security for good conduct, by the different classes of the *legal profession*. All these together will frequently be found to do more than reimburse the state for the expenses it incurs in the administration of justice. When the burthen falls on the litigant, it is to be considered, whether it has been caused by his own misconduct or misfortune. If neither of these has occurred, his payment should be regarded in the nature of an insurance premium to secure a right possessed, or of a salvage on one which has been rescued for him from the grasp of the wrong doer; and it should not exceed what equity would award in either of those cases. If, on the contrary, he has been in fault, either on the general merits of his case, or on some incidental point in the proceedings, he is justly liable to be, *pro tanto*, condemned in *costs;* since the state, though bound to promote justice for its subjects, is under no obligation to relieve them from the consequences of their own error or misconduct. The complexity of interests, however, in modern times, and the consequent intricacies of procedure, renders the *taxation* of costs often a matter of great nicety, both as between party and party, and as between practitioner and client. The payment of expenses out of the object in litigation may be effected in various ways. On some ancient systems, the law gave a definite proportion of the value, ex. gr. a *decima litis*. In modern times, where the litigation has appeared to be

perfectly reasonable on both sides, some courts have been in the habit of decreeing "costs out of the estate," but in no definite proportion to its value.

Having premised these general observations, we propose briefly to trace the progress of legal procedure on the continent of Europe, from its two principal sources, the *Roman* and the *German*, of which the former eventually branched out into the *civil* and *canon* law, and the latter into the *common* and *feudal*.

The vague and obscure accounts which we have of the Roman law, for the first three centuries after the imaginary foundation of the city, afford but slight traces of a judicial establishment. The decisorial function (or, in other words, the judicial authority), seems to have been shared (equally or unequally, as it might happen) between the kings or consuls, and the assemblies of the people. We perceive that (with exception of the paternal power, which, in the domestic forum, was absolute), a citizen could not be put to death but by sentence of the people in the *comitia centuriata*, or, by that of the *quæstores parricidii*, when that office was subsequently instituted. In other matters, the distinction of criminal and civil jurisdiction seems to have been little thought of, or, rather all jurisdiction was substantially of a penal nature. "The advantages which result from a division of the science of law," says Hugo, "were not then appreciated." The consuls, no doubt, had a power of imposing *fines*, some of which went to the sacred, and some to the civil treasury; and, as patricians, the consuls were interested in both. Perhaps the Lex *Ateia Tarpeia* extended this power, within certain limits, to the Plebeian tribunes; but whether any part of the fine went to remunerate the judicial services of the magistrate who imposed it, or whether those services were paid in any other manner, is quite uncertain. The trials were summary; probably without so much as a scribe to record them, in an age when the art of writing was known to few. The only coercive officer was the *lictor*, unless we may add the *accensus*, both perhaps slaves, or freedmen, receiving as payment small pittances from the state. There was no legal assistance to the parties, unless a *patronus* chose to stand forward gratuitously in behalf of his *libertus* or *cliens*.

In short, at this period, what we now call "law expenses" may be said to have been nearly null.

In the year of Rome, 305, the laws of the *Twelve Tables* were brought into force. In point of procedure, they probably did little more than confirm the old customary usages, subjecting crimes and breaches of contract alike to penalties. Thus, a *fine* of double the value of the thing in dispute was denounced for privately stealing, for appropriating a deposit, for deceit in a sale, for fraud by a guardian, or for removing a beam of timber common to a neighbour's house; whilst usury was punished with a quadruple *fine:* and the mere fact of insolvency, however honestly incurred, rendered the unfortunate debtor liable to be sold into slavery, or even (as some critics think) to be cut in pieces, and to have his mangled remains distributed among his merciless creditors. The earliest known form of action, which can be deemed purely civil, was the *sacramentum*, so called from the deposit made by each party of a certain sum, to be forfeited in case of failure, to sacred uses. The *judicis postulatio*, which was also of a civil nature, is believed to have been subsequent in origin to the sacramentum. The *judex* was properly a judge of fact only, like our jurors, and was appointed for that purpose by the *prætor;* but neither prætor nor judex, nor indeed any other individual who exercised a judicial function, appears at that time to have been paid, either by a fixed salary, or by fees on any part of the proceedings. Neither can we discover that the Twelve Tables, in any other manner, tended to augment or diminish the law expenses.

From the epoch of these celebrated enactments to the end of the Roman republic, the procedure was gradually brought to a systematic shape, and the jurisdictions and forms of action both criminal and civil, were accurately distinguished; but the provisions which bore on the question of expense, remained extremely imperfect. The judicial establishment exhibited no permanent organisation nor any direct mode of payment. The *prætor*'s office was merely annual. He owed it to political influence. It furnished him (as we see in the case of Verres), with means of flagrant oppression whilst it lasted, and it led to other appointments, in which, if so disposed, he could exercise a more unbridled tyranny. The

judices, on the other hand, were in many cases too numerous to judge well had they been so inclined, and having no legal remuneration, they paid themselves by the indirect sale of their votes. The commemorative and the coercive officers were, indeed, multiplied; but their pay was probably trifling and their conduct can hardly be supposed to have been more scrupulous than that of their superiors. Legal assistance was now amply afforded by the *patroni*, but they also were paid indirectly and in a manner most injurious to the public, by the support of their clients, at elections, in tumults, and often in sanguinary conflicts and acts of private vengeance. *Advocati*, it is true, were known in the time of Cicero; but they formed no part of a legal profession: they were merely private friends whom the suitor called upon (*advocabat*), for countenance and support in his cause, and sometimes to intimidate the judges by their weight and numbers. "Vellem adesset Antonius (says Cicero) modò sine *advocatis*" (*Phil.* 1. 7.), that is, without the armed myrmidons whom Antony had brought to surround and overawe the senate. The *procurator*, too, was known, in the general sense of one—"qui aliquid nostri negotii gerit;" but there was no professional or official "*procurator ad lites.*" During the whole of this period, therefore, the administration of justice was apparently conducted at small expense; but in reality, it became, especially in the later years, an intolerable grievance to the country, and was one of the main causes of the downfal of the republic.

Under the emperors judicial order was first systematically established. Many new judicial offices were created. The emperor himself, aided by his great dignitaries, the *præfectus prætorio*, the *magister libellorum*, &c., not only declared or enacted the law in his *consistorium*, but formed in his *auditorium* the court of appeal, *en dernier ressort*, for the whole empire. The *prætors* were multiplied in number; but their decisions were rendered less arbitrary by the perpetual edict, and by the binding authority given as well to the *responsa prudentum*, as to the *constitutiones principis*. The *judices* became permanent officers, deciding both on the law and the fact, and were paid partly by a *salarium*, and partly by *sportulæ*. The *salarium* was an annual allowance made to

each judge by the state, and in the time of Justinian amounted to two pounds weight of gold. The *sportula* was a fee of one-tenth of a pound of gold received by the judge from each party, in cases where the value of the object in dispute exceeded two pounds and a half of gold, inferior cases being exempted from payment. By this arrangement the state provided a judge gratuitously for the lower classes of the people, while those who could more easily bear the burthen, contributed in part to the expense of the tribunals. The judicial establishments were now fully supplied, both with commemorative and coercive officers. The former, under the designations of *tabelliones, notarii, exceptores,* &c., were probably paid by *sportulæ,* in proportion either to the length or importance of the documents which they transcribed. The latter, called *nuncii, viatores, apparitores, exactores,* &c., also received *sportulæ,* which were fixed by law, at one time, according to the duty done, at half a solidus, a solidus, or two solidi for each act (*Leo* and *Anthem.* C. 1. 3. 33.); at another time, according to the value of the thing in litigation (*Justin.* I., 4. 6. 24.)

Nor was a less change effected in the mode of affording legal assistance to suitors. A *legal profession* now arose and took its due rank in society. The old hereditary patronus had disappeared, and the advocatus was recognised as the *patronus causæ. Julianus,* about A. D. 130., cites from the Pretorian edict,—"Si non habebunt *advocatum,* ego dabo" (Digest. 3. 1. 1.), and *Antoninus Pius,* about twenty years afterwards, speaks of persons interdicted from advocation (Digest. 3. 1. 8.), which shows that it had then become a lucrative employment. It still however retained so much of the dignity of the ancient *patrocinium,* that its remuneration could not be enforced by the *jus civile* in an *actio locati,* but by the *jus honorarium,* as a matter within the extraordinary cognizance of the *prætor,* whence the payment itself came to be called *honorarium.* The prætor, however, would not compel payment of more than two pounds and a half weight of gold in one cause. (*Ulp.* D. 50. 13. 1.) At a later period (A. D. 396.), we find the advocates spoken of as a "*corpus togatorum*" (*Arc.* and *Hon.* C. 2. 7. 3.) *Procuratores* also, answering to our attorneys and proctors, became gradually of

importance in a cause. Anciently, every man was obliged to litigate in person; afterwards he was allowed, in certain specified cases, to do so by a procurator; and at length the permission became general. Vexatious litigation was first treated as a crime, and punished with branding. Then it was subjected to the civil *actio calumniæ*. Condemnation in costs is mentioned by Ulpian, A. D. 212, and adopted by Justinian generally, A. D. 530, subject to the oath of the party, and to the taxation of the judge. (Cod. 3. 1. 13.) The rule of taxing was to allow "omnes expensas, quæ *consueto modo* circa lites expenduntur" (ib.): and these words, "consueto modo," furnish a probable etymology of our modern term "costs;" for we find various law expenses termed, in barbarous Latin, *consuetum*, *costuma*, *costagium*, and in Norman French, *coustage*, which, in our old statutes, is rendered *costs*.

Having thus taken a hasty view of the rise and progress of the Roman procedure, so far as relates to its expense at different epochs, we must now turn to the German system, which, in its origin, is so graphically described by Tacitus. When the half-savage chiefs, and more than half-savage people, of a German tribe met, at the new and full moons, to consult on their common interests, causes were brought before them, which, in some rude manner, they tried. Their proceedings, like those of the early Romans, were rather of a criminal than civil nature, and mostly terminated in the imposition of a *fine*, divided between the community and the injured individual. Besides the attendance at these meetings, some head men of the tribe were sent round through the different districts to administer justice, accompanied by a number of followers to enforce their decisions. In these latter arrangements we see the embryo forms of a judicial establishment, so far as regards the decisorial and coercive functions; whilst the fines imposed may have furnished an indirect mode of compensating the services of the individuals employed in this branch of the public service. Of legal advice, or assistance to the suitors, there is, of course, no trace.

At a later period, when the German tribes, under the various names of Lombards, Franks, Saxons, &c., had issued

from their woods, and laid the foundation of civilised states, the notions of jurisdiction and procedure began to develope themselves among the new communities. In imitation of the Roman system, judicial officers were formally appointed, under the designations of *missus, grafio, tunginus, rachinburgus,* and the like; of whose powers and duties the celebrated *Savigny* has given a full and accurate account in his History of the Roman Law during the Middle Ages. Their proceedings, however, for a long time, retained much of a criminal character; and most of their punishments still resolved themselves into *fines;* for, though the judgment might be amputation of a limb, or even death, it generally admitted of a pecuniary composition, which was divided, in certain proportions, between the complainant and the sovereign, or the judges. The offender was then said to have bought his *fred,* or peace, and thence a portion of the composition itself was called *fredum,* from which word is derived the modern French "*frais* du procès." It may suffice to cite the following instances: "Testes, qui falsi apparuerint, manus suas redimant, cujus compositionis *duæ partes* ei, contra quem testificati sunt, dentur; *tertia* pro *freda* solvatur. (Leg. Lougob. 2. 51. 11. circ. A.D. 640.) "Rachinburgi—quantum debitum valuerit, de fortunâ illius tollant: et si *freda* anteà de ipsâ causâ non fuerat data, *duas partes* ille, cujus causa est, ad se revocet, et Grafio *tertiam* partem obtineat." (Lex Salic. 52. 3. A.D. 798.) The fredum, therefore, was one mode of remunerating a judge. Another mode in use among the Franks was by granting to him the *decima sumptûs litis,* which was a due, otherwise levied to the use of the king. (*Marculf.* Formula, 1. 20. circ. A.D. 660.) At a later period, in France, certain payments were made by the suitors, which were called (as in a charter of the year 1047) *judiciariæ consuetudines* (*Ducange,* voc. Consuetudo), which probably went (directly or indirectly) to the support of the judicial establishment. To these courts was generally attached a registrar, called *scrinarius, exceptor,* or *tabellio;* as the "exceptor civitatis Placentinæ," mentioned A.D. 721. (*Savigny,* 1. 422.), and the scrinarii of the judges palatine, about A.D. 1000. (Ib. 379.) In this latter court, also, were "*Defensores,* quos *advocatos* nominamus." (Ib.)

We now approach a period, when the judicial systems of Europe underwent considerable changes. In the twelfth century, the study of the Roman *Civil Law* was revived by *Irnerius*, on the Continent, and taught by his scholar, *Vacarius*, at Oxford; and shortly afterwards the *Canon Law* began to be systematised by *Gratian*, and the Feudal Law by *Obertus ab Orto*. Each, and all of these events had a marked influence on the constitution and practice of the tribunals, under all the systems of law then in force.

The canon law was administered in the ecclesiastical courts. Their general organisation and procedure were modelled on those of imperial Rome; but, in some instances, with manifest improvement. They had regular judicial establishments for exercising the decisorial, the commemorative, and the coercive functions; and moreover they recognised distinct bodies of advocates and procurators. At an early period we meet with a "collegium judicum et advocatorum" in Bologna (*Savigny*, i. 295.), the members of which were probably doctors, either "legum" or "decretorum," the former presiding, or practising, in the lay tribunals; the latter in the ecclesiastical. By the canon law the judges, being ecclesiastics, were, as such, presumed to be competently provided for, and therefore were, in strictness, required to give their judicial services gratuitously; though this seems, in practice, to have been little attended to. They were indeed forbidden to exact from the litigants the "decima litis," or any other proportion of the matter in dispute (Decretal iii. 1. 10.); but they were allowed to receive expenses "victualium" (ib.), and "modica xenia" (ib. gloss.), and these afterwards seem to have been converted into *Sportulæ;* whence the rule was laid down "Ordinarius non debet habere nisi sportulas." (Ib.) By Sportulæ also, on their respective acts, were the tabelliones and nuncii paid. The advocates and procurators were left to settle their remuneration with the parties, not exceeding a certain sum. In the matter of costs, the canon law was very clear and explicit. It adopted, as a *general* proposition, the rule, "ut in fine litis, victus victori in expensis litis condemnetur" (Decretal 2. 14. 5.), but with several equitable modifications; for instance, that the party who had a "probabilis causa litigandi," should be exempted from paying costs (ib.);

that the costs allowed should only be those which were "necessariæ in lite" (ib. 2. 16. 3.), and that partial costs might be awarded against either party in the course of the suit, for vexatious delays. (ib. 2. 14. 5.) Lastly, it provided, that in the case of a pauper thus impeding the course of justice, "si solvendo non fuerit, aliàs, secundum arbitrium discreti judicis, puniatur." (Ib.)

As the canon law procedure grew out of the later Roman, so the feudal law procedure grew out of the earlier German. Montesquieu has minutely traced the alternate transitions from unwritten to written law, and *vice versâ*, which took place among the northern nations. Local customs and ancient usages are recognised in the Formulæ of Marculfus, and the extant codes of the Lombards, &c. in the seventh century; but the written codes and formulæ differed in many particulars from the unwritten customs and usages. New customs soon arose, from political and other changes, to which the codes were inapplicable, insomuch, that "toward the end of the second race (circ. A. D. 950.), the Salic, Burgundian, and Wisigothic laws were much neglected; and after the beginning of the third race (A. D. 987.) they were scarcely ever referred to." (*Mont.* 28. 9.) It is not here necessary to follow that eminent writer's speculations on the trials by ordeal or duel, the relics of barbarous ages; nor on the purgation and compurgation by oath, which succeeded these *Judicia Dei.* Suffice it to observe, that early in the 11th century, *Conrad* the Salic, having rendered fiefs hereditary, enacted the first written feudal laws, which, together with those of his immediate successors, were shortly afterwards collected by Obertus ab Orto and Gerardus Niger, under the title of "Consuetudines Feudorum." In this system, the old German mode of trial, before the chiefs and armed multitude, was replaced by the "*Judicia parium, coram comite et populo.*" (Consuet. Feud. 1. 26.) The judicial establishments of these feudal courts threw (at least directly) no burthen on the suitor; he was himself one of the "*pares curtis,*" and if he were a party to day, he might be a judge to-morrow; for the *pares* were the only competent judges, and in most cases the only competent witnesses of the court. The modes of trial were very various, admitting of proof not only *per testes, per breve testatum,* or *per*

sacramentum et sacramentales (purgation and compurgation), but also *per duellum.* (Ib. 1. 4., 26., 2. 27.) It does not appear that any part of the judicial establishment was paid either by salary or fees; but *fines* were imposed on the culpable parties; and these being divided, in certain definite proportions, between the judges and the injured individuals, afforded, to the latter, compensation for their wrongs, and to the former, remuneration for their services.

The subsequent multiplication of fiefs, and of the jurisdictions attached to them, with little or no effective control, rendered the feudal customs so various and uncertain, that a reform became obviously necessary; and with this view, about the middle of the thirteenth century, were framed the celebrated *établissemens de St. Louis,* which at first were binding only on the *domaine du Roi,* but were gradually adopted in the *pays des Barons.* These établissemens being chiefly drawn up by *Pierre Desfontaines,* a lawyer well versed in the civil and canon laws, naturally borrowed from these sources a great part of their provisions. On the subject of expense Desfontaines says, that in his time there were no other *expensæ litis* than the *decima litis,* and the *emenda.* The *decima litis* was of Roman origin: the *emenda* was analogous to our Norman *amercement,* which considered the unsuccessful plaintiff as *à merci,* and liable to be fined, *pro falso clamore suo.* In like manner the *emenda* was a sum by which the litigious suitor (*emendavit se*) cleared himself of his fault. The word still exists, and is of more general application in the modern French *amende.* We are not aware whether or not the *emenda* ever went to remunerate any part of the judicial establishment; but shortly after the period last mentioned, a new source of emolument to the judges was put in practice. The *successful* suitor, in his gratitude, offered the judge, who had decided in his favour, certain *species,* that is, spices (spiced cakes or the like), called in French *épices,* and by contraction *épis.* These little presents in time were sanctioned by custom, and then *by leave of the court* the suitor was *indulged* with permission to commute his spices for gold! On the 12th of May 1369, "Le Sire de Tournon, *par license de la cour,* bailla vingt francs d'or, pour les *espices* de son procès, et les eurent les deux

juges rapporteurs." (*Menage* voc. Espices.) The money payment itself came at last to be deemed obligatory, insomuch that in the margin of several registered sentences of the parliament of Paris, were to be found these words : — " Non deliberetur, donec solventur species." In the reign of Louis XIV., the *procedure civile* underwent a thorough reform, by a committee including the chancellor Seguier and the first president Lamoignon; and after many conferences, an ordonnance of the king was published in 1667, embracing all the points then discussed. But notwithstanding the attention of the greatest lawyers of the time to the subject, the *épis*, manifestly subject as they were to abuse, continued down to the time of the revolution, to form a regular part of a French judge's emoluments.

In many other parts of the Continent, the principles of the civil and canon law prevailed in the regulation of the procedure, and were illustrated by authors of great repute, such as Maranta at Naples, Ridolfinus at Rome, and Gaill in Germany. The last mentioned writer (whose work was published in 1578,) has left a full account of the procedure of the Imperial Chamber, of which he was a member. The judges of that high court were called *assessors*. They received no *sportulæ* (says Gaill), " eò quòd, ex publico, a statibus imperii, *salarium* annuum habent." (Pract. Obs. l. 151. 7.) Inferior judges, however, received *sportulæ* (called in German, *leg-geld*, or *gericht-geld*), and, it seems, had no salary. The advocates received *honoraria*, which consisted of *arrhæ* (answering to our retainers), and an annual *salarium* paid at the beginning of the year by their clients, to insure their services for a twelvemonth. The *procurator* was paid in like manner. Sometimes the same person acted both as advocatus and procurator, and was then entitled to payment in both capacities. Parties might agree with their advocatus or procurator for certain charges, if not, the judge was to tax the costs. The distinction of costs to be allowed, as between party and party, and as between attorney and client, was fully recognised. The general rule in taxation was, that " judicialium et necessariarum expensarum, quæ propter ipsam causam facta sunt, circa litis instructionem, et prosecutionem causæ, ratio tantùm habenda est." (Ib. 151. l.).

Thereupon Gaill states a question thus:—"Initio litis, clientes consueverunt esse liberales, suisque advocatis et procuratoribus aliquid, Arrharum nomine, largiter dare, vel annuum salarium, pro navandâ operâ, durante lite, munificè constituere. Post definitivam autem sententiam, in schedulâ expensarum, hujus modi arrhas, et multorum annorum solutas pensiones exponunt, earumque restitutionem a parte victâ, et in expensis condemnatâ, petunt. Fuit sæpe quæsitum, an harum expensarum ratio, in taxatione, habenda sit. Conclusum quòd non; eò quòd sint delicatæ, et voluntariæ, quarum rationem Judex habere non debet. Quid enim ad partem victam, quòd victor tam effusè et splendidè expensas fecerit?" (Ib.) The practice of adding to the condemnation in costs, a fine or amercement to the crown, was also followed in this court. "Condemnari solet temerarius litigator, ultra expensas, etiam procuratori fisci, in aliquot marcas auri puri vel argenti." (Obs. 152. 8.) With regard to paupers asserting themselves such on oath, the judge was bound to assign to them, gratuitously, advocates and proctors, and to furnish them, in case of appeal, with the acts of his court gratis. Commissioners were to examine witnesses for them gratuitously, registrars were to furnish them gratuitously with copies, and nuncii were to execute for them the necessary processes without remuneration: all such services, however, constituting a preferable lien, on any sum which might afterwards be gained in the cause. (Obs. 1. 43.) But in cases of appeal vexatiously brought, the pauper was liable to corporal punishment. (Obs. 155. 4.)

At the present day, the prevalent system, in most parts of the Continent, is to pay the judges, and frequently the registrars, out of the Public Treasury, leaving the executive officers to be paid by the parties for their separate acts. In France, it was determined by Arrêté of the 25 Vendemiaire, year 10, that the salaries (*traitemens*) of the judges and registrars of the courts of appeal, of the judges and registrars of the criminal courts, of the judges and registrars of the courts of first instance, and of the registrars of the commercial courts, should be carried to the account of, and discharged by the Public Treasury.

The imperial decree of the 30th January, 1811, pursued

the same principle into all its details; fixing the traitemens of the different judges and law officers at definite sums, and providing that these and other charges, fixed and variable, should all be paid by the state; whilst, on the other hand, the suitors pay considerable sums under the title of *Droits de Greffe*, of which the state receives the benefit; and the *Droits de Timbre*, on legal documents, form a much heavier burthen.

The liquidation of costs, in a civil suit, is provided for by the French code of civil procedure, arts. 543, 544.; and the *réglement* relative thereto, confirmed by the above-mentioned decree of the 30th Jan. 1811. By the criminal law, a convicted person may be sentenced to pay to the party injured restitution, damages, and *costs*, and also to the state a fine and *costs*. (Code Pénal, arts. 51. 53.) Costs, however, do not always fall wholly on the unsuccessful party; but sometimes partially on the other party, if irregular in a particular stage of the procédure (Code de Procedure Civile, arts. 301. 358. 367., &c.); sometimes on the *huissier* (art. 293.); sometimes on the *avoué* (arts. 152. 293.); sometimes on the *juge commissaire* (art. 292.); and sometimes on the *witness* (art. 263.).

The French financial accounts enable us, in some degree, to form an opinion how far the burthen of the administration of justice in general falls, in that country, on the suitors. In 1832, the charge on the state, under the head of "*Service de la Justice*," amounted to 18,915,760 fr.;

	Francs.
Of which the Cours Royales cost - -	4,139,417
the Tribunaux de première Instance	5,518,373
the Justice de Paix - - -	3,085,915
and the Frais de Justice - - -	3,678,604

On the other hand, the receipts of the state from *Droits de Greffe*, *Amendes*, and *Recouvrement de Frais de Justice*, amounted to 9,768,679 fr.:

	Francs.
Of which the Droits de Greffe were -	4,057,863
Decimes on ditto - -	103,668
Amendes - - - -	4,285,278
Recouvrement de Frais -	1,321,870

But it is to be observed that the *Droits de Timbre*, which amounted to 28,929,497 fr., are in part to be added to the revenue which the state derives from the administration of justice; though, in our present state of information, we cannot precisely ascertain the proportion. Another important benefit is derived to the state from the sums lodged with it by way of security (*cautionnement*) for good behaviour by the *greffiers, huissiers, avoués,* and *notaries,* amounting altogether, in 1834, to 62,723,119 fr., and yielding an interest of 2,508,928 fr.

Taking into account all these and minor details, which it would be tedious to notice, the probability seems to be, that the whole burthen of the administration of justice in France is directly or indirectly thrown on the civil suitors and criminal offenders.

It has appeared necessary to us, in considering the complex subject of costs, to inquire into their origin and history. In our future articles we shall see how the law now stands in this country, and what alterations may judiciously be made.

ART. V.—LORD CHIEF BARON ABINGER.

FEW men have ever appeared in the profession of the law endowed with a greater store of the qualities required to form an accomplished advocate than James Scarlett, afterwards raised to the Bench as Lord Chief Baron, and to the Peerage as Lord Abinger. His understanding was piercing and subtle; no man had more sagacity in seeing through obscure matters, or finding his way through conflicting difficulties, or reconciling contradictions, or dispelling doubts, or, if need were, of raising them; no man could bring more ingenuity to devise explanations, or overcome obstacles, or provide defence, or secure escape. Then he was, though naturally irritable, yet by habit completely master of his temper, always entirely self-possessed, hardly ever to be thrown off his guard by anger or vexation; and, habit becoming a second nature, he had all the

external aspect and much of the reality of a placid good-humour, though this was drawn over a somewhat sensitive interior. He had thus in the largest measure these two great qualifications of the Nisi Prius leader — perfect quickness of perception and decision, and imperturbable self-possession.

There is the greatest difference between the two sides of Westminster Hall in the qualities which form the leading Advocate. In truth, Courts of Equity hardly know what the lead of a cause is; for each of three, or it may be four or five counsel, go in much the same way over nearly the same ground; and it does not even follow that the junior takes the same view of the case with those who have gone before him. All the materials on which they have to work are fully known before they enter the court; their adversary's case is as much before them as their own; nothing can possibly arise for which they were not thoroughly prepared; and even were it possible to make any slip, as in meeting or proving unable to meet some new view of the case unexpectedly taken by the opposite advocate, or thrown out by the court (a thing of very rare occurrence), abundant opportunities remain for supplying all defects and setting all oversights right. The words quick, ready, decisive, sudden, have therefore no application to equity practice, and are hardly intelligible in the courts where bills, answers, affidavits, and interrogatories reign.

It is far otherwise at Nisi Prius. What was all argument, all talk in Equity, is here all work, all action. What was all preparation and previous plan there, here is all the perception of the moment, the decision at a glance, the plan of the instant, the execution on the spot. The office of the leader here well deserves its name; he is every thing; his coadjutors are useful, but they are helps only; they are important, but as tools rather than fellow workmen; they are often indispensable, but they are altogether subordinate. He is often wholly — in some degree he is always—uncertain beforehand what his own case is to be; he is still more uncertain of his adversary's. He comes into court with an account in his hand of what his witnesses are expected to swear, because his client has seen and examined them, which he himself has not; but he is necessarily uncertain that they will so swear, both because his client may have ill examined

them, and because they may give a different account upon oath before the court and jury. Then he is still more uncertain how far they may stand firm, how far they may be shaken upon cross examination, and upon the examination by the Judge. He is even uncertain of the effect his case and his witnesses may produce upon the judge and upon the jury. So far is the advocate at Nisi Prius in the dark as to his own case and witnesses. But of his adversary's he knows little or nothing; he may have to meet a story of which he had no kind of warning whatever; and he may have to protect his witnesses against evidence called to discredit them by proving that they have told a different story to others from that which they have told in court. Documents, letters, receipts, acquittances, releases, title deeds, judgments, fines, recoveries — all may meet him, as well as unexpected witnesses; and on the spot he may have to devise and execute his measures of protection or of defence. It is needless to observe that this gives the greatest advantage to an advocate of quickness, sagacity, and decision; and that it is a just remark which likens the *tact*, and generally the practical skill and firmness, of the leader in jury trials, to the *coup-d'œil* of the leader in war.

Nor is this all. Far different from the effects of slip or blunder or oversight in equity are the consequences of the like mistakes or neglects at law; they are almost always irremediable, not seldom fatal. No relief is given against a verdict obtained by the miscarriage of counsel. Against a surprise in the adversary's case, or in the testimony of the witnesses of either side, there may be relief; but if the mishap was owing to the error of counsel, never. Thoughtless men have found fault with this rule; but were a contrary course pursued, the most careless transaction of all business would be one consequence, and another would be the giving business by favour or connection to the most incapable men. It is quite necessary that the client should, to some such extent and under some such qualification as has been mentioned, be bound by the conduct of his professional representative.

From what has been said it will at once appear, first, how difficult and how anxious is the position of a Nisi Prius

leader; next, how small a portion of his needful qualification consists of mere eloquence. That which to the vulgar, the spectators at large, may seem the most important part of the whole, is in truth the leader's least important qualification. The object is to gain the cause; mere talk, if he spoke "with the tongues of men and of angels," would never get the verdict. By a great speech he may atone for minor errors in the management of the cause; for great slips, or great imperfections in the conduct of it, the eloquence of Demosthenes and Cicero combined could afford no compensation, nor any substitute. The importance of eloquence is admitted; with equal, or nearly equal conduct, the great speaker will have the advantage; but conduct without eloquence is safer by much to trust for the victory than eloquence without conduct. Mr. Wallace was a successful Nisi Prius advocate, with hardly any powers of speech; Mr. Wedderburn, afterwards Lord Loughborough, had but little success, though a very fine speaker; but Wallace was an excellent lawyer and a good leader of a cause; Wedderburn had so little law, that J. Lee said what he took in on the circuit at York had run through him before he got to Newcastle; and he was moreover an indifferent conductor of a cause.

What has just been said has prepared the reader for an admission that Mr. Scarlett was a more consummate leader in the conduct of a cause than in the eloquence wherewith he addressed the jury. Not that he was deficient in some of the greater qualities of the orator. He had a most easy and fluent style; a delivery free from all defects; an extremely sweet and pleasing voice—insomuch that a lady of good sense and of wit once said that as some people are asked to sing, Mr. Scarlett should be asked to speak, so agreeable and harmonious were his tones, though of little compass or variety. But he had far higher qualities than these, the mere external or ornamental parts of oratory. He had the most skilful arrangement of his topics, the quickest perception of their effect either upon the jury, the enemy, or the judge. Indeed he used to choose his seat while he ruled the Great Circuit (the Northern) second to that of which he had a rightful possession by his rank; he preferred the seat on the judge's left, because standing there he had the judge always in his eye as he spoke, and could

shape his course with the jury by the effect he found he produced on My Lord. Then his reasoning powers were of a high order; they would have been of a higher, if he had not been too subtle and too fond of refining; so that his shot occasionally went over the head both of court and jury, to the no little comfort of his adversaries. But when he had a great case in hand, or an uphill battle to fight, his argumentation was exceedingly powerful. Nor did he ever lessen its force either by diffusiveness or by repetition, or by the introduction of vulgar or puerile matter; his classical habits and correct taste preserved him from the one, his love of the verdict from the other. His language was choice; it was elegant, it was simple, it was not ambitious. Illustration he was a master of, unless when the love of refining was his own master, and then his illustration rather clouded than enlightened. He had considerable powers of wit and humour, without too much indulging in their display; and no man had a more quick sense and more keen relish of both. Hence he ever avoided the risks of any ridicule, and when treated with it himself showed plainly how much he felt and how little he approved its application. The greater feats of oratory he hardly ever tried. He had no deep declamation, no impassioned effusion. He indulged in no stirring appeals either to pity or terror; he used no tropes or figures; he never soared so high as to lose sight of the ground, and so never feared to fall. But he was an admirable speaker, and for all cases except such as occur once in the course of several years, he was quite as great a speaker as could be desired. No man who understood what was going on in a trial ever saw the least defect in his oratory; and none could qualify the praise all gave his skill and his knowledge by a reflection on his rhetoric.

That skill and that knowledge were truly admirable. It really was impossible to figure any thing more consummate than this great advocate's address in the conduct of a cause. All the qualities which we set out with describing as going to form the Nisi Prius leader he possessed in unmeasured profusion. His sagacity, his sure tact, his circumspection, his provident care, his sudden sense of danger to his own case, his instantaneous perception of a weak point in his adversary's, all made him the most difficult person to contend against that

perhaps ever appeared in Westminster Hall, when the object was to get or to prevent a verdict; and that is the only object of the advocate who faithfully represents his client, and sinks himself in that representative character. It is needless to add that no man ever was more renowned as a *verdict-getter*— to use the phrase of the Nisi Prius courts.

A country attorney perhaps paid him the highest compliment once when he was undervaluing his qualifications, and said:—"Really there is nothing in a man getting so many verdicts who always has the luck to be on the right side of the cause." This reminds one of Partridge in "Tom Jones," who thought Garrick was a poor actor, for any one could do all he did—"he was nothing of an actor at all."[1] His weight with the court and jury was not unhappily expressed by another person when asked at what he rated Mr. Scarlett's value,—"A thirteenth juryman"—was the answer. A remarkable instance is remembered in Westminster Hall of his acting in the face of the jury, at the critical moment of their beginning to consider their verdict. He had defended a gentleman of rank and fortune against a charge of an atrocious description. He had performed his part with even more than his accustomed zeal and skill. As soon as the judge had summed up, he tied up his papers deliberately, and with a face, smiling and easy, but carefully turned towards the jury, he rose and said, loud enough to be generally heard, that he was engaged to dinner, and in so clear a case there was no occasion for him to wait what must be the certain event. He then retired deliberately, bowing to the court. The prosecuting counsel were astonished at the excess of confidence or of effrontery,— nor was it lost upon the jury, who began their deliberation. But one of the juniors having occasion to leave the court, found that all this confidence and fearlessness had never crossed its threshold— for behind the door stood Sir James Scarlett trembling with anxiety, his face the colour of his brief, and awaiting the

[1] "He the best player!" said Partridge with a contemptuous sneer. "Why I could act as well as he myself. I am sure if I had seen a ghost I should have looked in the very same manner, and done just as he did."—*Tom Jones*, book xvi. c. 5.

result of "the clearest case in the world" in breathless suspense.

This very eminent person was born in the island of Jamaica, where his highly respectable family had long been settled and were considerable planters. In the colony he passed his earliest years; but he afterwards was brought to the mother country, and in a truly disinterested manner he gave up his share of the family inheritance to the convenience of his relatives. His West Indian connection, however, never biassed his mind on the great question of the African Slave Trade,—though from that connection he had been always employed as counsel for the traders and planters. Once only, it was upon the famous case of Smith the missionary in 1824, he showed some leaning in the wrong direction, and having stated that he had always been an abolitionist, it became necessary to mention that he was also a West Indian—a disclosure which he could apparently well have spared. At Cambridge, having been a fellow commoner, he took no honour, according to the truly absurd system which excludes from academical competition all persons of the higher rank. He cultivated, however, classical literature with success; and his taste as well as his knowledge on such subjects may be perceived in the valuable Note which he added to Mr. Brougham's Inaugural Discourse on Ancient Eloquence in 1825.

He was very early called to the Bar; and came into a certain share of business almost immediately, though then only twenty-two years of age. He chose the Northern Circuit, and on Mr. Law, afterwards Chief Justice and a Peer, taking the office of Attorney-General, he shared in the practice which his promotion scattered. Serjeant Cockell, Mr. Park, and Mr. Topping were the leaders who chiefly commanded the business, and it was not till the Serjeant retired, in 1810, that Mr. Scarlett was considerably advanced. His rank of King's Counsel being so long delayed was extremely prejudicial to him; this delay enabled inferior men to keep above him; and it arose from a circumstance honourable in the highest degree to him, discreditable in a nearly equal proportion to others. He happened to be a steady and conscientious Whig; his opinions were early

formed, and firmly maintained. He refused all the professional advantages which the intimate personal friendship of Mr. Perceval might have given him. Nor can there be a doubt that but for his party connections he must have risen to the office of Attorney-General twelve or fifteen years earlier than he held it, and been Chief Justice of England when Lord Ellenborough resigned in 1818. Instead of obtaining such promotion, he was prevented from even having the fair prospect of elevation to rank — almost a matter of course and all but a thing of strict right — because his political adversaries were determined to keep down a very capable Whig and protect less capable Tories. This was to a certain degree the case with Sir Samuel Romilly; it has since been still more the case with others; and such refusals of rank, though they more directly oppress the individual kept down, yet operate to oppress all who are his seniors at the Bar and are not qualified to act as leaders. Mr. Brougham's being refused his rank when the Queen died in 1821 threw ten or twelve of his seniors out of business, because he could lead, and did lead, in a stuff gown, while they could hold no briefs with him. He only received a patent of precedency in 1827 during the Junction Ministry of Mr. Canning, and then, as is understood, he was with difficulty induced to take the rank, having long since made his footing secure without it. Mr. Scarlett ought to have been made certainly in 1810, when Serjeant Cockell died — possibly earlier. He only was made when Mr. Park went upon the Bench in 1816, and when Lord Eldon had no longer the power of withholding his silk gown. He had for some years been second leader all round the Circuit in a stuff gown.

The first remark which occurs upon this load under which Mr. Scarlett as well as those other lawyers laboured — and he more than they because its pressure was more injurious — is, that the injustice of which they were the object and might have been the victims was peculiar to his case, and that the blame of it belonged in an especial manner to Lord Eldon. That Lord Loughborough was culpable in respect to Sir Samuel Romilly is certain, though in a lesser degree. No such injury was inflicted upon his seniors as those of Mr. Scarlett, Mr. Brougham, and Mr. Denman suffered, and suffered for

no fault of theirs, but for the political sins of their juniors at the Bar. Serjeant Clayton and Mr. Walton, and many provincial barristers were no Whigs that they should be punished by their own Tory leaders. Mr. Littledale was no Whig that Lord Eldon should deprive him of business. But if they had been all out of the question, the three leaders themselves were most wrongfully treated in being deprived of their professional rights merely because their political opinions differed from those of the ministry. Nay, Mr. Scarlett had the more right to complain, because his opinions could only be known in private society; he never was in Parliament all the while the ministry were oppressing him in his profession for differing with them in his politics. This too was an impediment to his progress at the Bar which Mr. Erskine never had to struggle against. Mr. Pitt and Lord Thurlow disdained to keep him down by refusing him the rank which was his right. He was member for Portsmouth; he voted against Mr. Pitt and Lord Thurlow; he was an intimate friend and indeed coadjutor of the Prince of Wales (being his Attorney General in 1783), whom George III. is known to have cordially hated, as he did all his son's connexions (except his wife). Yet no personal objection was made by that monarch to Mr. Erskine's promotion, any more than by the Prime Minister and the Chancellor to whom he was opposed. He obtained his silk gown in 1783 when of five years standing [1], Mr. Scarlett had to wait for it four-and-twenty! But when that Prince of Wales was king, Lord Eldon and Lord Liverpool hearkened to his personal objections against Messrs. Brougham and Denman, which those ministers well knew resolved themselves into their doing faithfully and firmly by their client, his wife, whom he was persecuting to death, that

[1] The name of this illustrious advocate and perfectly finished orator suggests an instance to illustrate our remarks on the ignorance of the vulgar in estimating forensic genius. No less celebrated a work than the *Penny Cyclopedia* has admitted into its pages a remark, that he was a speaker "not distinguished by felicity of diction, or figure, or imagery"! Did the writer of this wholly incredible sentence ever read the speech on Stockdale? and if he did, will he refer to any modern writing of which the diction, the figure, and the imagery are, we will not say superior, but equal? In truth the matchless beauty of his language was very far above the force and energy of his declamation, which really was not his forte, though this writer seems to think otherwise.

duty which it is to be hoped every barrister (at least in England) would perform as faithfully and as firmly. Had they basely betrayed their illustrious client, and enabled the king to gratify his malicious vengeance upon her head, Lord Eldon and Lord Liverpool well knew there was no favour which their royal master would not have gladly showered down upon them, possibly including, at no distant period, an offer of the very places they themselves then held. Their blame was therefore great in this instance. In the case of Mr. Scarlett, they had not even the excuse — a poor one doubtless — of the king's caprice. His exclusion from his just rank at the bar was the mere work of common party rancour, or less worthy party contrivance, a work which Lord Thurlow had deemed too dirty for his not very clean hands.

The next remark to which Mr. Scarlett's long and unjust exclusion gives rise, is, that his political conduct, his party honour, his honest and conscientious avowal of his principles, little less unpopular in those days than they were prejudicial to the individuals who held them, reflects on his memory the very highest credit. It is usual for men who know little and think less to make severe comments upon this eminent person, and to describe him as an apostate from the Whig party. It is equally usual for Whig partizans to join in this cry, who never in their lives made any sacrifice to their principles.

We could name men, who never were known for Whigs at all until the party was in possession of power, and who nobly sacrificed to their principles by receiving high and lucrative offices for adhering to the Whig opinions, and further sacrificed by being promoted to still more lucrative office a short time after their first adoption; and yet some of these men have the effrontery to cry out against Lord Abinger for having left their party! When did they and those they act with ever remain one hour out of their just rights and rank because of the Whigs? But Lord Abinger was kept by his Whig principles from being Chief Justice in 1818, and from having the rank of King's Counsel and the ample revenue of leader on the Northern Circuit in 1802, fourteen years earlier than Lord

Eldon by mere compulsion removed the black mark of Whig that stood against Mr. Scarlett's name.

But this is not all, nor any thing like all that is suggested by the history of Lord Abinger. We have noted the injurious effects of his principles upon his professional fortunes. Then of course the party, who are now so loud in their complaints of his desertion, did all that in them lay to indemnify this their zealous adherent for the sacrifices he was making to his connection with them. Kept from his just place in the profession, because he was privately an advocate of Whig opinions, of course they seized the earliest occasion of placing him in Parliament, where he might openly support them by the advocacy of the same principles. The policy of such a course, too, was as manifest as its justice; for no greater gain in force and in weight can accrue to any party, but especially to a party in opposition, than the alliance with able and successful lawyers. Therefore, of course, he was brought into Parliament early in life for some of the Whig seats — close seats afterwards the victims of schedule A?—No such thing; nothing of the kind! Mr. Scarlett, while seriously injured by his principles, saw others daily brought into the House of Commons who had never lost a brief by their adherence to the Whigs; saw Mr. Horner in 1806 seated in Parliament before he was called to the Bar; saw Mr. Brougham seated in 1810 after he had gone a single circuit; saw Mr. Denman in 1817 seated before he could have lost a brief by his principles. All this Mr. Scarlett saw, and he continued a Whig, and continued to suffer the professional pains and penalties of a Whig lawyer under the Eldons and the Liverpools. We do not believe he ever condescended to utter any complaint on this neglect; but we are sure that neither Lord Denman nor Lord Brougham, nor Mr. Horner, had he been fortunately still living, could have mustered up courage to condemn very seriously their truly honourable and learned friend for afterwards quitting a party to which he owed obligations like these. That, however, is not our defence for Lord Abinger; and it is a defence which he never dreamt of making for his conduct in 1831. We only state it for the purpose of reminding the Whig party how little ground they have of per-

sonal complaint against him. They have been as loud in their clamour as if, instead of being slighted by them while all but ruining himself for their sake, he had been treated by them with extraordinary kindness and preference during all his professional and political career.

It was not until the year 1818 that the death of Mr. W. Elliott putting a seat at the disposal of Lord Fitzwilliam, that venerable person had the honour of introducing Mr. Scarlett into the House of Commons as member for Peterborough. No one lawyer in practice and of professional reputation already established ever was so successful as he proved in his first efforts. On the question of the Duke of York's salary as guardian of the King's person, he made one of the ablest and most powerful speeches ever heard in Parliament upon a merely legal subject. His subsequent efforts were not such as sustained the great reputation which he thus had acquired. And this was owing to the great imperfection of his character, the vanity which, it must be admitted, formed not only a feature of his mind, but acted on it as a moving power with a more than ordinary force. To this are to be traced the only errors he ever committed as an advocate, errors very few in number considering the vast practice in which he was engaged for so many years, and the constant recurrence of occasions on which this his besetting sin might be supposed to spread snares in his path.

One instance is recorded on the Northern Circuit of his overweening confidence betraying him, when matched against a party who was conducting his own cause. It was a case of libel, and no justification had been pleaded. He was for the plaintiff, and the defendant was throwing out assertions of the truth of the matter, which the judge interfered to check as wholly inadmissible in the state of the record. Mr. Scarlett, with his wonted smile of perfect, entire, and complacent confidence, said, "Oh, my lord, he is quite welcome to show—what I know he cannot — that his slander was well-founded." The man went on, and called a witness or two — nay, he was making much way in his proof, when Mr. Scarlett appealed to the judge for protection. "No (or rather *Na*)," said Mr. Baron Wood; "I won't — it's your own fault — why did you let him in?" The man proved his case and

got a verdict, to the extreme annoyance of Mr. Scarlett. But this was a trifling matter compared with other consequences of the same foible. He made himself extremely unpopular, both in the profession and in society, by the same course; for his was not, like Lord Erskine's weakness — a kindly, forbearing, recommending kind of vanity, which, if it sometimes made us smile, never gave pain, not even offence, because it never sought to rise by the depression of others. On the contrary, Lord Erskine, with hardly any exception[1], was the patron and foster-father of other men's merits, lauded their exertions, and enjoyed their success. Not so was Mr. Scarlett's self-esteem; he would rise by depressing others; he would allow nothing to be well done that any but one individual did; he would always intimate how it might have been better done, and would leave little doubt as to the artist whose superior excellence he had in his eye.

This self-esteem and confidence, we have most fully admitted, rested upon a broad and deep foundation of real merit, and it was justified in almost every thing of achieving which a possibility existed. But sometimes it was applied to cases which lay beyond that possibility. Thus to the great debate in the missionary's case already mentioned, he came down wholly unprepared; and the question turned entirely upon the evidence contained in a thick folio volume. This had been carefully studied by all his predecessors in the discussion; — by Mr. Brougham, who brought forward the question; by Mr. Denman, Dr. Lushington, and Mr. Williams, who followed him with an eloquence and an ability of which it is saying enough to declare that to this debate we really, under Heaven, owe the destruction of Negro Slavery. All of these had shown the most complete acquaintance with the evidence in even its minuter details. When Mr. Scarlett addressed himself to the question, he said, in a very careless

[1] Sir A. Pigott was one of them. He had been Mr. Erskine's senior, and, on taking rank, allowed him to go over his head on the Home Circuit, which both frequented. It is difficult to conceive how, after so great—almost irregular —an homage paid to his superior powers, he should have retained so much bitterness against this most able, worthy, and learned person. But so it was. Perhaps he hardly ever showed this kind of evil disposition in any other case. In Sir A. Pigott's instance he showed it unremittingly and offensively. It is the only unamiable trait in his attractive character.

and not a very becoming manner, but with his wonted complacency and confidence, that he had not looked at the evidence before he entered the House, but that his opinion was clear against the motion. So that when the season arrived for the reply, the mover observed that he would have believed almost any improbability on his learned friend's bare assertion, but that this strange statement required something more of proof to make it credible; and accordingly that had been amply provided by the speech of Mr. Scarlett, every part of which clearly showed the strict truth of his assertion that he knew nothing of the evidence.

The same defect was exceedingly injurious to his judicial qualities and reputation. He came late — too late — upon the Bench, and he was far from diminishing, by painstaking, the unavoidable consequences of this late promotion. He took the judicial office far too easily; he did not sufficiently work and labour, considering that it was a perfectly new duty which he had to perform — a duty less easily performed after a person has grown grey as an advocate. The consequence was, that he who had every one endowment for the constitution of a great judge, — quickness — sagacity — learning — integrity — legal habits — great knowledge of men — practice at the Bar of vast extent and infinite variety — good nature withal and patience, — really made a very inferior judge to many who, having a more modest estimate of their own faculties, a greater respect for others, and a keener sense of the difficulties of their task, exerted those lesser faculties which they possessed far more strenuously than he did his much superior powers.

He was not raised to the Bench till the change of ministry in November 1834. He had been upwards of forty years at the Bar; and he had held the undisputed lead in the Common Law Courts for about twenty years — held it to the last without the least diminution of his favour among clients. This is unexampled in the profession of the Common Law, unless in the case of Mr. Garrow,—and it is unexampled because the practice of Nisi Prius requires youthful vigour as well as other less fleeting qualities. Even Lord Erskine in less than that period of time showed plain symptoms, not certainly of decaying faculties, but of declining practice. For the last five or

six years and more of his brilliant career his business fell greatly off. It must be added, that though a Nisi Prius advocate should be as good as ever in himself, he is more exposed to the competition of new men, with captivating qualities — perhaps of lower arts — and that there is a fashion, therefore, in this walk of the profession which passeth away. It is certain that Mr. Garrow passed both Mr. Erskine and Mr. Gibbs — the latter for nearly ten years before he retired upon the Bench.

In 1827 Mr. Scarlett became Attorney General[1] under the Junction Ministry of Mr. Canning; he went out early the following year on Lord Goderich's government being removed; and when the Catholic question was carried, early in 1829, the main ground of conflict between the moderate Whigs and the liberal Tories having been removed, he with Lord Rosslyn and one or two other Whigs took office with the Duke of Wellington. This they did with the full approbation of Lord Grey and the other Opposition chiefs. Lord Fitzwilliam had, indeed, considerably earlier opened a communication, unknown to Sir James Scarlett, with the Duke's government, and recommended his being employed as Attorney General.

No admittance of the party to any share of power being possible while George IV. reigned and cherished his marked hatred of his former associates and party, little opposition was given to his government for the rest of 1829 and the early part of 1830. As soon as his death was certain to happen in the course of a few weeks, the Whigs prepared again for battle; and the first session of William IV.'s reign passed in fierce party contests. The result of the general election, at which the illustrious Duke at the head of the government exerted no influence whatever to control the returns, displaced his government, and Sir James Scarlett went out with the rest. Lord Rosslyn, having refused office with the new ministers, also retired; but it is worthy of observation that Sir James held his high station of Attorney General with the stipulation that he was at liberty to vote

[1] It is to be observed that he was sworn into office by the same Lord Eldon who had been so tardy in giving him his silk gown, Lord Eldon having remained in office to give some judgments.

for Parliamentary Reform when it should be propounded. Mr. Brougham's Reform motion, which stood for the day after Sir H. Parnell's was carried against the government, would in all likelihood have turned out the ministers, and then Sir James Scarlett could not well have been overlooked in the new arrangements of office. But the ministers resigning in the morning, the motion was not brought forward. Nevertheless, the new Attorney and Solicitor General took their offices with a notice that if a vacancy or vacancies in any of the chief judgeships took place within a few months, they were not to be offended if Lord Lyndhurst and Sir James Scarlett were promoted over their heads. This is certainly the only favour ever bestowed by the Whig party upon their old and faithful and important ally; and it is one to which his sacrifices and his merits amply entitled him. However, he was much displeased with the Lord Chancellor for appointing Lord Lyndhurst to the Exchequer. He was still more annoyed at the extent, regarded by him as full of danger, to which the Reform plan of the new government proceeded; and, from the 1st of March, when it was brought forward, he was found, with some other Whigs, ranged in opposition to the Whig ministry. Enough has already been said to show how slender the claims of the party upon his adhesion were. But no claim could of course have been allowed to supersede his clear and conscientious opinions upon important points, far removed above the reach of compromise, and never to be settled by mutual concessions for peace and unity's sake. He differed with his former associates on a fundamental question; and if any test be wanted to determine whether that difference was honest or sordid, let it be sought in his whole political life through times past; which exhibits more sacrifices to his principles than that of any other professional man of his eminence, or indeed of any considerable station in the law.

Nothing is more frequent in the heats of faction than such charges of apostasy. Some of us are old enough to remember when Mr. Burke himself received no other name than the turncoat — the renegade — the apostate. He had differed with his party; they had taken a course which he deemed contrary to their principles; he conceived that, abiding by

those principles, he had been abandoned by the Whigs, not they by him. The world, for a while deafened, bewildered, by the clamour which however did not mislead it, suffered this great and good man to be so run down. It now does his memory justice. It now has learnt the lesson, that of all tyranny, the tyranny of party is the most intolerable. It now knows that men are expected to give up every vestige of freedom in word and in thought who join a faction, and that if they once belong to it, they are to be stamped as apostates from their own principles if they only retain the power of thinking for themselves, and are determined to maintain those principles which the faction for some sordid reason thinks proper to abandon or to betray.

ART. VI. — JOINT STOCK COMPANIES REGULATION ACTS.

An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies (7 & 8 Vict. c. 110.). Royal Assent, 5th Sept. 1844.

An Act for facilitating the winding-up the Affairs of Joint Stock Companies unable to meet their pecuniary Engagements (7 & 8 Vict. c. 111.). Royal Assent, 5th Sept. 1844.

If equity and utility, according to the remark of Burke, constitute the only right basis of a law, we apprehend that the statutes, of which the titles are prefixed to this article, stand upon a firm and legitimate foundation. They are, it is true, designed to regulate associations wholly voluntary in their creation, and with which the self-acting part of the community has no compulsory connection. But Joint Stock Companies have from time to time forced themselves upon the attention of the Legislature. The parties interested in their success and injured by their failure are so numerous as to penetrate every quarter of society. The *gullibility* of the public, and the consequent facilities for the perpetration of frauds by artful concoctors of plausible schemes, have been the

fruitful sources of much public and private distress from the glorious days of the South Sea Bubble to the present time. The great abundance of unemployed or unremunerative capital continues to afford daily encouragement to the formation of joint stock associations, as the expected means of obtaining both an easy and a profitable return for investments. The vast and increasing number, therefore, of such institutions, the enormous aggregate of pecuniary capital embarked in the adventures, and the consequent magnitude of the interests depending on the right conduct and management of Joint Stock Companies, have rendered it an unavoidable duty on the part of the Government to provide some legislative remedy for the mischiefs, which were continually arising, in some instances from the thoughtlessness and ignorance of the public in regard to such subjects, and in others from the carelessness or the dishonesty of the promoters of these undertakings. The Acts under review owe their origin to this state of things; and they were brought into Parliament under the auspices of the Board of Trade. That department of the state has undergone a singular revolution since the days when Gibbon became a lord commissioner of trade and plantations, and remarked that "the fancy of an hostile orator might paint in the strong colours of ridicule the perpetual virtual adjournment, and the unbroken sitting vacation of the Board of Trade." The annexation to that office of the extensive public duties connected with the railways is alone sufficient to furnish respectable employment to the Board, while the new duties created by the Joint Stock Companies Registration Act will be a considerable addition to its ordinary labours.

In introducing the subject of Joint Stock Companies to the House of Commons, the Right Honourable President of the Board stated that the evils against which the bills then before the House were intended to operate were of two classes. The first class was occasioned by the formation or concoction of fraudulent or fictitious companies, by which innocent and inexperienced persons were induced, by a show of respectable names as the patrons or promoters of an undertaking, to advance money in aid of schemes and purposes which could end in nothing but great or ruinous loss. The second

class of evils which the bills were intended to obviate, arose from the formation of companies not founded in deliberate fraud or dishonesty, but so badly constituted and unwisely conceived as to be equally productive of disappointment and ruin with those of baser origin. In this state of things the purpose of the Government was to place such restrictions and limitations on the formation of joint stock companies, as, without unduly discouraging honest and bonâ fide undertakings, or imposing unreasonable burdens or restraints upon the promoters, would create a barrier against the frauds, which the public at large were unable to detect under the guise of the plausible prospectuses and advertisements issued by objectionable associations. It was also desirable, that, while a check was given to mere bubble companies, the privileges, intended to be conferred upon joint stock associations affected by the measures in contemplation, should not operate as an indiscriminate encouragement to the formation of public companies.

With these views, the preamble of the Registration Act recites that it is expedient to make provision for the resigtration of Joint Stock Companies during the formation and subsistence thereof; and also, after the complete registration provided by the Act, to invest such companies with the qualities and incidents of corporations, with some modifications, and subject to certain conditions and regulations; and also to prevent the establishment of any companies which shall not be duly constituted and regulated according to the Act.

The second Act recites in its preamble that "it is expedient to extend the remedies of creditors against the property of Joint Stock Companies *when unable to meet their pecuniary engagements*, and to facilitate the winding-up of their concerns; and that it may be for the benefit of the public to make better provision for the discovery of the abuses that may have attended the formation or management of the affairs of any such companies or bodies, and for ascertaining the causes of their failure."

These preambles sufficiently explain the objects and purposes of the new statutes: and we propose to make a few remarks upon them both, chiefly with the design of pointing out the changes effected in the law by the Acts in question

Such companies as are established by charter or by a private Act of Parliament are not the direct or primary objects of the new Registration Act. The constitution of such companies is usually defined by the Act of incorporation; and their nature and purposes are thus laid open to public consideration: — while their corporate character protects the shareholders from all individual liability. Hence comparatively few complaints have been made of the working of such institutions. Creditors, on the one hand, know that they are trusting an invisible body, whose corporate funds alone are amenable to legal execution: while, on the other hand, members or shareholders know the full extent of the personal risk which they incur by joining the ranks of such a body.

The new Registration Act applies peculiarly to that large class of companies, which, in the eye of the law, are nothing else than enormous partnerships, but which by their internal constitution and management take upon *themselves to act as corporations.* With respect to these companies, there have heretofore been two special difficulties to contend against. One is, to prevent the establishment of bubble companies; the other, to provide the means of suing large unincorporated companies in an effectual manner before the courts of law and equity: And these points appear to be prominently kept in view in the new Registration Act.

I. To provide for the first point, the Act is declared (sect. 2.) to apply to every Joint Stock Company established in England or Ireland, and every Joint Stock Company established in Scotland with a place of business in England or Ireland, for any commercial purpose, or for any purpose of profit, or for the purpose of assurance or insurance (except banking companies, schools, scientific and literary institutions and also friendly societies, loan societies, and benefit societies duly certified and inrolled): and the term "Joint Stock Company" is to comprehend every partnership, whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the copartners; and also every assurance or insurance company, and also every institution inrolled under the Friendly Society Acts, and making insurance upon lives or contingencies involving the duration of human life to an amount exceeding 200*l.* upon one life or

for any one person; and also every partnership which at its formation, or by subsequent admissions (other than by devolution or act of law) shall consist of more than twenty-five members.

Companies for executing bridges and other public works, which cannot be carried into execution without the authority of Parliament; and (except as thereinafter provided) all companies incorporated by statute or charter, or authorised by statute or letters patent to sue and be sued in the name of a public officer, are not within the Act.

The remedial clauses of the Registration Act commence with the 4th section, which enacts that before proceeding to make public, by prospectus, handbill or advertisement any intention or proposal to form a company for any purpose within the meaning of the Act, whether for executing any work under the authority of Parliament or for any other purpose, the promoters of such company shall make to the new registry office returns of the following particulars according to a schedule annexed to the Act: — 1. The proposed name of the intended company; 2. The business or purpose of the company; 3. The names of the promoters, with their occupations and places of business and residence: And also the following particulars when decided upon; 4. The name of the street or place in which the provisional office or place of business is situate, and the number or other designation of the house or office; 5. The names of the members of the committee, or body acting in the formation of the company, with their occupations and places of business and residence, together with a *written consent* on the part of every such member or promoter to become such, and also a written agreement signed by him with some one or more trustees for the company to take one or more share or shares in the undertaking; 6. The names, occupations, and places of business and residence of the officers of the company; 7. The like as to every subscriber to the company; 8. A copy (before circulation or issue) of every prospectus, circular, handbill, advertisement or other document addressed to the public, or the subscribers relative to the formation or modification of such company; 9. And afterwards, from time to time until the complete registration of such company, a return of a copy

of every addition to or change made in any of the foregoing particulars.

Upon registration of at least the first three of such particulars, a certificate of *provisional* registration is to issue.

By the seventh section, no joint stock company within the Act is to act otherwise than provisionally until a certificate of complete registration be obtained: and such certificate is not to be granted unless the company be formed by deed or writing under the hands and seals of the shareholders therein. The deed must appoint three directors at the least, and one or more auditors, and must set forth in a tabular schedule the following particulars: — 1. The name of the company; 2. The business or purpose of the company; 3. The principal or only office, and every branch office (if any); 4. The amount of proposed capital, and the means by which it is to be raised; and where the capital shall not be money, or shall not consist entirely of money, then the nature and value of such capital shall be stated; 5. The amount of money (if any) to be raised by loan; 6. The total amount of capital subscribed or proposed so to be at the date of the deed; 7. The division of the capital (if any) into equal shares, and the total number of such shares, each of which is to be distinguished by a separate number in a regular series; 8. The names and occupations and (except bodies politic) the residences of all the then subscribers, according to the information possessed by the officers of the company; 9. The number of shares held by each subscriber, and the distinctive numbers of such shares, distinguishing those on which the deposit has been paid; 10. The names of the then directors, and of the trustees (if any), and of the then auditors of the company, together with their respective occupations, and places of business and residence; 11. The duration of the company, and the mode or condition of its dissolution. By the same section every deed of settlement is required to contain certain clauses for the purposes mentioned in Schedule A[1] of the Act, and is

[1] The clauses required by this schedule are of three classes: I. For the holding of meetings and the proceedings thereat; II. For the direction of the execution of the affairs of the company, and the registration of its proceedings; III. For the distribution of the capital into shares, or for the apportionment of the interest in the property of the company; IV. For the borrowing of money.

to be signed by at least one-fourth of the persons who are subscribers at the date of the deed, and who shall hold at least one-fourth of the maximum number of shares in the capital of the company, and is to be certified by two of the directors according to the form prescribed by the Act: And, on the production of such deed, so drawn, signed and certified, together with a complete abstract or index, and a copy for the purpose of registration, the Registrar is to grant a certificate of *complete* registration.

By sect. 10., every supplementary deed is to be registered in like manner within one month after date: and within six months after any change shall have taken place in any of the particulars required by the Act to be contained in the schedule to a deed of settlement (except so far as respects the shareholders and their respective shares), returns of such changes are to be made to the Registry Office.

By sect. 11. the directors are required to make a return in every January and July, according to the form prescribed by the Act, of every transfer made of any shares in the company since the preceding half-yearly return (or, in the case of the first of such returns, since the complete registration of the company); and also a return, according to the form prescribed by the Act, of the names and abodes of all persons who have ceased to be shareholders, or have become shareholders otherwise than by transfer, since the preceding return, or since the complete registration of the company, as the case may be; and also of the changes made in the names of all shareholders, whose names have been changed by marriage or otherwise since the last preceding half-yearly return, or since the complete registration of the company, as the case may require.

By sect. 13. it is enacted, that until the return has been made of the transfer or other fact or event whereby a person becomes the holder of any shares, such person shall not be entitled to the profits of such shares, or in anywise to act as a shareholder; and the person whose shares have been transferred is to continue subject to all liabilities connected with such shares until the registration of the transfer.

By sect. 14. every company completely registered under the Act is to make a return of its name and business annually

for Parliamentary Reform when it should be propounded. Mr. Brougham's Reform motion, which stood for the day after Sir H. Parnell's was carried against the government, would in all likelihood have turned out the ministers, and then Sir James Scarlett could not well have been overlooked in the new arrangements of office. But the ministers resigning in the morning, the motion was not brought forward. Nevertheless, the new Attorney and Solicitor General took their offices with a notice that if a vacancy or vacancies in any of the chief judgeships took place within a few months, they were not to be offended if Lord Lyndhurst and Sir James Scarlett were promoted over their heads. This is certainly the only favour ever bestowed by the Whig party upon their old and faithful and important ally; and it is one to which his sacrifices and his merits amply entitled him. However, he was much displeased with the Lord Chancellor for appointing Lord Lyndhurst to the Exchequer. He was still more annoyed at the extent, regarded by him as full of danger, to which the Reform plan of the new government proceeded; and, from the 1st of March, when it was brought forward, he was found, with some other Whigs, ranged in opposition to the Whig ministry. Enough has already been said to show how slender the claims of the party upon his adhesion were. But no claim could of course have been allowed to supersede his clear and conscientious opinions upon important points, far removed above the reach of compromise, and never to be settled by mutual concessions for peace and unity's sake. He differed with his former associates on a fundamental question; and if any test be wanted to determine whether that difference was honest or sordid, let it be sought in his whole political life through times past; which exhibits more sacrifices to his principles than that of any other professional man of his eminence, or indeed of any considerable station in the law.

Nothing is more frequent in the heats of faction than such charges of apostasy. Some of us are old enough to remember when Mr. Burke himself received no other name than the turncoat — the renegade — the apostate. He had differed with his party; they had taken a course which he deemed contrary to their principles; he conceived that, abiding by

those principles, he had been abandoned by the Whigs, not they by him. The world, for a while deafened, bewildered, by the clamour which however did not mislead it, suffered this great and good man to be so run down. It now does his memory justice. It now has learnt the lesson, that of all tyranny, the tyranny of party is the most intolerable. It now knows that men are expected to give up every vestige of freedom in word and in thought who join a faction, and that if they once belong to it, they are to be stamped as apostates from their own principles if they only retain the power of thinking for themselves, and are determined to maintain those principles which the faction for some sordid reason thinks proper to abandon or to betray.

ART. VI. — JOINT STOCK COMPANIES REGULATION ACTS.

An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies (7 & 8 Vict. c. 110.). Royal Assent, 5th Sept. 1844.

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If equity and utility, according to the remark of Burke, constitute the only right basis of a law, we apprehend that the statutes, of which the titles are prefixed to this article, stand upon a firm and legitimate foundation. They are, it is true, designed to regulate associations wholly voluntary in their creation, and with which the self-acting part of the community has no compulsory connection. But Joint Stock Companies have from time to time forced themselves upon the attention of the Legislature. The parties interested in their success and injured by their failure are so numerous as to penetrate every quarter of society. The *gullibility* of the public, and the consequent facilities for the perpetration of frauds by artful concoctors of plausible schemes, have been the

in January, and the Registrar is to give a certificate of such return.

By sect. 17. the Board of Trade is authorised to make regulations respecting the returns to the Registry Office and to dispense with any of the returns required by the Act.

By sect. 18. every person is to be at liberty to inspect the returns, deeds, and registers on payment of a shilling for each inspection.

By sect. 19. the Registrar is constituted, and his duties are to be prescribed or regulated from time to time by the Board of Trade.

By sect. 23. no *provisionally* registered company is to act provisionally for more than twelve months, unless upon taking out a new certificate, which is to continue in force for twelve months: And such company may assume its name, but coupled with the words "registered provisionally;" and may open subscription lists, and allot shares and receive deposits not exceeding 10*s.* per 100*l.* on the amount of every share; and may also do such other acts only as are necessary for constituting the company, or for obtaining letters patent, or a charter, or an Act of Parliament: But provisionally registered companies are not to make calls, nor to purchase or contract for or hold lands, nor to enter into contracts for any services, or for the execution of any works, or for the supply of any stores, except such as are necessary for the establishment of the company, and except any purchase or contract made conditional on the completion of the company, and to take effect after the certificate of complete registration.

By sect. 24. if before a certificate of provisional registration shall be obtained, the promoters or their servants take any money in consideration of the allotment either of shares or of any interest in the concern, or by way of deposit for shares to be granted or allotted, or issue in the name or on behalf of the company any note or scrip or letter of allotment or other writing to denote a right or claim or preference or promise absolute or conditional to any shares, or advertise the existence or proposed formation of the company, or make any contract in the name or on behalf of the intended company, every such person shall be liable to the penalty of 25*l.*

By sect. 25. every Joint Stock Company, when completely registered, is incorporated, as from the date of the certificate of complete registration, for the limited purposes to which we shall hereafter advert: And every company, on obtaining its certificate of complete registration, is empowered as follows; (that is to say),

1. To use the registered name of the company, adding thereto the word "registered;"

2. To have a common seal with the name of the company inscribed;

3. To sue and be sued by their registered name in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not;

4. To enter into contracts for the necessary purposes of the company;

5. To purchase and hold lands, tenements, and hereditaments as or for a place of business; and also (but not without license from the Board of Trade) such other lands &c. as the nature of the company's business may require;

6. To issue certificates of shares;

7. To receive instalments from subscribers;

8. To borrow money within the limitations prescribed by any special authority;

9. To declare dividends out of profits;

10. To hold general, and extraordinary meetings;

11. To make by-laws;

12. To perform all acts necessary for effecting the purposes of the company;

And the company are empowered and required,

13. To appoint from time to time not less than three directors for a period not greater than five years;

14. To appoint and remove one or more auditors, and such other officers as the deed of settlement may authorise.

By the same section companies for executing public works requiring the authority of Parliament, even though completely registered before the Act of Parliament is obtained, are not to enter into contracts otherwise than conditionally upon obtaining such Act.

By the twenty-sixth section, no shareholder of a registered company is to be entitled to receive any dividends or profis,

until he shall have executed the deed of settlement, and paid up all instalments on calls, and shall have been registered in the Registry Office: and, until such registry, no shareholder in any company commenced to be formed after the 1st of November 1844 shall dispose by sale or mortgage of such share or any interest therein: every contract for such sale or disposal is to be void: and for better protecting purchasers, the directors by whom certificates of shares are issued are to state on every such certificate the date of the first complete registration of the company.

By sect. 28. no person is to be or act as director or patron of any company, unless, at the time of his appointment or acting, he hold in his own right at least one share in the capital of the company: and for every breach of this rule the penalty of 20*l.* is imposed; and if any person is announced by or on behalf of any company as a director, patron, or president, or as holding any such or the like office, without his having so consented or acted, then each director of the company knowingly concurring in such representation shall forfeit a sum not exceeding 20*l.*

By the sixty-fifth section, a blow is struck at the practice of using fictitious lists of patrons and directors in the advertisements and prospectuses of new undertakings. It runs in these words: — "And forasmuch as great injury has been inflicted upon the public by companies falsely pretending to be patronised or directed or managed by eminent or opulent persons: now, for the purpose of preventing such false pretences, be it enacted, with regard to every company or pretended company whatsoever, whether registered or not, and whether now existing or not, that if any person shall make any such false pretences, knowing the same to be false, in any advertisement or other paper, whether printed or written, and whether published in any newspaper or handbill, or placard or circular, then every such person shall forfeit for every such offence a sum not exceeding 10*l.*" This section is likely to be of great public service.

Thus far the Registration Act interposes with regard to the formation or institution of public companies. But in order to judge of the extent of the alterations produced by the foregoing enactments, it will here be expedient to take a

hasty review of the previous course of English law relative to the formation of joint stock companies.

The first Act by which such companies were attacked was the statute 6 Geo. 1. c. 18., commonly called the Bubble Act. The eighteenth section enacted that "all public undertakings and attempts, tending to the common grievance, prejudice, and inconvenience of his Majesty's subjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public subscriptions, receipts, payments, assignments, transfers, pretended assignments and transfers, and all other matters and things whatsoever, for furthering, countenancing, or proceeding in any such undertaking or attempt, and more particularly the acting or presuming to act as a corporate body or bodies, the raising or pretending to raise transferable stock or stocks, the transferring or pretending to transfer or assign any share or shares in such stock or stocks without legal authority, either by Act of Parliament or by any charter from the Crown, to warrant such acting as a body corporate, or to raise such transferable stock or stocks, or to transfer shares therein; and all acting or pretending to act under any charter formerly granted from the Crown for particular or special purposes therein expressed, by persons who do or shall use or endeavour to use the same charters, for raising a capital stock, or for making transfers or assignments or pretended transfers or assignments of such stock, not intended or designed by such charter to be raised or transferred, and all acting or pretending to act under any obsolete charter become void or voidable by nonuser or abuser, or for want of making lawful elections, which were necessary to continue the corporation thereby intended, shall (as to all or any such acts, matters, and things, as shall be acted, done, attempted, endeavoured, or proceeded upon after the said four-and-twentieth day of June, one thousand seven hundred and twenty) for ever be deemed to be illegal and void, and shall not be practised or in anywise put in execution."

By the nineteenth section all such undertakings are declared public nuisances, and their promoters are to incur all the penalties of *præmunire*, over and above the ordinary

liabilities of persons convicted for common and public nuisances.

It appears, then, that the offences contemplated by the Bubble Act were three, viz.: — 1. Acting or pretending to act as a corporate body; 2. Raising or pretending to raise transferable stock; 3. Transferring such stock without legal authority. But we conceive that these acts were not intended to be declared offences *per se*, but only in their connection with dangerous and mischievous undertakings; and so the statute seems to have been construed in later times. Moreover, the various private Acts of Parliament, authorising companies to sue and be sued by their secretary, appear tacitly to recognise the legality of the assumption of such powers by companies whose objects are beneficial or useful.

The first reported case which appears to have been tried under the Bubble Act was that of Rex v. Cawood[1], where the defendant was convicted of being the projector of an unlawful undertaking to carry on a trade to the North Seas, whereby many persons had been defrauded of great sums of money. The particulars of the Bubble are not given by the reporters; and the point stated in the books relates merely to the power of the court to inflict only a part of the judgment in *præmunire*.

From that time till the case of Rex v. Dodd[2], a period of eighty-seven years, the statute does not appear by any case in print to have been acted upon: and this circumstance was urged on the part of the defendant as evidence of the hardship of such a prosecution. He had projected two schemes, and issued prospectuses, one of which was styled the "Prospectus of the London Paper Manufacturing Company;" the other, the "Prospectus of the intended London Distillery Company for making and rectifying genuine British spirits, cordials, and compounds." By each of these schemes a large capital was to be raised in shares: and the companies were to be governed by a deed of trust, by which it was to be provided, "that no party could be accountable for more than the sum subscribed by him under the regulations

[1] 2 Lord Raym. 1361., 1 Strange, 472. Mich. T. 8 G. 1.
[2] 9 East, 516.

therein stipulated." It was stated also that the persons qualified to be chosen directors by the amount of their shares were to be taken in the rotation in which they subscribed. Each scheme was loudly extolled in its own prospectus as the source of immense profit to the shareholders: and there was annexed to the former of the two schemes a supposed Report from the defendant to the directors, stating that he had commenced to receive subscriptions, and alluding to the large sums which would be required for the purchase of premises and the conduct of the works, and naming various individuals (including himself), for election to the principal employments and situations in the concern. The Court of King's Bench in giving judgment, adverted to the long dormancy of the statute, and thought that, as other proceedings might be instituted against the defendant, they ought not to enforce the penalties, although the offences were within the Act: And Lord Ellenborough said: —

"Independent of the general tendency of schemes of the nature of the project now before us to occasion prejudice to the public, there is besides in this prospectus a prominent feature of mischief, for it therein appears to be held out that no person is to be accountable beyond the amount of the share for which he shall subscribe, the conditions of which are to be included in a deed of trust to be inrolled. But this is a mischievous delusion, calculated to ensnare the unwary public. As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility: but as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership."

Several other cases of the same kind afterwards occurred[1]; but the leading case in which the Bubble Act was most fully discussed was that of Rex v. Webb.[2] A company was formed to consist of 20,000 shareholders with a capital of 20,000*l.* to be raised by subscriptions of 1*l.* each, for the purpose of buying and grinding corn and making bread and dealing in flour and distributing it among the members.

[1] Buck v. Buck, 1 Campb. 547.; Rex v. Stratton, Ibid. 549. n.; Pratt v. Hutchinson, 15 East, 511.; Brown v. Holt, 4 Taunt. 587.

[2] 14 East, 406.

The association was styled The Birmingham Flour and Bread Company, and was managed by a committee; and by the deed of settlement it was stipulated that no partner should hold more than twenty shares unless the same should devolve upon him by marriage or any act of the law, and that each member should purchase weekly of the concern a certain quantity of bread or flour, not exceeding one shilling in value for each share, as the committee should appoint; and that no shareholder should assign his share, unless the assignee should covenant with the other partners for the performance of all covenants contained in the original deed; and that the majority of partners at a public meeting might make by-laws to bind the whole. The defendants were indicted under the Bubble Act, as for a public nuisance, with intending to prejudice and aggrieve divers of the King's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by making subscription toward raising a large sum for establishing a new and unlawful undertaking, tending to the common grievance &c. of great numbers of the King's subjects in their trade and commerce, (that is to say), by making subscriptions towards raising 20,000*l.* in 20,000 shares for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same, and also with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock for the same purpose.

The jury found a special verdict that the company was instituted from laudable motives during the high prices of provisions, for the purpose of supplying Birmingham and the neighbourhood with flour and bread, and that the company originally, and still was, beneficial to the inhabitants at large; but was at the time of the verdict (which did not include the time of the offence charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood of Birmingham.

The Court of King's Bench gave judgment for the defendants; and Lord Ellenborough said, "The acts supposed to be made out against the defendants are these, 1st, that they have raised a large capital by small subscriptions; 2dly, that this has been done to enable them to buy and grind corn,

&c.; 3dly, that the shares in this capital are transferable; and 4thly, that the subscribers have presumed to act as if they were a body corporate. The first and second of these points are certainly established; the third is made out to a certain extent, but to a certain extent only; and the fourth is not made out. That the shares are not transferable, unless under the restriction that the vendee shall enter into covenants to demean himself as though he had been an original subscriber, is quite clear, because there is an express clause to this effect in the deed-roll of September 1796. The nature of the thing, too, imposes this additional restriction upon the transfer of shares, that the vendee must either be resident at or near Birmingham, or must have an agent there, because the possession of each share imposes upon the holder the obligation of taking weekly so much bread and flour, not exceeding one shilling's worth per share, as the committee should fix. The shares in the stock therefore are not *generally* transferable, but are virtually restricted to persons in the neighbourhood only; they are transferable to no one who will not enter into covenants and take his weekly portions: no one can become a purchaser of more than twenty shares, and for any thing which appears in the deed it may be essential that upon each transfer the consent of the other members or of the committee should be obtained. It is to this extent only, and in this manner, that shares are transferable. As to the fourth point, that the subscribers have presumed to act as if they were a body corporate — how is this made out? It was urged that they assumed a common name (which, however, does not appear to have been the case); that they have a committee, general meetings, and power to make by-laws; but are these unequivocal *indicia* and characteristics of a corporation? How many incorporated assurance companies, and other descriptions of persons, are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being, of itself, the distinctive and peculiar criterion of a corporation? Taking it, then, that these subscribers have not acted peculiarly as a body corporate, but that they have raised a large capital by small subscriptions for the purposes stated, and that the shares in such

The association was styled The Birmingham Flour and Bread Company, and was managed by a committee; and by the deed of settlement it was stipulated that no partner should hold more than twenty shares unless the same should devolve upon him by marriage or any act of the law, and that each member should purchase weekly of the concern a certain quantity of bread or flour, not exceeding one shilling in value for each share, as the committee should appoint; and that no shareholder should assign his share, unless the assignee should covenant with the other partners for the performance of all covenants contained in the original deed; and that the majority of partners at a public meeting might make by-laws to bind the whole. The defendants were indicted under the Bubble Act, as for a public nuisance, with intending to prejudice and aggrieve divers of the King's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by making subscription toward raising a large sum for establishing a new and unlawful undertaking, tending to the common grievance &c. of great numbers of the King's subjects in their trade and commerce, (that is to say), by making subscriptions towards raising 20,000*l.* in 20,000 shares for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same, and also with presuming to act as a corporate body, and pretending to raise a transferable and assignable stock for the same purpose.

The jury found a special verdict that the company was instituted from laudable motives during the high prices of provisions, for the purpose of supplying Birmingham and the neighbourhood with flour and bread, and that the company originally, and still was, beneficial to the inhabitants at large; but was at the time of the verdict (which did not include the time of the offence charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood of Birmingham.

The Court of King's Bench gave judgment for the defendants; and Lord Ellenborough said, "The acts supposed to be made out against the defendants are these, 1st, that they have raised a large capital by small subscriptions; 2dly, that this has been done to enable them to buy and grind corn,

&c.; 3dly, that the shares in this capital are transferable; and 4thly, that the subscribers have presumed to act as if they were a body corporate. The first and second of these points are certainly established; the third is made out to a certain extent, but to a certain extent only; and the fourth is not made out. That the shares are not transferable, unless under the restriction that the vendee shall enter into covenants to demean himself as though he had been an original subscriber, is quite clear, because there is an express clause to this effect in the deed-roll of September 1796. The nature of the thing, too, imposes this additional restriction upon the transfer of shares, that the vendee must either be resident at or near Birmingham, or must have an agent there, because the possession of each share imposes upon the holder the obligation of taking weekly so much bread and flour, not exceeding one shilling's worth per share, as the committee should fix. The shares in the stock therefore are not *generally* transferable, but are virtually restricted to persons in the neighbourhood only; they are transferable to no one who will not enter into covenants and take his weekly portions: no one can become a purchaser of more than twenty shares, and for any thing which appears in the deed it may be essential that upon each transfer the consent of the other members or of the committee should be obtained. It is to this extent only, and in this manner, that shares are transferable. As to the fourth point, that the subscribers have presumed to act as if they were a body corporate — how is this made out? It was urged that they assumed a common name (which, however, does not appear to have been the case); that they have a committee, general meetings, and power to make by-laws; but are these unequivocal *indicia* and characteristics of a corporation? How many incorporated assurance companies, and other descriptions of persons, are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being, of itself, the distinctive and peculiar criterion of a corporation? Taking it, then, that these subscribers have not acted peculiarly as a body corporate, but that they have raised a large capital by small subscriptions for the purposes stated, and that the shares in such

capital are, to the extent already pointed out, transferable, it remains to be considered how far this is necessarily *per se*, without any prejudice to any individual, constituted an offence by the 6 Geo. 1. c. 18. ss. 18, 19. We think it impossible to say that the statute makes it a substantive offence to raise a large capital by small subscriptions, without any regard to the nature and quality of the objects for which the capital is raised, or whatever might be the purposes to which it was to be applied. The subscriptions, which the preamble of the Act contemplated, were subscriptions upon dangerous and mischievous objects, where the pretences of public good were false, and where the unwary were the persons who were drawn in to subscribe. The purpose for which this capital was raised, viz. the buying corn, &c. not manifestly tending to the common grievance, and being in this case expressly found to have been beneficial, the only remaining question is this, whether, as the shares in this institution are, to the extent which has been pointed out, transferable, the defendants have offended against this Act, in respect of having raised such a description of transferable stock. It may admit of doubt, whether the mere raising of transferable stock is in any case, *per se*, an offence against the Act, unless it has relation to some undertaking or project which has a tendency to the common grievance, prejudice, or inconvenience of his Majesty's subjects, or of great numbers of them. The mischief intended to be remedied arose from such undertakings and projects; and the suppression of such undertakings and projects seems to be the great object of the Act. But without entering particularly into that point, it may be sufficient to say here, that in the qualified extent to which these shares are transferable, it cannot be said that there has been such a raising of transferable stock as to fall clearly within the scope of the Act. It was not the object of the undertaking to raise stock for the purposes of transfer, nor to make such a stock subject of commercial speculation and adventure; it is made expressly transferable to no one individual to a greater amount than 20*l.*, and the purchaser is obliged in every case to enter into covenants, and to comply with the condition of taking from the institution a weekly supply of bread and flour. For

these reasons we think that the facts stated on this special verdict do not bring the defendants within the prohibition of this Act of Parliament, so as to make them, according to the fair sense and meaning of it, liable to be found guilty on any of the counts of this indictment."

In some later cases, however, it seems to have been considered that the Bubble Act affected all associations acting as corporate bodies or possessing transferable shares, whether the purposes of such companies were of a beneficial or of a mischievous tendency.[1]

The repeal of the Bubble Act, as we have before observed, left all these doubtful points to the decision of the common law: so that, as to every unincorporated company since founded or subsisting, the question might at any time arise, whether it were or were not a legal association. The constitutions of such companies have been regulated entirely by the will of their founders or promoters: and there was no legal obligation to uniformity or similarity in their deeds of settlement. The practice, indeed, of the Profession, founded on experience and on enlightened views of the nature and purposes and operation of such companies, had without doubt led to a great similarity in the leading features of all such deeds: and it is probable that few such deeds would be found in any way to be repugnant to the common law. But many joint stock companies never advanced beyond the early preliminary or provisional stages of their institution; and the promoters contrived to accomplish their own private objects of fraudulent profit, without waiting for such formalities as a regular constitution and deed of settlement.

It is with reference to this state of things that we anticipate a beneficial result from the new Registration Act. Heretofore a Joint Stock Company could be set on foot and brought into full operation, without any one being legally able to pronounce whether it were a bubble or not, until the point arose either directly or indirectly before a court of competent jurisdiction: but now we apprehend that every company completely registered according to the new Act is to be deemed *ipso facto* a legal company — leaving the merely

[1] Josephs v. Pebrer, 3 B. & C. 639.; Duvergier v. Fellows, 4 Bing. 248.

prudential considerations which ought to govern shareholders to have the same operation as before. By the new statute no Joint Stock Company can hereafter be founded except under the system of registration; and that system requires the observance of various formalities, which have the effect of preventing the formation of purely delusive and fraudulent companies.

Thus far, therefore, the Registration Act seems calculated to satisfy the intentions of its projectors, by checking the formation of fraudulent companies, without imposing any burdensome restrictions on legitimate and *bonâ fide* adventures. No rules can effect an absolute protection against fraud: but an approach to greater security is a decided advance in improvement.

II. With respect to the second difficulty to which we before alluded, viz. that of suing large unincorporated companies in an effectual manner before the courts of law and equity, there had been an opinion, not discountenanced by Lord Eldon when he had occasion to refer to it [1], that if bodies were formed on such principles, that they could not in the courts of this country, and according to the laws of the country, effectually demand what they had a right to demand, or be effectually sued for that for which they were liable—the very circumstances of that inability or incapacity, and the inconvenience or impracticability of dealing with them in a court of justice, proved bodies of that kind to be illegal at common law.

No decision, however, has gone the length of the opinion just quoted; and the difficulty of suing unincorporated companies consisting of large bodies of shareholders has continued to the present hour, although the courts of equity have afforded great assistance by an adaptation of their rules of pleading to such cases.

At first it was almost impossible to sue such a company at all.

In Van Sandau v. Moore [2] the plaintiff was a shareholder in a Joint Stock Company, and filed a bill against the directors

[1] Van Sandau v. Moore, 1 Russ. 441. 462.
[2] 1 Russ. 441.

and other shareholders, praying for a dissolution of the partnership, and the taking of the accounts. Fourteen directors appeared, and filed as many separate answers, with long schedules to each: and upon a subsequent motion relative to this proceeding, the Court held that the directors were not bound to answer jointly, and that in fact all the 300 shareholders were at liberty to file separate answers. This would have obliged the plaintiff to take office copies of 300 answers and schedules, with the further necessity on every change in the firm by death or other events, to file a bill of revivor or a bill of supplement. Lord Eldon thus adverted to the inadequacy of the jurisdiction of the Court: — "Another consideration is this: ought the jurisdiction of the Court, which can be administered usefully only between a limited number of persons, to be employed for a purpose which it cannot by possibility accomplish? Here is a bill with nearly 300 defendants: how can such a cause ever be brought to a hearing? and if the plaintiff cannot shew a probability of getting a decree, with what purpose, except that of oppression, can the proceeding have been instituted. In such a suit the plaintiff can do nothing, except put himself and others to enormous expense." Again, in the same case, his Lordship made the following observations: —

"The bill brings before the Court not only the directors, but all the individual members, so far as they are known to the plaintiff, amounting to between 200 and 300. Now can the plaintiff ever hope to bring to a conclusion a cause, which is necessarily incumbered with so many defendants? The shareholders, I take it, either by original contract, or by what is found in the deed, will have the right of selling their shares, subject or not subject, as the case may be, to interposition by the directors: so that the interests may be changed from day to day. With the certainty that individuals who continue in existence will thus cease to be members of the company, and that those, who do not by their own acts withdraw from the partnership, will from time to time be removed out of the world by death — to say nothing of the other contingencies of human life, which will affect the interests of individuals in the shares — and with the necessity which will thus be created for a constant succession of bills

of revivor and bills of supplement; is it possible to hope that a suit so framed can ever come to a beneficial end?"

It may be here not uninteresting to give a sketch of the progress of the law with regard to its means of suing Joint Stock Companies; and it is impossible to do this in better words than those of Lord Eldon's judgment in the case of Van Sandau v. Moore already cited, which came before him in the year 1826.

"It is quite clear," said Lord Eldon, "that in a commercial country like this, there may be many undertakings and enterprises to which individual powers of mind or purse may be unequal: and for such cases the constitution of the country has provided by giving the means of creating corporations. It is within my own memory, that when an application was made to Parliament to incorporate bodies, it was generally met with this short answer; 'Why have you not gone to the Crown with your request; why have you not obtained a charter?' However, that mode of thinking has gone by; and several Acts of Parliament have been passed establishing companies similar to this one.

"There were not many of those Acts passed, before inconveniences were found to follow. If a man had occasion to bring an action against one of the bodies so constituted, he did not know how to proceed, or against whom to bring his suit; and if he brought it naming the defendants who were known to him, he was treated with a plea in abatement, which was a check-mate to his action. To meet this inconvenience, it became necessary to introduce into those bills a clause that the company should sue and be sued by their clerk or secretary.

"It was soon found that this provision did not set the matter right. The secretary on behalf of the company sued a man of opulence: and if he succeeded, he recovered not only judgment but payment of the demand. On the other hand when the secretary was sued, the person suing found that though he had gotten an individual with whom he could go into a court of law or equity in order to enforce a claim against him as defendant, yet after he had gone thither he frequently found that it would have been better for him not to have stirred; for though the secretary when he was

plaintiff got the money for which he sued, he was often unable when made defendant to pay what the plaintiff recovered.

"That state of things suggested to a learned lord (Redesdale) the necessity of making all the members liable as well as the secretary, for a demand against the company. Thus there arose a third class of Acts of Parliament establishing companies: Acts which made all the members, as well as the secretary, liable to answer demands recovered against the company. Still this was not enough; for as these Acts did not provide the means of letting the world know who the members were, the consequence was, that though all the members were liable, nobody, who had a claim against them, could tell who the persons were that were then liable.

"Another improvement was therefore made. A proviso was introduced, requiring that, before a company was formed, or within a given time afterwards, there should be a register or inrolment of the individuals of whom the company was composed; and it was thought that thus, at last, the work had been done completely, and that all was safe. Unfortunately, however, it turned out, in consequence of sales and transfers of shares, that a person who was a member of the company to-day, was not a member of it to-morrow; the constituent members of the body were constantly changing: and a plaintiff did not know against whom to proceed, whether against the present or against former members.

"A further alteration was then made: the effect of which was that those who had been members should continue liable, although they had transferred their interests, and that those who became members should also be liable: an inrolment of the names both of the one and the other being required. This had a very considerable operation: and it was wonderful to observe how much, after it was adopted, the passion for becoming members of these companies diminished.

"One thing was still wanting. If the members of these bodies happened to quarrel among themselves (which, though they came harmoniously together, was very likely to happen), how were they to sue one another? And it was not till the latest stage of improvement that that difficulty was provided for. I believe it was in the Act regulating the new banking

establishments in Ireland (5 Geo. 4. c. 75. s. 5., repealed and improved by 6 Geo. 4. c. 42.) that provisions were for the first time made to meet all these difficulties: and similar provisions now form part of the regulations which are likely to take place in the banking establishments in England now in contemplation."

The provisions just mentioned are contained in the tenth section of the stat. 6 Geo. 4. c. 42., which enacts that all proceedings at law or in equity on behalf of the company against any persons, whether members of the company or otherwise, for any matter relating to the concerns of the company, should be prosecuted in the name of the public officer of the company; and that all proceedings to be commenced or instituted against the company by any persons, *whether members of the company or otherwise*, should be prosecuted against the public officer of the company as the nominal defendant. But this Act was a limited measure, affecting only the banking establishments to which the Act relates.

The next general change was made by the Act 4 & 5 W. 4. c. 94., which enables the Crown to grant by patent to any trading company any of the privileges which it was competent to grant by a charter of incorporation, especially the privilege of suing and being sued in the name of a public officer, upon such terms as the Crown should impose.

This Act was repealed by the stat. 7 W. 4. & 1 Vict. c. 73., which enlarged the powers of the Crown in reference to other points, but re-enacted the foregoing regulation. It was stated, however, to the House of Commons by Mr. Gladstone, that very few companies had availed themselves of the provisions of these Acts. There remained, therefore, a multitude of associations or partnerships composed of a vast number of persons acting together merely according to the terms of a deed of settlement, and standing in the eye of the law upon the same footing as any ordinary partnership consisting of only two or three members.

As between such companies and strangers, the new Registration Act provides a remedy in the twenty-fifth section, which enacts, that on the complete registration of any company being certified by the Registrar, the company and its

shareholders shall be incorporated, as from the date of the certificate, for the purpose of carrying on the trade or business of the company, and for the purpose of suing and being sued: but the incorporation thus effected is not to restrict the liability of the shareholders under any judgment or decree against the company for payment of money.

Thus far, as between such companies and strangers, the remedy by suit appears to be complete; every company, however numerous its members may be, being for the purposes either of bringing or defending an action or suit, reduced to a legal unit by clothing it with a corporate character.

But, as between the companies and their own members, the difficulties of suing and being sued appear to remain on their former unsatisfactory footing. Van Sandau v. Moore was a case of this description: and although by means of the principle of representation, whereby one member is allowed to sue on behalf of himself and all others against certain excepted members of the company, the courts of equity have attempted "to go as far as possible towards justice rather than deny it altogether," still cases are continually occurring in which the doctrine of representation is not admissible: and the result is literally a denial of justice, because a plaintiff in such a case can never bring his suit to a hearing. The cases of Cockburn v. Thompson [1], Long v. Yonge [2], and Walworth v. Holt [3], exhibit a general view of the rules of pleading in the Court of Chancery in cases like those to which we have alluded: but it is not our intention here to do more than to refer to those decisions.

Our present object is merely to show that the new Joint Stock Companies Registration Act makes no alteration in this branch of legal practice.

III. There is a third particular in the new Registration Act which also requires observation. It is to be found in the 66th section, which enacts that every judgement, decree, of order against any registered company not otherwise privileged by letters patent or by private Act, shall take effect, and execution shall be issued, not only against the property or

[1] 16 Ves. 325. [2] 2 Sim. 386. [3] 4 Myl. & Cr. 619.

such company, but also, if due diligence have been used to obtain satisfaction out of the property of the company, then against the person, property, and effects of any shareholder for the time being, or any former shareholder in his individual capacity, until such judgment, decree or order be fully satisfied; provided, in the case of execution against any former shareholder, that such former shareholder was a shareholder at the time when the contract or engagement for which such judgment, decree, or order may have been obtained was entered into, or became a shareholder during the time such contract or engagement was unexecuted or unsatisfied, or was a shareholder at the time of such judgment, decree, or order being obtained; *provided also that in no case shall execution be issued on such judgment, decree, or order against the person, property, or effects of any such former shareholder of such company after the expiration of three years next after the person sought to be charged shall have ceased to be a shareholder of such company.*

The principle of limited liability has been partially brought into operation by means of several charters and private Acts of Parliament: and such limitation has extended not only to the amount, but also to the duration of the liability.

The French law of partnership *en commandité* also embraces the principle of limitation as to the amount of liability.

The Irish Anonymous Partnership Act[1] embodied the same principle. But it was confined to companies having a capital not less than 1000*l.*, and not exceeding 50,000*l.*: and the duration of such partnerships was not to exceed fourteen years. Very few persons, however, availed themselves of the powers of the Act: and it is almost a dead letter.

The general opinion of the principal merchants and other persons, who were examined before the Parliamentary Committee of 1836, was adverse to the introduction of partnerships on the French principle. But it does not appear that the creditors of those public companies which have been established with limited liability, either by private Acts, or by Charters, have expressed any complaints regarding the operation of such a system.

[1] 21 & 22 Geo. 3. c. 46. (Irish.)

Great practical inconvenience certainly arose from the unrestricted continuance of a shareholder's liability to the debts and engagements of an unincorporated or unchartered Joint Stock Company. Upon the decease of such a shareholder, his executor could not safely pay a single debt or legacy, except under legal compulsion: and though a similar state of things often exists with regard to the affairs of a testator who is not possessed of a single share in a public company, yet in such a case an executor may have something like a chance of ascertaining the extent of his testator's liabilities; but it is utterly impossible for him to discover the measure of such liability, where it involves the previous examination and settlement of the accounts of a multitudinous association, and possibly the necessity of a suit in a court of equity to complete the process. By the new Registration Act the term of liability is, as we have seen, restricted to the period of three years from the time of a shareholder ceasing to be a member of the company: and we think this is likely to operate as an encouragement to the purchase of shares in joint stock companies, without unduly trenching upon the fair rights and privileges of creditors, to whom much compensation for this limitation of liability is afforded, by the means which the Act furnishes to them, of ascertaining from time to time, by the aid of the Registry, the condition and the probable solvency or durability of any particular company, with which they may happen to be dealing or contracting.

IV. We proceed now to a brief notice of the second of the statutes under review. The Act 7 & 8 Vict. c. 111. is an extension of the law of bankruptcy to corporations; and it applies to every commercial or trading company now or at any time hereafter incorporated by Charter or Act of Parliament;

To every company or body of persons now or at any time hereafter associated for commercial or trading purposes, and enjoying any privileges or powers under the Act 7 W. 4. & 1 Vict. c. 73.;

To every company subject to the provisions of the last-mentioned statute;

To every company or body of persons now or at any time

hereafter to be associated for any commercial or trading purposes, and registered either provisionally or completely under the act 7 & 8 Vict. c. 110.; and to every joint stock company now existing and comprehended within the definition, in that Act contained, of a joint stock company. And upon the commission by any such company of any act, which by the statute under review is to be deemed an Act of Bankruptcy, a fiat is to issue against the company in the same way as against a private person.

By sect. 2. the bankruptcy of a company is not to be construed as the bankruptcy of any individual member.

By sect. 3., service of the adjudication of the bankruptcy of a company is to be made upon the chief clerk or secretary or registrar of such company, or (if no such person) on any director. The person so served is to surrender on behalf of the company.

Then follow the enactments, sects. 4, 5, 6, 7., specifying the several acts by which a company is to be rendered bankrupt:

1. A declaration of insolvency by a resolution passed at a board of directors, and filed in the office of the Secretary of Bankrupts; provided a fiat issue within two months thereafter:

2. Default in paying, securing, or compounding for a judgment debt within fourteen days after a requisition for payment at the instance of a creditor who is in a situation to issue execution:

3. Default in compliance with any decree or order in equity or in bankruptcy, or in lunacy duly served, and ordering payment by the company of any sum of money:

4. Default for one calendar month in paying, securing, or compounding, to the satisfaction of a judge, for any debt, whereof an affidavit shall have been filed in any of the superior courts of law, followed by a summons duly served.

By the eleventh section the law and practice of bankruptcy now in force is to extend as far as possible to all proceedings under the new Act.

A measure of public policy, affording the means of much future benefit to the community, is provided for by the twenty-fifth section, whereby it is enacted, "That, previous

to passing the last examination under a fiat against any such company or body adjudged bankrupt, it shall be the duty of the Court, authorised to act in the prosecution of such fiat, to inquire, by the examination of such person or persons as such Court shall think fit, into the cause of the failure of such company or body; and after the passing of such last examination, or after the time allowed by such Court for that purpose shall have elapsed, such Court shall cause a copy of the balance sheet filed in the Court under such fiat to be transmitted to the Committee of Privy Council for Trade and Plantations; and such Court shall at the same time certify in writing to the said committee, what, in the opinion of such Court, was the cause of the failure of such company or body, and shall have liberty to state any special circumstances relating to the formation or management of the affairs of such company or body; and shall cause to be annexed to such certificate a copy of the examination of any person or persons taken under such fiat, and which such Court shall deem material, relating to the formation or management of the affairs of such company or body."

The twenty-sixth section then goes on to enact, That after the cause of failure of any company has been certified to the Board of Trade, the Crown shall have power to revoke all powers and privileges granted to such company by any charter, patent, or Act of Parliament: And by the twenty-seventh section the Board of Trade is empowered to lay all the papers relating to the failure of any such company before the Attorney-General, in order to the institution of a prosecution against the directors.

This last enactment, so far as it applies to corporations, is calculated, we think, to infringe a little upon the valuable privilege so long enjoyed by such bodies, of *having no conscience.*

In conclusion, and by way of summary, we may observe that the following four great changes in the law are effected by the two statutes which we have been considering;

1. Joint Stock Companies have now a statutory definition of their composition distinct from that of ordinary partnerships;

2. Joint Stock Companies, duly registered, become corporations *ipso facto* for limited purposes;

3. The principle of restricted *duration* of liability upon contracts is specially applied to shareholders in such companies;

4. The law and practice of bankruptcy are extended and adapted to registered Joint Stock Companies, and also to trading companies holding charters, or incorporated by special Acts of Parliament.

It ought not to be here omitted that, by s. 58. of the Registration Act, it is required that all *existing* companies whatsoever shall, within three months from the 1st November, 1844, be registered as to the following particulars, viz., 1. The name or style of the company; 2. The purpose of the company; 3. The principal or only place for carrying on its business.

We hope to have frequent opportunities of recurring to the general law of Joint Stock Companies.

ART. VII.—ALTERATIONS IN THE ALIEN-LAW.

An Act to amend the Laws relating to Aliens, 7 & 8 Vict. c. 66. *Royal assent, 6th August* 1844.

We propose to give a short account of the Act of the last session of Parliament relating to aliens. It may be well to state the great injustice and equal absurdity of the former law, in order that it may the more clearly appear from what a deformity our legal system has happily been freed.

The former law of this country laid aliens under great disabilities. They could hold no office; they could hold no real estate. If any alien purchased or inherited land, upon an inquest of office and office found, that is a verdict that the lands of Blackacre had become vested by whatever title in A., an alien, the Crown became entitled, and the ouster of the alien was immediate, final, and irremediable.

The original definition of alien was, any person whatever born out of the allegiance of the Crown; so that if, as actually happened, a royal duke, or one of our greatest landed grandees, happened to be born abroad from the casual ab-

sence of his mother to recover her health, they were aliens as much as if their parents had never been in this country and had never held any connection with it.

This absurdity was removed nearly a century and a half ago, by two statutes[1] which provided that the children of all men, British subjects, should be, though born abroad, considered to all intents and purposes as natural-born subjects; and another[2] extended this to the grandchildren of such persons. But it never was extended to the children or grandchildren of females; and hence an heiress to an English estate, if taken in labour abroad, brought forth aliens, and her estates vested in the Crown upon those children succeeding. This is now altered.[3]

When the House of Hanover was called to the succession early in the last century, additional precautions were taken by the legislature with the view of preventing the influence of foreigners in our government and in our legislature, and generally in our public offices. It was provided, among other jealous enactments, that no bill for naturalising any alien could ever be presented to either House of Parliament, unless it should contain a clause disabling the petitioning party from holding any office whatever, from being a member of either house of parliament, and from being a privy councillor.[4] This provision affected to do almost the only thing which all the authorities agree is beyond the power of the legislature, namely, to bind future parliaments. To this extent of course it could not go. For if a bill were introduced having the clause in question, the exigencies of the Act of Settlement were complied with, and yet that clause might be struck out in the progress of the bill, at any stage. It seems, however, to have been doubted if this omission could boldly be effected. The grounds of such a doubt are not very easily understood; but it so far existed as to disincline parliament from having the question raised; for on the naturalization of any foreign prince, marrying one of our princesses, or a foreign princess marrying into our royal family, there is also a bill previ-

[1] 7 Ann. c. 5., 4 G. 2. c. 21. [2] 13 G. 3. c. 21.

[3] Sect. 3. Every person now born or hereafter to be born out of her Majesty's dominions, of a *mother* being a natural-born subject, shall be capable of taking any estate real or personal by devise, purchase, or inheritance.

[4] 12 W. 3. c. 3., 1 G. 1. c. 4.

ously introduced suspending the operation of the restricting clause in the Act of Settlement, and then the naturalizing bill is brought in without the clause.

The absurdity and inconsistency of this course can hardly be described in too strong terms. A man of the most humble state is subjected to the whole disability. A small trader, an ensign in the army, a midshipman on board a vessel, are not allowed to fill the office of petty constable, or justice of peace, lest he should influence the government of the country, and turn its operations in favour of a foreign country, and away from the interests of England. But as soon as a marriage is proposed with a foreign prince, he who may be the Queen's consort, and exercise the greatest influence over the course of the government, is, quite as a matter of course, relieved from the restrictions which the Act of Settlement imposed in order to prevent the accession of foreigners to places of influence and power. It has thus happened that gentlemen possessed of ample estates, and who happen to be aliens merely because their property came from their English mother married to a foreigner, have been unable to hold either the place of member of parliament, or of justice of the peace, in the county where the estates were situated.

The late Act removes this absurdity by so far repealing[1] these Acts. It provides that the government may by a simple certificate[2] grant naturalization to all intents and purposes, except the capacity of holding the place of privy councillor and member of parliament; but it leaves them to be dealt with by the legislature in each case, repealing the clause in the Act of Settlement, and thus enabling the parties to be completely naturalized by private act.

That there can be no danger from this amendment of the law, is manifest, for no man can be enabled to sit in parliament or be a privy councillor, without the special assent in his case of Queen, Lords and Commons. That assent never will be withholden unless there be good and sufficient grounds. But as the law before stood, it never was given, for the clause in the Act of Settlement prevented it from being given unless a special Act was first passed to suspend its operation.

[1] Sects. 1. and 2.

[2] Sects. 6, 7. 9.

ART. VIII.—SPEECH OF LORD CHIEF JUSTICE DENMAN

ON THE BILL FOR RELIEVING SCRUPULOUS PERSONS FROM TAKING OATHS. JUNE 27. 1842.

THE subject of this able, well-reasoned, and most admirable speech is of the greatest importance. It concerns neither more nor less than the security against false testimony on the one hand and the sacred rights of conscience on the other. We rejoice, therefore, that the speech of the Lord Chief Justice has been given to the public in a more correct form and with greater fulness than the course of publication in the daily newspapers rendered possible; and we deem it an imperative duty to direct towards the question the attention of our readers and of all lawyers, the rather because the Bishop of London having proposed referring the whole matter to a select committee, and the Lord Chief Justice having acceded to his proposition, the committee has only begun its labours, and will consider of its Report next session. Consequently a discussion of the subject in the mean while becomes of essential importance to the right decision of the committee.

We must begin by observing that the introduction of such a measure as this by such an authority in the law is an event of much importance, and demands from all persons and in all places the greatest respect. The Lord Chief Justice of England, the first common law judge, the first criminal judge in the realm, one, too, who has held for above twenty years judicial offices intimately connected with the administration of the criminal law and with its practice, comes down to his place in parliament, the tribunal of the last resort in all criminal cases, and declares, as the result of his long and varied experience, that he deems the investigation of truth in courts of law to be obstructed, and in many cases precluded, by the present forms of the law, and that both for enabling judges well to examine cases brought before them, and for relieving tender consciences from an unbearable load

of oppression, some alteration of that law is absolutely necessary. Who can reflect on the person, the office, the subject, and not admit that every deference is due to such a proposition, so made? But we may add, that which delicacy towards Lord Denman, prevents us from expanding into a just eulogy, — that all who know him know also his inflexible integrity, and feel assured that he is utterly incapable of propounding or of supporting any measure in his legislative capacity, above all any measure intimately connected with his higher and more sacred judicial functions, unless his mind were thoroughly imbued with the conviction of its safety, its justice, its necessity.

We begin our statement of the case by two short extracts from the admirable speech before us — a speech deriving, it is true, extraordinary weight and authority from the station and the character of the speaker, but quite equal to the exigency of the great occasion in its own intrinsic merits — a speech abounding in impressive eloquence, instinct with the soundest principles, and breathing throughout an enlarged view of human affairs, and a tender anxiety for human happiness. Here is the Lord Chief Justice's lucid and impressive description of the mischiefs that arise from a law excluding the testimony of all whose conscientious scruples forbid them to take an oath.

"By the exclusion of evidence, the justest debt may be lost to the creditor; if it has been paid, the debtor may be deprived of the proof of payment, and compelled to pay it twice: in the ordinary occurrences of life, the wrong-doer may always triumph over the oppressed; the property of one man may be wrested from his possession and transferred to a stranger; a fraudulent pretender may obtain a seat in your Lordships' House, which he knows to belong to another, and thus obtain the high privilege of enacting the laws of the land.

"In the department of Criminal Law the evil is far greater." His lordship here adverts to the grievous encouragements, daily multiplying, to the infraction of the law. He enumerates some of the more prominent of these, and with just indignation; — such are the assumption of "a portion of the literature of the day of an important character, ex-

citing the youthful mind by tales and dramatic representations to sentiments of the most vicious and debasing tendency, throwing a veil of romance over meanness and cruelty, and exhibiting them in an impossible alliance with heroic courage, generosity, and kindness."

In passing, we cannot but pause to join our feeble testimony with this just and grave reprobation. The vile taste of the unthinking public, which encourages such writings, with about as much propriety and as much temperance as it promotes the vice of dram-drinking,—for the use of both stimulants comes from the like morbid appetite,—furnishes no kind of excuse for the authors to whom his lordship alludes; because their writings foster the bad taste they live on, and stimulate the vicious propensities to which they pander. But the Lord Chief Justice goes on to expose another class of exciters to criminal conduct. He gently hints that possibly the mere love of notoriety may be the origin of the fanatical folly to which he refers. But be the motive what it may, he most justly stigmatises the acts of these misguided and misguiding persons as in the very highest degree pernicious.

"Not content with exhorting them (convicted criminals) to penitence and prayer, and consoling them with a humble to hope for mercy, they have surrounded them with the enjoyments of this world, and invested them with distinction and interest in the eyes of their fellow-creatures, which no other position could have earned for them. This patronage of criminals has displayed something like an indifference to crime; and the vilest and most abject have avowed that they have thus been tempted into outrages which have filled the public mind with horror and indignation."

No doubt his lordship here had in his mind the memorable scene enacted at the city which he once represented in parliament—the Nottingham tragedy. A murder of the most atrocious kind had been committed. The wretch had for the sake of gaining a few pounds killed a poor old man, and first mutilating, had then burnt his body. He was convicted on the clearest evidence, and he fully confessed his guilt. Forthwith there stepped forward a woman—a lady of some figure in society—and, inspired with a holy zeal to save the man's soul, administered all consolation not only of prayers

and psalms, but of meat, drink, and entertainment. He was converted to the new light of Methodism; he was proclaimed a saint ready for heaven, and awaiting the moment of his translation through the halter to the abode of the blessed; he was attended to the gallows by his dear sisters in Christ; he was mourned by them as an innocent lamb led to the slaughter; his hair was divided as relics of saints are in Romish countries; ribbons worn by him were eagerly distributed among and worn by his admirers; and he actually died the death of a felon with the portrait of his patroness hanging on his bosom. We affirm that such religion as this works not only no kind of good but infinite mischief. It is made the parent of crimes; the repentance and its fruits, which may be all very right after the offence has been committed, and nothing remains to do or to abstain from, is held out to men *beforehand* as the harbour into which they may retreat, and where they may find repose and rest for their souls after they shall have robbed or murdered their neighbours — and also after they shall have been detected — and also after they shall have been convicted; for unless all these chances of escape shall fail, not one of the saints in question ever dream of repentance and salvation. But who does not perceive that the knowledge of all this — the prospect of this haven of rest, should the worst come to the worst — must greatly influence the conduct of criminals, must deprive punishment of half its horrors, and disarm religion of all its terrors? We regard such individuals as the lady of Nottingham in the light of great criminals; guilty of many crimes, to which their vanity, or their fanaticism, or their folly of what kind soever it be, has occasioned, and far more pernicious to society than he who has only committed one.

The Lord Chief Justice, having adverted to the varied incentives now applied in stimulating crime, proceeds to ask what is the consequence of the law diminishing the facilities of conviction, while every effort is made to multiply the chances of crimes being committed. "What would your Lordships have felt — how would the public mind have been affected — if any of the wretches who have lately polluted the courts had departed without punishment through this defect? What, if a necessary witness to identify the open

traitor, or to trace the proofs against the midnight murderer, had been reduced to silence by his own religious scruples, and the rigid exaction of an oath by the Law?"

But the chances of a guilty person's escape are less to be lamented than those of an innocent person's suffering.

"Even worse consequences might follow, in proportion as an erroneous conviction is more to be deprecrated than the acquittal of guilt. Conspiracies to accuse falsely may be well laid; untoward circumstances may amount to proof; while the facts by which innocence can be established may be known to none but such as hold an oath unlawful. The present law shuts out the truth so tendered, and knowingly suffers the innocent man to be branded as a felon."

His Lordship proceeds to state the number of persons upon whom the pressure of the law requiring oaths to be taken by witnesses is grievous. There are 100,000 Baptists in England, and 5000 in Scotland; seventy-nine petitions were presented by Lord Denman during the session, and thirty by Lord Lansdowne, from congregations of churches declaring their inability to take oaths. A large proportion of the Independents abide by the same conscientious opinion. Whenever a crime can only be proved by any of these sects, whenever the innocence of an accused party can only be so proved, the guilty must escape, the innocent must be convicted. It is not for the benefit of the sectary, but for the interests of public justice, that the law is required to be relaxed. The Quakers always opposed Mr. Justice Williams's bills to allow their testimony upon affirmation in criminal cases. They were inimical to capital punishments, and they wished to be exempt from the necessity of giving evidence whereby persons might suffer death. But when pressed with the question, "Suppose you alone could give evidence whereby an innocent man might be acquitted, are you prepared to say, you would rather the innocent than the guilty should suffer death?" The Quaker had nothing to answer. Nevertheless he was very far from yielding; for a Quaker never gives up his erroneous position, and scarcely ever argues in support of his error. He regards moral truth as a matter placed beyond the sphere of reason. He has some kind of feeling about it; but argue he will not.

It is therefore for the public, and not for the sectarian interest, that this relaxation of the law is proposed. Nevertheless the sects are exposed to serious oppression by the operation of the law on their conscientious scruples. Young men, we are told by his lordship, qualified by talent and study for the learned professions, are deterred by the preliminary oaths; clerks and inferior servants cannot find employment, because they cannot depose on oath to facts of ordinary occurrence. Some gentlemen of high character have resigned important offices of considerable value because they involved the administration of oaths. We can avouch the accurate truth of this statement. The son-in-law of Sir James Macintosh, the son of Mr. Wedgewood of Etruria, gave up the lucrative place of a police magistrate in London because his conscience forbade him to administer oaths, and he was too honest a man to derive gain from an employment which his conscience disapproved.

The following passage is striking and decisive: —

"Your lordships will naturally inquire what corrective is now applied by the law to the unqestionable evils which it produces. Before that corrective is described, the tale of grievance is but half told. The corrective is an intolerable aggravation. This is the substance of the controversy which arises in our courts: — The person who attends his summons as a witness is ready to depose to the facts in his knowledge; he is told that he cannot be allowed to do so, unless he swears to speak the truth. Conscious of this duty, and prepared to discharge it, he still remonstrates against the oath; when peremptorily ordered to lay his hand on the Gospel and swear, he answers that he has meditated on that sacred volume from his youth up, has yielded entire deference to its authority, and laboured to conform his life to its precepts, among which he finds none more direct and binding than the simple injunction — 'Swear not at all!'

"Nothing can be less important than my own sentiments on any matter of this kind; but I beg your lordships to understand that I do not share this scruple, nor bring forward my proposal from any personal motive whatever. I have no wish to maintain the correctness of the non-juror's opinion beyond this: — that it is by no means too absurd to be sin-

cere; that it neither bears that character of wild fanaticism that impeaches the understanding, nor is so obviously contradictory to reason as to draw motives into suspicion. The rules of biblical criticism may fully justify those who believe oaths to be lawful; but the adherence to the plain words of the New Testament, however satisfactorily shown to originate in error, is an error of a very different kind from that of engrafting something arbitrary and extraneous upon them.

"The non-juror is all this time standing before the tribunal. He has given his plain reason for refusing to take the oath, and persists in his refusal. What duty does the law impose on the presiding magistrate? Hitherto, my lords, I have pleaded for the public against the exclusion of testimony; I have pleaded for individuals who are virtually outlawed by their exclusion: I now plead for the magistrate, and beseech your Lordships to attend to the situation in which he is placed. There is but one duty imposed upon him by the law in this crisis — the duty of menace and coercion. He must warn the reluctant Christian that much temporal annoyance awaits him, if he perseveres in what he deems his duty to God. If the warning succeed, if the courage give way under the threat, his compliance degrades him in his own estimation and in the face of the world; by consenting to become a witness, he proves himself unworthy of credit. If he still refuse, the magistrate has no alternative. However he may respect the conscientious scruple, though from personal acquaintance he may know its sincerity, he is compelled to refuse the proffered testimony, in which he would fully confide, and for want of which his judicial power is paralysed; and he must consign his fellow-subject to a dungeon for the crime of too faithful an obedience to the declared will of the Saviour of mankind.

"Such scenes have recently been presented, reflecting little honour on religion or on justice. The unseemly spectacle will be the more strange, if it happen that the non-juror who is hurried into custody should at the same moment hear testimony given on affirmation by one who was formerly a Quaker; — if he should see both a Quaker and a Separatist actually seated in the jury-box, to decide on the life of a fellow-creature without an oath. To them the law has

granted this privilege merely because they hold the faith for which their fellow-Christian is proscribed and punished.

"The only principle on which this severity is now inflicted is that of making the non-juror an example to others in the like case offending. The state has formed one opinion on a religious point, and is resolved that none of its subjects shall hold a different one. Let us not disguise from ourselves that here the spirit of persecution is in full operation; but let us consider what hope of success the attempt holds out."

We have now only to note the objections urged against his Lordship's Bill, which enacts that any person solemnly affirming that he believes in his conscience that the taking of an oath is contrary to the law of God shall be permitted to affirm instead of swearing, and be liable to punishment as for perjury if he affirm falsely. Of these objections, the only one that obtained any attention was the ordinary one—How can we know that the witness really feels the scruple—having only his own word for it? The Lord Chief Justice most truly and most unanswerably says, that you have and you can have no better proof of a man's being a Jew, and yet you let him put on his hat and swear on the Old Testament—of a man's being a Quaker, and yet you let him affirm, without swearing at all—or of a man's being a Mahometan, and yet he calls for the Koran, and on the Koran is sworn. But, says his Lordship, the "security against this species of deception is, that no sane man can have a rational motive for stating an untruth upon the subject. If bent on fraud and falsehood, how easy to claim the privilege of a Quaker, a Moravian, a seceder from the Society of Friends, or a Separatist. You are already at the mercy of all who choose to give themselves these descriptions; but with the sanction of penal consequences before their eyes—the fear of degradation and exposure in society—no one is found to run the risk attending this preliminary falsehood. An abuse of a different kind might be apprehended. Irksome and injurious as it is to classes of men to be excluded by conscientious opinions from giving evidence, many individuals are interested in avoiding that duty. In almost every case there are some who, from fear or interest, wish to conceal their knowledge, to screen the culprit, or withhold their testimony

from those unjustly accused. They may affect the scruple for the very purpose of being rejected, and leave the court under false colours.

We think enough has been said favourably to incline all reflecting men towards this important improvement of the law. But as we have mentioned the Lord Chief Justice's severe and dignified reprobation of causes leading to the commission of crimes, we must add that we happen to know how severely both his Lordship and the other judges condemn the course taken on so many occasions by some portion of the newspaper press in the same direction. It seems as if their whole object were to find excuses, palliatives, and extenuations for guilt. They never point the public indignation against the crime and the criminal, but against the laws and the institutions of the country, to which they are pleased if they think they can trace the causes of the offence which has been committed. And not only the newspapers, but the magistrates themselves entrusted with the administration of criminal justice, sin in this kind. If we have on the one hand one newspaper tracing all crimes to the new poor law, and another to the game laws (forgetting how much this law has of late years been relaxed), we have the chairman of the Suffolk quarter sessions actually assuming that incendiarism itself must be prompted by some good, or at least some rational motive, for he is pleased to connect it with the low rate of wages. Surely the removal from the commission is required of men whose understanding is thus furnished. They are the instigators of crime.

ART. IX. — REVISION OF PUBLIC BILLS.

SOCIETY FOR PROMOTING THE AMENDMENT OF THE LAW.[1]

Parliamentary Committee.

THE following reference was made to this committee: —

"To consider the propriety of establishing a Board for revising and settling Public Bills in Parliament, brought in by the Government or by private Members, the latter with the consent of the Members that have brought them in.

REPORT.

THE defects of the present mode of preparing and carrying through Public Bills in Parliament have been long very generally admitted. They have been the subject of constant complaint by the judges, and were referred for inquiry to a select committee of the House of Commons in 1836.[2]

Some progress has been made in both Houses of Parliament as to the revision of Private Bills. In the House of Lords a general supervision takes place by the chairman of committees and his counsel; and in the House of Commons the same superintendence is effected by means of the Chairman of Ways and Means, and the counsel to the Speaker. But no care whatever on the part of the Legislature is taken as to the preparation of Public Bills. In the House of Lords,

[1] We have been permitted by this useful and learned Body to print this Report; and we hope to derive other reports from the same source. — ED.

[2] Much information on this subject may also be found in a document presented to Parliament in 1838, and compiled by Mr. Arthur Symonds, intituled "Papers relative to the Drawing of Acts of Parliament." The judicial expressions of disapprobation of the present system of legislation are very numerous. It is only necessary here to refer, in addition to those referred to by Mr. Symonds, to the strong opinion of Lord Hardwicke in the House of Lords, on the discussion of the Militia Bill in 1756; to the opinion of Lord Eldon (see his life by Mr. Horace Twiss, vol. ii. p. 282.); to the opinion of Sir Edward Sugden, now Lord Chancellor of Ireland, in his letter to Mr. Humphreys in 1826; and to the more recent opinion of Lord Langdale, Master of the Rolls, on 13th June, 1836, in the House of Lords. — *Original Note.*

Bills may be presented, and are usually read a first time and ordered to be printed as a matter of course on the motion of any peer. In the House of Commons, although in some cases the principle is discussed on moving for leave to introduce a Bill, no precaution whatever is taken as to the mode and language in which the principle is carried into effect. The Member, indeed, who moves for leave to introduce the Bill is, in conjunction with one or two other Members, ordered to prepare and bring in the Bill; but this proceeding is a mere formality, as he does not in fact usually prepare it. The Bill is then brought in, and not unfrequently in its progress through Parliament it rests entirely on the individual responsibility of its promoter. If it excites no party feeling, or interferes with no vested interest, and even if it does, when its principle or fate is once decided on, its details, and still less its language, are hardly looked to by any one, and are not in many cases attentively considered, until the Bill becomes the law of the land. Sometimes a particular clause, or part of a Bill, is severely contested, or express attention is called to it; and then this clause or part of a Bill is critically considered; but even when this is the case, all the other parts and clauses frequently pass without any proper attention being paid to them.

Thus it may happen that a Bill affecting the whole country may be drawn by a person who never drew a Bill before, by one ignorant of law as a science, and possessing merely a superficial acquaintance with the usual technicalities of Acts, prepared possibly after a similar fashion. There is no uniformity of expression. There is in many cases no attempt to use the same word or phrase in the same sense throughout. There is no responsibility, except a very vague one, attaching to the mover of the Bill, who is rarely its draftsman.

The Bill thus passed into law sometimes remains a dead letter in the statute book from inability to work it. In other cases, consequences result from the Act which were never intended or anticipated; but at best the parties attempting to carry the measure into execution are frequently beset by the greatest doubt and difficulty. A very considerable proportion of the cases laid before counsel are occasioned by the difficulty of construing these statutes; and the same observ-

ation applies to actions and suits in the courts both of common law and equity, the time of which is taken up in expounding and settling the meaning of the Legislature. But all this is of course attended with great, and sometimes ruinous, expense and delay to the parties.

It may however be said, that legislation, in the nature of things, must be attended by disadvantages and hazards. But it is found that where Acts have been drawn by competent persons, as for instance in the Acts for the Consolidation of the Criminal Law, brought in by Sir Robert Peel, and most of the acts passed under the direction of the Real Property and Common Law Commissioners, very few doubts comparatively have arisen, although many of these Acts have made great alteration in the law, and have legislated on points of much technical nicety and of constant occurrence.[1] It is to be observed that most of the statutes to which allusion is now made passed very nearly as they were brought in.

It may be asserted, therefore, that legislation is capable of being so conducted as to avert the evils which are now so deeply felt, and of which complaint has become so general.

The inquiry then arises, whether it be not possible to devise some plan by which Acts may be passed, which will not be attended by the evils of the present system?

The plan which appears to this Committee best calculated effectually to guard against and remedy these evils is to appoint certain persons selected from the legal profession, officers of Parliament, for the examination and revision of all Public Bills.

After much consideration, it appears to this Committee that these officers should not be employed to draw the Bills either of the Government or of private Members. All that they would recommend, at any rate, in the first instance is, that every Bill should, after its second reading, be revised by the officers to be appointed. On the Bill being so revised, it should be returned to the House of Parliament in which it originated for committee; but the duty of the revising offi-

[1] If this observation is peculiarly applicable to one act more than another, it is to the act for the abolition of fines and recovery, 3 & 4 W. 4. c. 74., the merit of which is almost exclusively Mr. Brodie's. — Ed.

cers should not be supposed to end when the Bill was so returned, but it should be their duty to watch it throughout, and attend to all alterations made in either House of Parliament until it received the royal assent; and on any alterations being made, it should be referred back again to the revision of the officers.

It does not seem unreasonable to expect that the following advantages would attend the establishment of this office, some of which are now not even attempted to be gained.

1. A uniformity of style and expression in Acts of Parliament.

2. A knowledge of the existing state of that part of the law intended to be affected by the proposed measure.

3. A greater degree of clearness in the Act when passed, and thus greatly lessening the doubts as to the intention of the Legislature, and the subsequent expense of ascertaining it either by opinions of counsel, or actions or suits for his purpose.

Another great advantage that would be gained is, that competent persons would be induced to turn their attention to the framing of Acts of Parliament, a branch of study hitherto almost entirely neglected, and yet surely demanding exclusive attention as much as any other.

The principal disadvantages appear to be, that the establishment of this office might lessen the responsibility which now attaches to the Government and to the Speaker in matters of public legislation, and that when appointed, the new officers might relax in their zeal, and leave things much as they now are.

On the whole these disadvantages, although they deserve attention, appear to be far outweighed by the advantages which would attend its establishment.

One difficulty which has been sometimes urged to the establishment of the officers proposed is, that it might tend to fetter individual Members in the exercise of some of their powers in committee on the Bill; but it is conceived that this difficulty is not very formidable. Where the committee is a select committee, one of the Public Bill officers might attend the committee (which is now not an unusual course for the gentleman to take who has prepared the Bill) to make expla-

nations and provide for objections. A committee of the whole House is not perhaps the best place for settling construction of language; but it would be still open to Members to make objections of this nature if they thought fit, although, as there would probably be less occasion for it, so it may be considered that this privilege would not be so often acted on as now.

It is quite possible that the office might, at some portion of the session, have a great press of work, and at others very little to do. When there was an excess of business they might have means afforded them of obtaining some assistance.

When the House was not sitting, or when business was not so pressing, their time might be usefully employed in consolidating and digesting the statute law, or advising on what statutes are obsolete or repealed, in reporting on the state of the law affected by proposed alterations, and in the general care and supervision of the statute law. The officers might also with advantage accompany the Bills which they returned to the House with a short statement of the existing law, and the effect of the proposed alteration.

Another question of great difficulty will be, whether the new officers should continue in practice? It is considered that the chief officer, having the task of supervising the whole, should devote himself exclusively to the duties of the office. The other members might with advantage be allowed to remain in practice in the several branches of their profession.

In effecting an object of this nature, so important to every member of the community, it is conceived that the expense to be incurred should not be the difficulty in the way of carrying it out. But it seems capable of proof that the saving that the office would effect in stopping inconsiderate and useless legislation, in shortening Bills, in preventing reprints of Bills in many cases, and in saving the time of the courts, which is now occupied in construing the present imperfect statutes, would amply pay for its establishment.

For the reasons here given, and subject to the restrictions above alluded to, this Committee are of opinion that parliamentary officers to revise Public Bills might be appointed with great advantage, as well to the legislature as to the public.

ART. X.—A MEMOIR OF THE LATE LEWIS DUVAL, ESQ.

It is very unlikely that a legal practitioner, following the quiet and retired paths of the profession frequented by conveyancers, should offer matter of interesting remark or general discussion to the historian.

The lives of these learned men are spent in hard but obscure labour. The other branches of the profession unite with society, and both during the judicial year and the intercalated vacation the Nisi Prius advocate, nay, even the Chancery practitioners, seem to be dealing with their fellow men, to be acting and working among them, to be addressing them, to be in contact and confliction with them, to be appealing to their reason, to the press, to their will, to the passions. The conveyancer sits among his abstracts, clauses, and precedents, remote from man. It cannot be expected, therefore, that the life of the very eminent person whose name we have prefixed to these pages should afford materials for an interesting portraiture; for, unlike Mr. C. Butler, who had much general learning and varied literary pursuits, or Sir Edward Sugden, who early combined general practice at the bar with conveyancing, Mr. Duval was a mere property lawyer, and had no other serious pursuit besides that branch of the law. He was a person of undoubted skill and learning and great experience; and so eminent a man cannot be suffered to depart without some attempt being made to record his merits.

Mr. Duval was the son of an eminent diamond merchant settled in this country, but of Genevese origin, with a pedigree of some syndical dignity, and, we believe, connected by marriage with the family of the celebrated Monsieur Dumont. He was sent early to Cambridge, and entered at Trinity Hall; and as the members of that College generally, as it is termed, go out in law, his attention was not particularly turned to the study of mathematics, and it is not understood that he applied

to any particular subject during his residence beyond the usual college exercises. Some few elementary books on the civil law were read during his time, and some courses of lectures were attended; but he did not in after-life pretend to have derived much benefit from his elementary studies in civil law. Soon after leaving college he was elected a fellow, and until his marriage, long after, continued many years at Christmas to join the party of lay-fellows who regularly attend during the Christmas holidays. Here he formed a close intimacy with the late respected master, Dr. Le Blanc. On leaving college he became a pupil of Mr. Charles Butler, who entertained the highest opinion of his industry and talents, often saying that he was a draftsman by intuition. It may be presumed that the hesitation in his speech determined the branch of the profession which Mr. Duval was to select, though perhaps it was expected when he entered Trinity Hall (the College where the civilians are usually educated) that he might have overcome this defect, and have been enabled to practise at Doctors' Commons. After remaining with Mr. Butler somewhat more than two years, he began to practise for himself, but was not immediately called to the bar; a course at that time common with conveyancers; and it is understood that during the early years of his professional career he was much employed by Mr. Butler in the preparation of such of his drafts as required elaborate care. Some adverse circumstances in the affairs of his father rendered him very early almost entirely dependent on his profession; and, perhaps, in the particular branch to which he devoted himself, never was there a more steady and complete conquest of all the difficulties which beset the path of the early practitioner. When he commenced practice, Mr. Butler and the late Mr. Shadwell were at their greatest eminence. Mr. Hargrave also was in full practice as a conveyancer, and the late Mr. Sanders and Mr. Preston were with others, rising into eminence. The merits of Mr. Duval were early discovered by all these persons, but especially by the late Mr. Sanders, a conveyancer of great skill and profound learning, and with whom Mr. Duval continued on intimate terms of friendship till the death of the former. In a memoir which we intend to give to our readers, we propose to show what was the state of

practice amongst conveyancers when Mr. Butler first began his career, and to set forth what were his labours, and to what extent his peculiar practice had the effect of improving the system in the preparation of legal instruments.

The system, for the improvement of which Mr. Butler did so much, was in a great degree adopted by Mr. Duval, and in many respects, as his experience increased, he was enabled to introduce important amendments of his own. Unlike Mr. Butler, Mr. Hargrave, Mr. Sanders, Mr. Preston, and other eminent conveyancers, Mr. Duval owed his rise entirely to his skill as a chamber practitioner. He never published any professional work; and, indeed, it is believed that the only articles from his pen which are in print are the very celebrated reasons in the appeal case of Scarisbrooke v. Scarisbrooke, and the greater part of the Second Report of the Real Property Commissioners which relates to the establishment of a general registry of deeds. It is known that Mr. Duval, who was one of the Real Property Commissioners, took a leading part in the discussions relating to this measure, and it is understood that his reasoning tended much to bring round the late Mr. Bell and Mr. Sanders to his views. The plan of this registry, and the reasons in support of it, were mainly his. Beyond the accidental contact at an occasional consultation, up to the time of his becoming a member of the Real Property Commission, he had been confined to the perusal of abstracts, and the preparation of drafts, and the answering of cases. On joining the commission he felt, perhaps for the first time, fully his own superiority on general subjects connected with jurisprudence: till then, he had scarcely looked beyond the acquiring the law necessary for his immediate wants; but having entered on the subject of a registry, he applied the whole energies of his profound and clear mind to it, and produced a plan, and reasons in support of it, which obtained the respect and applause of all, as well as the approbation of many of the most eminent lawyers of the day. If it had a defect, it was *too perfect;* every detail was so elaborated, that persons studying the plan were startled at its apparent complexity and difficulty, and it was only on a laboured and minute examination that its entire merits and completeness were discovered. Indeed

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REPORT.

THE defects of the present mode of preparing and carrying through Public Bills in Parliament have been long very generally admitted. They have been the subject of constant complaint by the judges, and were referred for inquiry to a select committee of the House of Commons in 1836.[2]

Some progress has been made in both Houses of Parliament as to the revision of Private Bills. In the House of Lords a general supervision takes place by the chairman of committees and his counsel; and in the House of Commons the same superintendence is effected by means of the Chairman of Ways and Means, and the counsel to the Speaker. But no care whatever on the part of the Legislature is taken as to the preparation of Public Bills. In the House of Lords,

[1] We have been permitted by this useful and learned Body to print this Report; and we hope to derive other reports from the same source. — ED.

[2] Much information on this subject may also be found in a document presented to Parliament in 1838, and compiled by Mr. Arthur Symonds, intituled "Papers relative to the Drawing of Acts of Parliament." The judicial expressions of disapprobation of the present system of legislation are very numerous. It is only necessary here to refer, in addition to those referred to by Mr. Symonds, to the strong opinion of Lord Hardwicke in the House of Lords, on the discussion of the Militia Bill in 1756; to the opinion of Lord Eldon (see his life by Mr. Horace Twiss, vol. ii. p. 282.); to the opinion of Sir Edward Sugden, now Lord Chancellor of Ireland, in his letter to Mr. Humphreys in 1826; and to the more recent opinion of Lord Langdale, Master of the Rolls, on 13th June, 1836, in the House of Lords. — *Original Note.*

Bills may be presented, and are usually read a first time and ordered to be printed as a matter of course on the motion of any peer. In the House of Commons, although in some cases the principle is discussed on moving for leave to introduce a Bill, no precaution whatever is taken as to the mode and language in which the principle is carried into effect. The Member, indeed, who moves for leave to introduce the Bill is, in conjunction with one or two other Members, ordered to prepare and bring in the Bill; but this proceeding is a mere formality, as he does not in fact usually prepare it. The Bill is then brought in, and not unfrequently in its progress through Parliament it rests entirely on the individual responsibility of its promoter. If it excites no party feeling, or interferes with no vested interest, and even if it does, when its principle or fate is once decided on, its details, and still less its language, are hardly looked to by any one, and are not in many cases attentively considered, until the Bill becomes the law of the land. Sometimes a particular clause, or part of a Bill, is severely contested, or express attention is called to it; and then this clause or part of a Bill is critically considered; but even when this is the case, all the other parts and clauses frequently pass without any proper attention being paid to them.

Thus it may happen that a Bill affecting the whole country may be drawn by a person who never drew a Bill before, by one ignorant of law as a science, and possessing merely a superficial acquaintance with the usual technicalities of Acts, prepared possibly after a similar fashion. There is no uniformity of expression. There is in many cases no attempt to use the same word or phrase in the same sense throughout. There is no responsibility, except a very vague one, attaching to the mover of the Bill, who is rarely its draftsman.

The Bill thus passed into law sometimes remains a dead letter in the statute book from inability to work it. In other cases, consequences result from the Act which were never intended or anticipated; but at best the parties attempting to carry the measure into execution are frequently beset by the greatest doubt and difficulty. A very considerable proportion of the cases laid before counsel are occasioned by the difficulty of construing these statutes; and the same observ-

ation applies to actions and suits in the courts both of common law and equity, the time of which is taken up in expounding and settling the meaning of the Legislature. But all this is of course attended with great, and sometimes ruinous, expense and delay to the parties.

It may however be said, that legislation, in the nature of things, must be attended by disadvantages and hazards. But it is found that where Acts have been drawn by competent persons, as for instance in the Acts for the Consolidation of the Criminal Law, brought in by Sir Robert Peel, and most of the acts passed under the direction of the Real Property and Common Law Commissioners, very few doubts comparatively have arisen, although many of these Acts have made great alteration in the law, and have legislated on points of much technical nicety and of constant occurrence.[1] It is to be observed that most of the statutes to which allusion is now made passed very nearly as they were brought in.

It may be asserted, therefore, that legislation is capable of being so conducted as to avert the evils which are now so deeply felt, and of which complaint has become so general.

The inquiry then arises, whether it be not possible to devise some plan by which Acts may be passed, which will not be attended by the evils of the present system?

The plan which appears to this Committee best calculated effectually to guard against and remedy these evils is to appoint certain persons selected from the legal profession, officers of Parliament, for the examination and revision of all Public Bills.

After much consideration, it appears to this Committee that these officers should not be employed to draw the Bills either of the Government or of private Members. All that they would recommend, at any rate, in the first instance is, that every Bill should, after its second reading, be revised by the officers to be appointed. On the Bill being so revised, it should be returned to the House of Parliament in which it originated for committee; but the duty of the revising offi-

[1] If this observation is peculiarly applicable to one act more than another, it is to the act for the abolition of fines and recovery, 3 & 4 W. 4. c. 74., the merit of which is almost exclusively Mr. Brodie's. — Ed.

cers should not be supposed to end when the Bill was so returned, but it should be their duty to watch it throughout, and attend to all alterations made in either House of Parliament until it received the royal assent; and on any alterations being made, it should be referred back again to the revision of the officers.

It does not seem unreasonable to expect that the following advantages would attend the establishment of this office, some of which are now not even attempted to be gained.

1. A uniformity of style and expression in Acts of Parliament.

2. A knowledge of the existing state of that part of the law intended to be affected by the proposed measure.

3. A greater degree of clearness in the Act when passed, and thus greatly lessening the doubts as to the intention of the Legislature, and the subsequent expense of ascertaining it either by opinions of counsel, or actions or suits for his purpose.

Another great advantage that would be gained is, that competent persons would be induced to turn their attention to the framing of Acts of Parliament, a branch of study hitherto almost entirely neglected, and yet surely demanding exclusive attention as much as any other.

The principal disadvantages appear to be, that the establishment of this office might lessen the responsibility which now attaches to the Government and to the Speaker in matters of public legislation, and that when appointed, the new officers might relax in their zeal, and leave things much as they now are.

On the whole these disadvantages, although they deserve attention, appear to be far outweighed by the advantages which would attend its establishment.

One difficulty which has been sometimes urged to the establishment of the officers proposed is, that it might tend to fetter individual Members in the exercise of some of their powers in committee on the Bill; but it is conceived that this difficulty is not very formidable. Where the committee is a select committee, one of the Public Bill officers might attend the committee (which is now not an unusual course for the gentleman to take who has prepared the Bill) to make expla-

nations and provide for objections. A committee of the whole House is not perhaps the best place for settling construction of language; but it would be still open to Members to make objections of this nature if they thought fit, although, as there would probably be less occasion for it, so it may be considered that this privilege would not be so often acted on as now.

It is quite possible that the office might, at some portion of the session, have a great press of work, and at others very little to do. When there was an excess of business they might have means afforded them of obtaining some assistance.

When the House was not sitting, or when business was not so pressing, their time might be usefully employed in consolidating and digesting the statute law, or advising on what statutes are obsolete or repealed, in reporting on the state of the law affected by proposed alterations, and in the general care and supervision of the statute law. The officers might also with advantage accompany the Bills which they returned to the House with a short statement of the existing law, and the effect of the proposed alteration.

Another question of great difficulty will be, whether the new officers should continue in practice? It is considered that the chief officer, having the task of supervising the whole, should devote himself exclusively to the duties of the office. The other members might with advantage be allowed to remain in practice in the several branches of their profession.

In effecting an object of this nature, so important to every member of the community, it is conceived that the expense to be incurred should not be the difficulty in the way of carrying it out. But it seems capable of proof that the saving that the office would effect in stopping inconsiderate and useless legislation, in shortening Bills, in preventing reprints of Bills in many cases, and in saving the time of the courts, which is now occupied in construing the present imperfect statutes, would amply pay for its establishment.

For the reasons here given, and subject to the restrictions above alluded to, this Committee are of opinion that parliamentary officers to revise Public Bills might be appointed with great advantage, as well to the legislature as to the public.

ART. X.—A MEMOIR OF THE LATE LEWIS DUVAL, ESQ.

It is very unlikely that a legal practitioner, following the quiet and retired paths of the profession frequented by conveyancers, should offer matter of interesting remark or general discussion to the historian.

The lives of these learned men are spent in hard but obscure labour. The other branches of the profession unite with society, and both during the judicial year and the intercalated vacation the Nisi Prius advocate, nay, even the Chancery practitioners, seem to be dealing with their fellow men, to be acting and working among them, to be addressing them, to be in contact and confliction with them, to be appealing to their reason, to the press, to their will, to the passions. The conveyancer sits among his abstracts, clauses, and precedents, remote from man. It cannot be expected, therefore, that the life of the very eminent person whose name we have prefixed to these pages should afford materials for an interesting portraiture; for, unlike Mr. C. Butler, who had much general learning and varied literary pursuits, or Sir Edward Sugden, who early combined general practice at the bar with conveyancing, Mr. Duval was a mere property lawyer, and had no other serious pursuit besides that branch of the law. He was a person of undoubted skill and learning and great experience; and so eminent a man cannot be suffered to depart without some attempt being made to record his merits.

Mr. Duval was the son of an eminent diamond merchant settled in this country, but of Genevese origin, with a pedigree of some syndical dignity, and, we believe, connected by marriage with the family of the celebrated Monsieur Dumont. He was sent early to Cambridge, and entered at Trinity Hall; and as the members of that College generally, as it is termed, go out in law, his attention was not particularly turned to the study of mathematics, and it is not understood that he applied

to any particular subject during his residence beyond the usual college exercises. Some few elementary books on the civil law were read during his time, and some courses of lectures were attended; but he did not in after-life pretend to have derived much benefit from his elementary studies in civil law. Soon after leaving college he was elected a fellow, and until his marriage, long after, continued many years at Christmas to join the party of lay-fellows who regularly attend during the Christmas holidays. Here he formed a close intimacy with the late respected master, Dr. Le Blanc. On leaving college he became a pupil of Mr. Charles Butler, who entertained the highest opinion of his industry and talents, often saying that he was a draftsman by intuition. It may be presumed that the hesitation in his speech determined the branch of the profession which Mr. Duval was to select, though perhaps it was expected when he entered Trinity Hall (the College where the civilians are usually educated) that he might have overcome this defect, and have been enabled to practise at Doctors' Commons. After remaining with Mr. Butler somewhat more than two years, he began to practise for himself, but was not immediately called to the bar; a course at that time common with conveyancers; and it is understood that during the early years of his professional career he was much employed by Mr. Butler in the preparation of such of his drafts as required elaborate care. Some adverse circumstances in the affairs of his father rendered him very early almost entirely dependent on his profession; and, perhaps, in the particular branch to which he devoted himself, never was there a more steady and complete conquest of all the difficulties which beset the path of the early practitioner. When he commenced practice, Mr. Butler and the late Mr. Shadwell were at their greatest eminence. Mr. Hargrave also was in full practice as a conveyancer, and the late Mr. Sanders and Mr. Preston were with others, rising into eminence. The merits of Mr. Duval were early discovered by all these persons, but especially by the late Mr. Sanders, a conveyancer of great skill and profound learning, and with whom Mr. Duval continued on intimate terms of friendship till the death of the former. In a memoir which we intend to give to our readers, we propose to show what was the state of

practice amongst conveyancers when Mr. Butler first began his career, and to set forth what were his labours, and to what extent his peculiar practice had the effect of improving the system in the preparation of legal instruments.

The system, for the improvement of which Mr. Butler did so much, was in a great degree adopted by Mr. Duval, and in many respects, as his experience increased, he was enabled to introduce important amendments of his own. Unlike Mr. Butler, Mr. Hargrave, Mr. Sanders, Mr. Preston, and other eminent conveyancers, Mr. Duval owed his rise entirely to his skill as a chamber practitioner. He never published any professional work; and, indeed, it is believed that the only articles from his pen which are in print are the very celebrated reasons in the appeal case of Scarisbrooke v. Scarisbrooke, and the greater part of the Second Report of the Real Property Commissioners which relates to the establishment of a general registry of deeds. It is known that Mr. Duval, who was one of the Real Property Commissioners, took a leading part in the discussions relating to this measure, and it is understood that his reasoning tended much to bring round the late Mr. Bell and Mr. Sanders to his views. The plan of this registry, and the reasons in support of it, were mainly his. Beyond the accidental contact at an occasional consultation, up to the time of his becoming a member of the Real Property Commission, he had been confined to the perusal of abstracts, and the preparation of drafts, and the answering of cases. On joining the commission he felt, perhaps for the first time, fully his own superiority on general subjects connected with jurisprudence: till then, he had scarcely looked beyond the acquiring the law necessary for his immediate wants; but having entered on the subject of a registry, he applied the whole energies of his profound and clear mind to it, and produced a plan, and reasons in support of it, which obtained the respect and applause of all, as well as the approbation of many of the most eminent lawyers of the day. If it had a defect, it was *too perfect;* every detail was so elaborated, that persons studying the plan were startled at its apparent complexity and difficulty, and it was only on a laboured and minute examination that its entire merits and completeness were discovered. Indeed

it is apprehended that the plan in question is *the* plan for a registry, and that any scheme founded on other principles will be erroneous, as all existing registries are without question erroneous as well as defective. With the plan as to the registry, his particular interest in the Real Property Commission seems to have ceased, though he entered largely into the discussions of the various recommendations contained in the other Reports. On the retirement of Mr. Butler, Mr. Sanders, and Mr. Preston, Mr. Duval came to be considered as the head of the profession, and perhaps no one of his predecessors held that situation so completely without a rival, and by universal consent as he did. His clearness, caution, and great practical experience, combined with his patience and extreme urbanity, rendered him eminently suited to this important situation,—and we say important advisedly, because one who holds such a rank as he did, and who has the entire confidence of both branches of the profession, becomes in fact a Judge in ninety-nine cases out of the hundred which are brought before him; and where one case relating to real property is settled by a Court of Law, a hundred are decided by the opinion of the leading conveyancer of the day. He would have been a bold man who, except under very particular circumstances, advised his client to undertake a suit in the teeth of a clear opinion of Mr. Duval.

From the importance to society of the situation held by him, the amount of the loss may be measured. He has, it is true, left many very eminent practitioners enjoying a large share of the public confidence, and to whom it would be invidious here particularly to refer. Yet, we have no hesitation in saying that some time, at least, must elapse before any one member of the profession will obtain that complete confidence both of the solicitors and his brother conveyancers, which for many years past was enjoyed by the subject of this paper. He early took pupils, as is the custom of all conveyancers, and many very eminent practitioners studied under him. Amongst the earliest of his pupils were the present Lord Chancellor of Ireland, Mr. Tinney, Mr. Bellenden Ker, Mr. Christie, and Mr. Loftus Wigram, all of whom, we know, were affectionately attached to him, and entertained the highest respect for his professional attain-

ments. He died on the 11th of August 1844, in his 70th year. His death was almost instantaneous, arising from affection of the heart.

Mr. Duval had not the slightest pretensions to scholarship, but was not wanting in the attainments necessary to constitute a well-educated gentleman. In writing he expressed himself with perfect precision, and with the utmost purity and elegance. He had read most of the popular English classics, and had a considerable tincture of French literature. In his latter years he sedulously avoided all unprofessional reading which did not directly minister to his amusement. Having carefully read all the great English poets and novelists of the last forty years, he testified much gratitude to a friend who directed his attention to Balzac, and the other leading French novelists of the day; and the leisure hours of the last two years of his life were devoted to a considerable extent to their not very improving pages. No man could be less liable to the charge of any grossness or excess in his enjoyments; but Mr. Duval was Epicurean in his disposition, and a careful economist of his pleasures. He loved port wine, but always drank claret; he dined well, and prolonged his dinner, and read books of amusement with deliberation, for he would not despatch an enjoyment which might be protracted. This sketch of his general character and habits would be incomplete if we did not notice that in his youth he was addicted to fox-hunting, loved to be well mounted, and rode boldly and well. This pursuit was continued till some time after he had attained considerable eminence in his profession. He was also an angler; but that to which he gave all his attention for the last twenty years of his life was shooting. The months of September and October were always spent in some quarter of the country where he had secured a well-stocked manor. He shot indifferently well, and was curious in his guns, dogs, shooting pony, and all equipments for the field. Though in a mild form, he was not entirely without the cant of sportsmanship, and, like most sportsmen, could never entirely divest himself of a slight feeling of pity, with some mixture of contempt, for men who neither rode nor shot.

Mr. Duval was not what is called a learned lawyer; he was

not very familiar even with the cases decided in his own time; but no man's eminence rested on a more solid foundation. To a competent supply of legal learning he added vast experience, and the comprehension and clearness with which his mind took in the extensive and complicated matters with which he had to deal could not be exceeded. He possessed a quick and subtle apprehension of legal principles, and a *natural logic* which was never at fault. To all this he added infinite caution, and a patience which could not be tired out. Candour was, with him, rather a necessary consequence of the frame of his mind than a virtue. His understanding was so just that conviction inevitably followed the propounding of sufficient reasons; and he would have shrunk from being guilty of the absurdity of withholding his assent after good grounds for yielding it were presented to him. In his intercourse with his friends he was in a high degree kind and confiding; and in his attachments was wholly devoid of changeableness or caprice. His personal demeanour was eminently conciliating; and, whilst he was universally looked up to as the great light of the day in conveyancing lore, he was in an equal degree loved and esteemed by the whole profession for his kindness and urbanity.

ART. XI. — LEGAL EDUCATION.

Certare ingenio, contendere nobilitate,
Noctes atque dies niti prestante labore
Ad summas evadere opes, rerumque potiri. LUCRET.

THE great importance of the legal profession renders the education of those who are to carry it on a matter of moment in two points of view. So many persons of respectable condition are attracted to its different branches both by the emoluments and the station which it confers, that the instruction of these to qualify them for entering on its duties is a thing of much consequence to the parties; and again, in a public point of view, nothing can more nearly concern the

highest interests of the community than the sufficiency of qualification in point of learning and good habits which the candidates for the most important of trusts, the administration of justice, bring to the performance of their eminent functions. In most countries the public seminaries of education, the Universities and Colleges, afford the inestimable benefit of legal tuition. In the Universities which were the earliest founded after the dark ages, and towards the latter portion of that period, the study of the law, that is, the Civil and the Canon Law, which form the groundwork of all other systems, was the chief business of the teachers. It is, nevertheless, certain that the teaching of the Civil Law was the pursuit which gave its origin to the most ancient of Universities, that of Bologna. From the beginning of the twelfth century it was taught there by Irnerius, and it most probably was taught much earlier; for the Emperor Theodosius is believed to have founded this Academical body in the fifth century, and we must conclude that he who first digested the Roman Law would not leave it untaught in an establishment of his own creation. The teaching of Irnerius spread the study through Italy and through Europe; and the fame of the University in which it had taken its rise increased exceedingly, insomuch that early in the thirteenth century 10,000, and a hundred years later 13,000 were educated within its walls. Soon after Irnerius became famous as a teacher, the Canon Law was taught, and the study of it was greatly encouraged by the Church.[1] But it was not till two centuries after Irnerius that a theological school was established; though philosophy had been taught from a considerably earlier period. In all the Universities of Europe, however, without any exception, law formed always one of the four faculties into which the teaching of the place is subdivided; even France was no exception, notwithstanding the prohibition in that country of all teaching in the Civil Law for some centuries, owing to the quarrels between the Holy See and its Eldest Son; in all Universities law was one faculty; and the degrees mainly conferred by these venerable seats of

[1] Irnerius taught from 1110 at the latest; Gratian's collection of the Decretal was published in 1151.

learning were given to proficients in this study. In some Universities this continues to be the case in our day; but in the greater number the name only is preserved; and so little does in this case the appellation answer to the thing signified, that we believe many even well-informed persons in both France and England are wholly ignorant that the title L.L.D. means Doctor in the Lex Legum, that is, in the Civil Law. In granting none of these degrees is there the least knowledge of the Civil Law, or indeed of any law whatever, now required.

But this is not all as regards England. In the country where the importance to the public interests of having well educated lawyers is the greatest, the provision for legal education is the smallest. In fact we bestow upon the process of making lawyers a very great and a very unjust compliment, by talking of any such provision, how scanty soever, as having an existence among us. There is no kind of provision whatever made for ascertaining that a person entering into the legal profession either as a civilian in Doctors' Commons, or a barrister in the courts of Westminster, or a proctor in the ecclesiastical courts, has received any education whatever to fit him for those professions, or indeed any education at all. An examination of a certain kind has indeed been recently instituted for attorneys and solicitors, but a person unable to read or write may become a barrister by merely entering his name during five years at one of the Inns of Court and attending twelve times in its dinner hall at the beginning of the dinners eaten on those days for about twelve weeks in the year. His name being on the books five years, he may attend those twelve times during three out of the five years. This circumstance is all that the law requires, to make a barrister of any man however ignorant both of law and of every thing else, together with the payment of certain fees, orders and certain taxes, dues, fees to the Inn of Court, taxes to the government.

The question needs hardly be asked, if this course of proceeding is rational or even decent. We believe the honour of it is exclusively our own. We do not suppose such an outrage upon all common sense as well as propriety is perpetrated in any other country. In Scotland, perhaps, the

nearest approach to it is made, but Scotland remains still at a great distance behind us in her advance towards the perfection of abuse, the *ne plus ultra* of mockery on education. For at least the party claiming to be admitted as an advocate must bring certificates of having attended three courses of lectures in the University, one upon the Institutes of Justinian, another on the Pandects (both delivered in Latin), and a third on Scotch law. The professor examines his pupils occasionally on the two former of these subjects. Besides it is something that there are lectures open to the student if he chooses to attend; he generally will choose. In England no such lectures exist; the law student is not required to attend any; if he were required, there are none to attend. Then an examination is gone through before certain of the faculty, that is of the bar, in the Civil law; and another in the Scotch law. Formerly this was a real examination; of late years it has been reduced to little more than a ceremony and form by the very bad practice of the examiners informing the candidate beforehand of the particular titles in which they are severally to examine him. However he must have prepared himself on eight titles of the Civil, and as many of the Scotch law. In England nothing of the kind is done; but, the candidate approaching the benchers' dining table, while their worships are waiting till the interval elapses that separates their wine from their meal, begins to read a sentence of law, put into his hand by the servants of the Inn, and as soon as he has read three words, the bencher, irritated to leave his wine, dismisses him, being satisfied with this "reading of law." Lastly, in Scotland the candidate must prepare and print a Latin Thesis on certain matters of the Civil law on his own selection; and as these productions are canvassed in the profession, the young lawyer always is the real author of his Thesis. This is no great test, indeed, of his proficiency; still it is better than our English no test at all.

But though the rules of the profession require no previous study or education whatever, the wants of the practitioner have instituted a custom, of young men, while awaiting their call (to the Bar), engaging themselves either with special pleaders or with conveyancers, or with equity draftsmen, ac-

cording as they purpose to try their fortune in the common law or in the equity courts. This is the real legal education in England, unless in so far as it has been preceded or is attended by reading privately at home. Yet this is a very unsatisfactory education: for it only consists in the pupil sitting at the pleader's desk and copying precedents at his own pleasure, or drawing pleadings under the pleader's direction, no pleader either in law or in equity considering himself as bound to afford the least instruction by lecturing, or discussing, or reading with his pupils, though it is admitted some of them, exceptions to the rule, do volunteer this assistance to the studies of the young men. But the consequence is, that even those pupils who see and who do most business in the pleader's office, acquire a practical and mechanical rather than a systematic knowledge of the law. Hardly any one reads on principle, or system as he ought, to prepare himself for the desk of the pleader. In former times it was otherwise; men learnt the science of the law, as they still do all other sciences, by reading to acquire a knowledge of its principles, and they came to the bar far better lawyers than some now are when they have risen high in the profession.

That this system is a little in the course of improvement at present we are willing to hope. That it must, before long, be entirely new modelled we are quite certain. There have been attempts at the beginning of a new plan, in one or two of the Inns; these must be revised and extended; nor is it possible that many years should elapse without the establishment of regular lectures in the law and the requirement by the Inns of a certain proficiency in candidates for the Bar, gained by attending these lectures.

But assuming that provision shall be made for giving easy and regular access to legal instruction, and that a competent knowledge of law shall be required of all who aspire to the honours of the gown, much remains to be considered as to the education of the lawyer.

And first of all, in discussing the question how is a man to prepare himself for advancing to the heights of this renowned profession, assuming as a matter of course that he is to make himself master of the law as far as any one can become master of it by reading and by attending a pleader's office, without

actual practice in giving opinions or conducting causes, we must lay it down as clear that a foundation should by all means be laid broad and deep of general learning. The classics are chiefly to be studied, no other means existing of making the taste pure and attaining a proficiency in the oratorical art. But the sciences are of much importance. The moral sciences evidently cannot be two carefully studied by those whose occupation it is to reason upon evidence, and probabilities, to address the feelings and the passions, to discuss points of duty, to discriminate between shades of guilt. The business of practical lawyers lies very mainly among questions of morals. But physical science, too, demands their care. No one can be ignorant how many cases are always coming before courts of justice, which turn upon principles of natural philosophy and niceties in the mechanical and chemical arts. Lawyers and judges of the highest eminence have frequently been heard to declare, that far from considering any portion of the time which they had spent in learning the different branches of physical science thrown away, they only lamented daily not having laid in a larger provision of such knowledge, aware how well they could find the means of turning it to account. It may fairly be questioned if any benefit can result to practical men from the extravagant degree of attention paid at Cambridge to pure mathematics, or to the niceties of the ancient metres at Eton and Oxford; but indeed it is equally questionable if such excessive refinements are at all profitable in any other department of exertion, even with a view to the cultivation of the sciences or of letters themselves; and in aid of this doubt comes the known fact of so very minute a percentage of wranglers and first-class men ever in after-life distinguishing themselves in scientific or in literary pursuits; nay, as the generally known fact of very few if any of these classes, after leaving the banks of Cam and of Isis, ever looking at either a mathematical or a classical book. But these are extravagant actings on a good principle; excesses to which sound doctrine is uselessly, even hurtfully, carried by the zeal of the learned. No man can doubt that a familiar acquaintance with mathematical principles, mathematical methods of demonstration, the doctrines of mechanical and of chemical science is of un-

speakable importance to the practical lawyer, whether conducting causes at the Bar or deciding them on the Bench. If any one doubted this before hearing Lord Tenterden try a patent cause, all his doubts must then have vanished for ever. After that he was more likely to overvalue than to underrate this accomplishment.

But next, the branches of knowledge not cultivated at schools and colleges are also of eminent use to lawyers. No man can be an excellent lawyer without a knowledge of history; especially the history of his own country. But also no accomplished lawyer can be without a general knowledge of the legal systems of other countries. They who have studied the ablest legal arguments in our courts in modern times especially must be aware what sources of both reasoning and illustration the comparative view of other systems has afforded. This is in truth almost the only particular in which our lawyers of the present day surpass the learned and elaborate ones of old.

An acquaintance with the lighter literature of the country is also highly beneficial to the advocate—to him especially who has to address either a parliamentary tribunal or a jury. Generally speaking, our older lawyers (we mean of modern times) have been confined in their reading to Shakspere, as indeed the sameness of their quotations appeared to testify. Yet even this modicum of the English classics had its advantages, and their making provision of it was a testimony to the advantages of such classical knowledge. Sir Vicary Gibbs, it was said, had never read but two books out of the profession since he quitted Cambridge, where he took a good degree. In the one he was fortunate enough; it was Shakspere. Not so felicitous did he turn out to be in his second choice; it was Damberger's travels, which he had painfully studied, and even indexed. But unluckily it turned out to be a very clumsy fabrication, no such journey into Central Africa having ever been undertaken, nor any such traveller having existed.

It has often been questioned whether the student derives any benefit from those lighter studies, sufficient to compensate the risk he incurs of having his mind drawn away to the mere flowery paths of literature from the arid and tedious road of

the law. But we must consider that the studies in question are to precede his devoting himself chiefly to his professional studies; and even if they be continued during his preparation for the Bar, they are likely to form rather a wholesome and invigorating relaxation from more severe pursuits than a distraction. It may safely be affirmed, that unless a young man have the fixed desire of becoming a good lawyer, either from ambition, or from narrow circumstances (by far the best preparation for Westminster Hall), or from both, he will never master the science of the law; and with such a resolution to govern and to guide him, he may safely be entrusted with access to the classics whether of ancient times or of his own.

Another question has been made touching the advantages of a plan much favoured by the students both for the Scotch and English Bar, that of attending debating societies. It seems strange that any doubt should be raised on this point. Give a youth as much book learning as can be poured into him, make him even expert in all the details of pleading or of practice that he can gain from attending a pleader's or an attorney's office, even with all natural capacity to boot, he must come into Westminster Hall or the Parliament House utterly incapable of opening his mouth, and making the stores of his learning, the fruits of his study, available, if he never has heard the sound of his own voice in public since he quitted the grammar-school. That this practice of debating may be carried to excess, no one can doubt. The means may become an end; the charms of discussion and of eloquence may absorb the spirit of the student, and he may become far more anxious to acquire superficially what may fit him for the club-room, than to learn deeply what will fit him for the Bar. Nay the proceedings of parliament seem to furnish examples of such mischiefs created by a premature habit of debate. But the risk of these is a necessary evil; for some practice must be had before public speaking can be acquired. It is an art which any one can learn if he pleases. He will excel in it according to his genius; but he may acquire it to a certain degree of perfection; as all may learn to draw, though few Raphaels and Michael Angelos have appeared. It will tend greatly to prevent the bad effects of debating so-

cieties in giving a careless and worthless fluency, the vice of our age, if the student makes it his rule to write as much as possible before he delivers his arguments or his remarks. He need not always repeat the very speech he has written. But having deliberately and laboriously written it, he will both have well mastered the subject, and will have considered the language in which his thoughts should be expressed. He may then speak better in every respect than if he never had employed his pen to prepare himself, although he should not get by heart and recite all he had written. No one need be ashamed to pursue this course. It has led to make the most finished orators in all ages; and men of business, above the mere tricks of the rhetorician, have adopted the plan. Lord Grenville upon all important occasions wrote a speech when he intended to take part in debate, but he scarcely ever committed it to memory, or delivered it as he had written it. Mr. Pitt and Mr. Fox followed no such course; neither of them in all probability ever wrote a sentence which he delivered. But Mr. Pitt must have studied composition with great pains, and he certainly, never having frequented any place of debate, felt somewhat anxious as to his success when he should for the first time try the experiment of his powers. He had in all probability not only written a good deal of note or dissertation on the subjects of his various reading, but had made speeches alone. In order to ascertain how he should feel, and how succeed, before an audience, he went disguised with the late Lord St. John, who then lived in the same Chambers (Old Square, Lincoln's Inn), to the debating club or theatre kept by a Mrs. Cornellis, where persons were allowed to speak in masks. His self-possession was complete, his success was very great, and all anxiety as to the final result was at an end.

Although we have given an unhesitating opinion in favour of debating societies, we must qualify it by adding that those are greatly to be preferred which either entirely or almost entirely confine the subjects of their discussion to points of law. It is quite easy to mingle jury speaking with legal argument; because cases may be drawn, like special verdicts, stating the evidence in detail, and leaving the conclusion in point of fact to be the question propounded, instead of the

legal inference as a special verdict or case does. The advantage is manifest of this restriction. Any such society which admits all general questions of morals, of evidence, and especially of politics, is most likely to beguile the student from his law books, beside exposing him to the hazard of acquiring a loose, tawdry, and popular style of speaking.

The necessity of attending a draftsman or a special pleader cannot be a matter of any doubt at all. But it has often been questioned whether before being called to the Bar, the candidate for practice should not also be a pleader below the Bar for some few years. Indeed, when the vast numbers, daily increasing, who frequent the circuits, are considered, there seems some ground for the opinion, now so prevalent, that if a barrister merely goes the circuit and takes no other steps to make himself known, his prospect of acquiring business is slender. Accordingly it has become a saying that "there be three roads to success in the common law: pleading, sessions, and miracle." As no one would trust the third chance, of which indeed the examples upon authentic record are but few, we may presume that this is the sound opinion, and that if the probation of pleading before admission be avoided, sessions for several years, perhaps for many, must be attended as well as circuit. In former times our chancery lawyers went sessions. Sir Samuel Romilly did so for upwards of a dozen years, as he also attended circuit regularly, he and Mr. Perceval travelling together. Now, indeed, the unfortunate separation of Law and Equity has taken place to the great injury of both branches of the profession, and of Equity considerably more than of Law, as we have had occasion to show in treating of Jurisprudence at large.

After a gentleman is called to the Bar, his study of the law does not end; it rather takes a new course, and is to be more actively and successfully pursued. He has hitherto only known the law from books, and from written pleadings, but is now to see how it works; how its principles are applied to practice; he is to acquire what the very learned lawyers like Heineccius, and Voet, and Vinnius term, in purely classical language, the *habitus practicus interpretandi leges, applicandique casibus obenientibus*, and which

very ignorant men like Mr. Canning[1], laugh at, not even knowing their own trifling accomplishment of Greek and Latin. He is, moreover, to see how cases are argued, how authorities are brought to bear on points, how judges are addressed in difficult cases, how adversaries are answered, how witnesses are examined, how cases are explained, how juries are addressed. He is to learn his profession, and how to exercise it by observing the skill with which practised men exercise it, "quod nunquam effecisset ipsius juris scientia, nisi eam præterea didicisset artem, quæ doceret rem universam tribuere in partes; latentem explicare definiendo; obscuram explanare interpretando; ambigua primum videre, deinde distinguere; postremo habere regulam, quâ et vera et falsa judicarentur, et quæ, quibus positis, essent, quæque non essent, consequentia."[2] All this can only be learned by an assiduous attendance upon courts; and the student may rely upon it, that the best course he can follow is to divide his day into two; remaining four hours in court, in strict attention to all that passes, and taking his note occasionally, but not writing so much as to prevent him taking in the whole scope of what passes — then repairing to his chambers, and reading on the points which he has heard discussed in court. He will do well to dine at a law club, and let him choose one which is frequented by men actually in business, and who will talk law when they meet together, and not gossip upon fashionable scandal, or wrangle on party politics, the two most fruitful topics of idle society, and the most barren at the same time. Mr. Pitt dined daily during the short period of his attendance on the courts before he was

"Lost, lost, too soon in yonder House or Hall,"

— daily dined at a good law club, and took the liveliest interest in the discussion of whatever points had arisen during the

[1] He ignorantly of Greek supposed there was no authority for the phrase of the civilians, infinitely better scholars than himself, though not perhaps as able rhymers. But had he read Quinctilian (to purify his often false taste) he would have found *ars πρακτικη* used by him in contradistinction to *θεορητικη*. Every other word of the passage has the authority of Cicero and of Livy, who probably knew Latin nearly as well as the generality of Eton scholars.

[2] Brutus, li.

morning in the King's Bench. It is one of the greatest injuries which the incroachments of the west-end of the town have inflicted upon the regions of the law, that clubs unconnected with the profession have both greatly diminished the number of law clubs, and seduced their members to a late dinner, and an idle if not a dissipated evening.

We have not recommended the young barrister to attend the whole six or eight hours of the day in court. Were he to do so he must devote his whole evening to reading the books connected with the arguments which he has heard in the morning, and the evening would not suffice for this purpose. Besides, so much of argument heard would be exceedingly apt to exhaust his attention and make the practical study of his profession an object of disgust. *Ne quid nimis* is a good rule in all pursuits; in that which is to form the business of life as well as in that which forms only its amusement. No sensible instructor would recommend to his pupil the example of Lord Eldon, rising between four and five daily, and reading at night with a wet towel round his head to keep off sleep. If few men are likely to become by any study lawyers like him, fewer still could undergo that discipline with impunity either to body or mind, and hardly any would succeed by following his course of too hard labour.

The circuit and sessions afford another school to the practical man; a school the more important because it teaches him a knowledge of men and of the world which the sameness of life and manners in the capital is not so well fitted to bestow. But the circuit is too often made the scene of relaxation, coming, as it does, after the labours of Westminster Hall. The young circuiteer cannot be too cautious in giving himself up to such habits of amusement, almost inseparable from dissipation.

But the circuits, and first of all sessions, are important in another view. It is here that he will have in all probability his first taste of business. The first brief is a grand event in his life; and it demands his utmost attention. Never let him be above anxiously and minutely making himself master of every part, every line, every word of it. Whatever he would have more fully explained, he has a perfect right by the most

rigid rules of a jealous profession to get explained by either speaking to his client, the attorney, in court, or by sending for him to his lodgings. He will thus prove useful to his leader and his client; but he will also prove useful by noting on the blank pages of the brief any observation both on the law and the fact that may occur to him in studying its contents. Don't let him either be so much above his business or his own standing as to despise this study, and to refrain from consulting his seniors on the circuit (not in the cause), on any difficulty that occurs to his mind. Don't let him be afraid of setting down needless references to authorities. These will sometimes be puerile enough, and, were he to show them all to his practised leader, who goes instinctively through his case, might draw a smile over his countenance at the innocence of youth of an age which he hardly can now recollect. But a little attention and acuteness at consultation will show him what are of any use and what are but burning daylight; and his client will be all the better pleased with his diligence when he receives back his brief, and possibly will suppose the references to be of much importance, from their being new to him.

When he is in consultation or in court, never let him on any account keep back any really useful suggestion from his leader; nor withhold a point, that he may make it when heard (as however rarely happens) to support an objection; nor above all withhold a view of the case, when he has to follow in a motion, or in showing cause at Westminster. The leader and the client have a right to all, and are unjustly dealt with, if any thing is "*bottled up*" for the junior's own separate use.

The time is now come when, by the accidents of business, he is to lead himself. Then double care is required. Above all, he must be prudent, circumspect, and never sacrifice the cause to any display. But also he must not be fastidious, and afraid of seeming to over do and over labour. It is not for him to have the confidence which experienced leaders derive from long use. He must supply this necessary deficiency by double labour and attention; and never let him for one moment imagine that by an absurd, a misplaced, an unreasonable imitation of the practised leaders, he can

impose upon his clients, and make them take him for an experienced man, and overlook the fault of carelessness, which in even old leaders is no grace, in young ones, who have not the same excuse, an inexcusable fault.

The life we have been describing of labour, of discipline, of reading, of writing, of early rising, of abstraction from pleasure, even from relaxation, of tedious hours and copying in the office, of tiresome attendance in court, of patient following of the circuit briefless, of the sessions all but briefless, of seeing others with less merit preferred by favour or by chance, of endless hope ever deferred — all is, we must allow, such as to exhaust the patience of most men, and damp the most lively expectations with which either the study of the law or its practice can be commenced. We have only to set off against these drawbacks the mighty things to which such exertions lead. The most brilliant success which talents the most splendid, learning the most profound, can ever attain; the most exalted offices in the state; the greatest weight in the government of public affairs; the noblest triumphs of genius, in its highest walk, the path frequented and illustrated by Demosthenes, by Cicero, by Erskine, by Plunkett; above all, the glorious privilege of protecting the oppressed, avenging the injured, prostrating the guilty, and the brightest and purest fame that mortals can enjoy, reaped from such employment of such talents such as alone can give men to rise in the renowned profession of the Law — these are the prizes which we place before the student, and the young practitioner. In the language of Nisi Prius, "*That is our case.*"

ART. XII. — RECENT ALTERATIONS IN CONVEYANCING FORMS.

1. *An Act to Simplify the Transfer of Property.* 7 & 8 Vict. c. 76. — Royal Assent, August 6. 1844.

2. *Outlines of a Plan for adapting the Machinery of the Public Funds to the Transfer of Real Property, respectfully inscribed to the President and Council of the Society for promoting the Amendment of the Law.* By ROBERT WILSON. London. Blenkarn, 1844.

THE Real Property Commissioners[1], in their first Report, state that they are "inquiring whether the length of deeds, which causes much expense and perplexity, may not be materially abridged, by making certain powers and obligations legal incidents to certain estates and interests to which they are now almost uniformly annexed (though we feel this to be a matter of much delicacy), or by recommending prescribed forms of conveyance to which in certain cases a given effect shall be imputed." It is much to be regretted, however, that this Commission was brought to a close before these inquiries were completed, the more so, as in the same Report it is said that "the forms of conveyances now in use are cumbrous and circuitous" (p. 7.), and that it appeared to the commissioners that the modes by which estates and interests in real property "are created, transferred, and secured, are exceedingly defective, and require many important alterations." (*ib.*) No further allusion, however, is made by the commissioners to this important subject in any of their subsequent reports. But we have been able to ascertain the sentiments on this subject of two of the learned commissioners from other sources, and to them we shall advert in the course of this article. We are desirous, in the first instance, of placing before our readers the opinions which were collected and printed on this subject by the commissioners, which formed the basis of their report, and which, it will be found

[1] 1 R. P. Rep. 57.

fully justified them in giving the matter their full consideration. On no one point, indeed, with the exception of the abolition of fines and recoveries, were the recommendations in favour of alteration so general as on the subject of the common assurances of the land: from all quarters of the profession, by barristers, by conveyancers, by solicitors (to say nothing of the groans extorted from Members of Parliament and country gentlemen), a very general opinion was expressed that the present length of deeds is the root, if not of all, of very great evil, that much might be done to remedy it, and that, at all events, the matter deserved the most serious investigation. It is to be observed, that the Real Property Commissioners' Reports, with their voluminous Appendices, form the depositaries of the grievances relating to the present law of property; and that most of the complaints which were then generally made have been already redressed. The opinions then, which are here expressed, which the Commissioners thought proper to print, deserve the utmost attention. We have not space to cite all the statements made on this occasion, but we wish to call attention to some of them (of course selecting the best and most apposite), although we can assure our readers the others will repay the perusal.

The late Mr. Justice Taunton, certainly not a very active law reformer, but a very sound real property lawyer, says,—

"It would be very useful for the legislature to enact a formulary, containing prescribed models or set forms of all sorts of conveyances, drawn up with most concise and technical words, not to be used compulsorily, but to be good and sufficient when used." — Appendix to First Report, p. 102.

Mr. Charles Butler, the father of modern conveyancing, confined his views in this respect chiefly to settlements: he suggested,—

"That powers of leasing for twenty-one years at rack-rent, powers of leasing for thirty-one years, &c. &c., and clauses for the appointment of new trustees, and for the indemnity of trustees, should be prepared under the direction of the Commissioners, and settled and approved by them, and when so settled and approved, should be inserted in an act of parliament." — Appendix, p. 117.; and he adds a plan of settlement referring to these powers.

Mr. John Pemberton says, that,—

"With regard to the form of instruments, much improvement is wanting. They have become far too long. It seems very desirable to revert to the simple muniments of former times." — Appendix, p. 456.

Mr. Henry Bacon is for giving,

"Every tenant for life a power of leasing under the restriction usually imposed for the benefit of the remainderman, and consequently to render the insertion in deeds and wills of a power of this kind unnecessary, and for other similar alterations." — Appendix, p. 601.

Mr. Richard Perry thinks that, —

"Forms of the instruments in common use, and settled by competent persons, should be published by the authority of Government, containing, on the one hand, all proper provisions, fully expressed in the settled language of conveyancing, and, on the other, rejecting all redundant and tautologous expressions." — Appendix, p. 609.

Neither must it be supposed that solicitors are backward in making similar observations.

Messrs. Hadfield and Graves, of Manchester, say, —

"The usual powers to appoint new trustees; also to give them and executors power to compound, &c.; also that they shall not be answerable for each other's receipts; and, that they shall have a right to reimburse themselves their expenses might be provided for by act of parliament, and render the insertion of them in deeds and wills unnecessary. * * Covenants for title, peaceable enjoyment, and further assurance and production of title-deeds, certainly might be rendered unnecessary by creating such covenants, by inference or implication in all cases (unless expressly stipulated against) between vendors and purchasers, distinguishing between absolute and special covenants, and making trustees merely covenant against their own acts." — Appendix, 629.

Mr. Charles Margetts, of Huntingdon, makes a similar suggestion, having previously observed that, —

"The great length of deeds, particularly of marriage settlements, causes a sad expense to purchasers. The world, too, is apt to attribute this apparently unnecessary waste of words to the avarice of lawyers." — Appendix, p. 632.

If lawyers express these opinions, we must not be surprised if country gentlemen sometimes vent their complaints pretty

strongly: "Perhaps," says George Tollet, Esq., of Bettley Hall (who it appears received a legal education), in a letter to E. J. Littleton, Esq. (now Lord Hatherton), and communicated by him to the commissioners,

"Perhaps a better reply could not be given to the circular of the Commissioners, than for you to state how many times you have been shorn and how many fleecings you expect. You may say, I have been fleeced when I succeeded to my property; I have been fleeced when I married. I have had some intermediate fleecings. I expect to be fleeced again when my son comes of age, — again when he marries; and when I die my family will again have a severe fleecing." — Appendix, p. 445.

This, we fear, is too much the general public feeling with respect to the lawyer's bill on any dealing with land; and it is surely to be considered whether it is for the interest of the lawyer to allow it to remain or to endeavour to remove it. Taking the mere pecuniary gains of the profession as those which are to be exclusively watched over, it seems to demand inquiry whether these are best promoted by leaving the system as it is, under which no one employs a lawyer in such matters unless he is obliged, or whether it would not be wiser, by facilitating the transfer of real property, to invite the public to deal in land, and to deprive the lawyer's bill of its terrors.

We have reserved to the last the opinion on the subject of the Real Property Commissioners themselves, but as to this, as we have already observed, in their joint capacity they have only alluded; but individually, two at least, of the Commissioners have expressed very decided opinions. Mr. Tyrrell repeatedly and unequivocally advocates great alterations in the forms of deeds; and he thinks "that if forms of the usual deeds were prepared by the Commissioners, and sanctioned by government, they would be followed by the whole profession, and might correct many redundancies and defects." [1]

Lord Campbell, also, the Head of the Commission, as our readers will remember, brought forward the subject in the House of Lords in the Session before the last, avowed the

[1] Suggestion on the Laws of Real Property, 137.

same sentiments, and introduced a bill to shorten and simplify the forms of conveyances.

It cannot therefore be denied that there is a very great body of professional testimony in favour of the consideration of this important subject, calling for a change, and shewing how it may be effected. These suggestions appear to divide themselves into the two modes alluded to by the Commssioners as the subjects of their future inquiries. 1. The giving certain forms, phrases or words, peculiar statutory effects; and, 2. The settling certain forms for ordinary transactions, which should supersede the forms now employed.

This being so, let us next inquire what acts have been recently passed with a view to further this wished-for amendment of the law, and what success has attended them.

The first recent attempt to dispense with or alter a common form of conveyancing, was by the Dower Act 3 & 4 W. 4. c. 105. This Act by s. 9. does not apply to widows married on or before the 1st of January 1834, as to whom the former law remains in full force. One of the consequences of the act was to dispense with the necessity for inserting the well-known form of the *limitations to bar dower;* but the saving clause which continues to a large class of wives the old provision, and to conveyancers their old devices for evading it, will have the effect of prolonging the practice of inserting limitations to prevent dower in purchase deeds and in wills devising estates in fee; for when the purchaser or the devisee has a wife living to whom he was married on or before the given day, limitations to prevent dower are still requisite. The doubt, indeed, is whether, in addition to the usual limitations there should not also be inserted a declaration that no future wife should be dowable.[1] Hence has arisen the practice to insert the usual limitations in all cases, in order to dispense with the necessity of proving the date of the marriage in any future dealing with the property; although this practice is certainly not universal. The immediate effect, however, of the attempt to dispense with the usual dower limitations has, in the opinion of some, rendered another form advisable. So far it was unfortunate.

[1] See 1 Hayes Conv. 303. 1 Sug. Pow. 249.

The only other very recent acts which can be said to bear directly on this subject are the 4 Vict. c. 21. and the act of the last session, 7 & 8 Vict. c. 76. The single object of the former act was to abolish the lease for a year, which it effectually accomplished, but then in order to obtain the benefit of the act, it was necessary in the deed having operation under it to refer to the act. This by some has been thought an inconvenient form, by others a useful and almost necessary mode of accomplishing the desired object. As by the latter act which comes into effect on the 1st of January next, the necessity for this reference is superseded, it will soon be seen which opinion is the more correct.

It is to be presumed, however, that this reference was not considered either necessary or advisable by Mr. Stewart, who brought in the Act, as it was not inserted in the first print of the Bill, but was introduced in committee on the suggestion of other members, among whom, it is understood, was the present Lord Chancellor of Ireland. If the reference be advisable, it may still be continued, otherwise it will disappear. It is of no great importance either way, the object having been accomplished.

The sections of the 7 & 8 Vict. c. 76., so far as the formal parts of deeds are concerned, are the second, the sixth, the eighth, the ninth, the tenth, and the eleventh.[1] As the act is so soon to come into operation and has been and will be the subject of much professional comment, we shall be pardoned for giving these sections fully.

By the second section every person may convey by any deed without livery of seisin, or inrolment, or a prior lease, all such freehold land as he might before the passing of this Act have conveyed by lease and release; and every such conveyance shall take effect, as if it had been made by lease and release.

This section then dispenses with the necessity of livery of seisin, of inrolment, of the prior lease for a year (already dispensed with by 4 Vict. c. 21.), and allows a person to convey land by a simple deed without any of these ceremonies: and we presume that the numerous operative words which

[1] There are only fourteen clauses in the act, three of which are formal.

have been heretofore inserted by some conveyancers, as applicable to several assurances, will be omitted in deeds intended to have operation under it: although we are by no means sure of this, as conveyancers cling with the greatest affection to their old words, and some good or doubtful reason (which is quite sufficient), may be found for retaining them. But the only new effect that this section *can* have on the deed itself, is to strike out two or three of these operative words which may possibly be supplied by others.

The sixth section deprives the words "grant" and "exchange" of the effect of creating any warranty or right of re-entry, or of creating any covenant by implication, except in cases where, by any act of parliament, it is or shall be declared that the word "grant" shall have such effect. The practice of conveyancing, even if there were ever any serious doubt on the point[1], has long since rendered harmless the word "grant." The effect of the word "exchange" was more powerful, and so far this is really a necessary clause.

Next comes the eighth clause, which is, in our opinion, the most useful, so far as the intention goes, in the Act. It enacts that, after the 1st of January, no estate in land shall be created by way of contingent remainder, but every estate which, before this time, would have taken effect as a contingent remainder, shall take effect (if in a will or codicil), as an executory devise, and (if in a deed), as an executory estate of the same nature, and having the same properties as an executory devise: It further enacts, that contingent remainders existing under deeds, wills, or instruments executed or made before the time when the act comes into operation, shall not fail or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate.

This clause will probably render the limitation usually inserted in marriage settlements to trustees, "to preserve contingent remainders" unnecessary. The first part of Mr. Fearne's celebrated Essay will henceforth be a treatise on an estate which can no longer be created, and the clause will, we trust, settle effectually many doubts and difficulties which ought in fact never to have arisen. Were we inclined, however, to be hyper-

[1] See Butl. Co. Litt. 384 a. n. 1.

critical, we might here ask, whether it be possible for an act of parliament, omnipotent as its power is, to enact that "no estate in land shall be created by way of contingent remainder." An act of parliament may deprive this estate of its peculiar properties or effects; but how can it be said that it shall not in future be created? If an estate be limited to A., remainder to B., if C. comes from Rome before next January, will this not be still a contingent remainder, although by this act it may take effect as an executory estate. The marginal note to this section, indeed, carries this doctrine a point further, as according to this "contingent remainders" are "abolished." This reminds us of a story told of a learned and eloquent person who may be considered to be the survivor of Lord Eldon's school: when it was suggested to him that a bill for abolishing contingent remainders would be desirable, he exclaimed, "Abolish contingent remainders! Why not repeal the law of gravitation?"

The ninth clause may be said to have a violent effect. It enacts, that when any person entitled to any freehold or copyhold land by way of mortgage, has or shall have departed this life, and his executor or administrator is or shall be entitled to the money secured by the mortgage, and the legal estate in such land is, or shall be vested in the heir or devisee of such mortgagee, or the heir, devisee, or other assign of such heir or devisee, and possession of the land shall not have been taken by virtue of the mortgage; nor any action or suit be depending, *such executor or administrator shall have power upon payment of the principal money and interest due to him on the said mortgage, to convey by deed or surrender* (as the case may require) *the legal estate which became vested in such heir or devisee,* and such conveyance shall be as effectual as if the same had been made by any such heir or devisee, his heirs or assigns. Would it not have been better to have made the estate created by the mortgage cease or determine on payment of the mortgage money. As it is, we will venture to say that this clause will frequently lead in practice to a conveyance being taken from both heir and executor to avoid all questions under the act.

The tenth clause has a very useful object. It provides that the *bonâ fide* payment to, and the receipt of any person

to whom any money shall be payable upon any express or implied trust, or for any limited purpose, or of the survivors or survivor of two or more mortgagees or holders, or the executors or administrators of such survivor, or their, or his assigns, shall effectually discharge the person paying the same, from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. This, if not expressly aimed at, will in some cases supersede the necessity for one of the most usual common forms, which runs in the precedent books, "*trustees' receipts to be sufficient discharges.*" This at any rate must be held to be the intention of the act.

The eleventh clause begins with the beginning, and from the 1st day of January next declares, that "it shall not be necessary in any case to have a deed indented." But as the statute does not say that a deed between, and executed by, several parties shall have the effect of an indenture as to estoppels, &c. it seems doubtful whether even after the 1st of January an indenture can be safely dispensed with. It further removes any real or supposed distinction between indentures and deeds poll as to a person not a party to the deed taking an immediate benefit under it.

These are the only clauses of the act, which in any way affect the formal parts of deeds, and we have endeavoured to do them full justice. In the main, we approve of the alteration made by the act, but it surely cannot be said, that they are all that are necessary. The substitution of the word "deed" for indenture; the dispensing with the waving line which has in fact long been dispensed with; the superseding the necessity for two common forms, even if the Act has this effect, and the questionable transfer of the legal estate from the heir to the executor in paying off a mortgage; these are surely not the only obvious blots on the present system of conveyancing. This is not that amendment which was called for by the profession in 1829, and has been expected ever since. This act, curtailed as it was in its progress through the House of Lords, would surely not have been the result of the inquiries of the Real Property Commissioners had they ever fully prosecuted them on this

subject. We gladly hail these alterations as an earnest of the intentions of the Lord Chancellor; they are steps in the right direction; they are an instalment of the debt which has so long been due; they prove that Her Majesty's Government are directing their attention to the subject, and they are an important admission of the principle that some of the common forms of conveyancing may be superseded by legislative enactment. More than this we cannot say. We think however the whole subject of the revision of the common assurances of the land deserving of the most careful attention. We would further say, that it is a matter as to which partial and bit by bit legislation is peculiarly unappropriate and inconvenient.

We are desirous therefore of rendering all the assistance in our power, and would wish the profession to consider the two branches of the subject, suggested by the Real Property Commissioners, as they both appear to us, either separately or together, particularly well-fitted for discussion in a work of this nature. Let us however endeavour to remove one or two stumbling-blocks in the way of their free and unbiassed consideration.

The usual argument then against any change of this nature has been, that the common forms of conveyancing, to which a well-known meaning is attached, and which, in fact, embody the wisdom of ages on the subject of the alienation of property, would be displaced by any legislation of this nature. Now we are enthusiasts in the love of these very forms: their value is inestimable; and so far as our own opinion and prepossessions are concerned, in any dealing with property which concerns ourselves, we would not dispense with one of them. We reverence every word of them, and if ever we married we would certainly jointure our wife in the words of Ignoramus: —

"Ego Ambidexter Ignoramus infeoffo te, uxorem meam Rosabellam in taile special de situ manerii de Longuewell cum capitali messuagio, et do tibi omnia et singula messuagia, tofta, crofta, cottagia et columbaria, molendina, fullonica, aquatica, ventritica, gardina, tenementa, boscos, subboscos, jampna, brueria, moras, mariscos salsos, mariscos freschos, juncaria, turbaria, alneta, moscheta, communia pasture, liberam warrennam, piscariam, faldagium, et

decimas garbarum, bladorum granorum, agnellorum, fœni, lini, cannabis, tallagium, stallagium, pontagium, picagium, escheta, catalla felonum, waviata extrahuras, wrecca maris."

Ignoramus, Act I. Scene 5.

But the abandonment of these forms we submit is not the question to be resolved. The real question now is, must these forms be detailed in every particular deed, or cannot their benefit be obtained by a reference to them? Would it not be of inestimable advantage first to have these common forms settled and approved by the most competent persons in the profession, and then to have the power of referring to them by using some very short form? Is this an impossible thing to be achieved? The forms are now to be found with certain variations, and in a more or less imperfect shape in the pigeon-holes of the conveyancer, whence they are taken and inserted in each particular deed, dealing with property according to its nature — one set for purchase deeds, another set for mortgages, a third for settlements of real estate, and a fourth for settlements of personal estate, and so on. Would it not be possible to give the public, yes, and the profession also, the benefit of these well-known forms on some other plan? and is not this a worthy object to which to draw the attention of persons competent to consider the matter, or are we to be precluded from even discussing this question?

We are very desirous however of not being misunderstood on one point which has been supposed to be intimately connected with any alteration of the nature alluded to. It has been supposed, that it must materially affect the profits of the profession. Now the opinion of this Journal has been already and distinctly avowed to be in favour of the proper remuneration of the profession. The interests committed to both branches of it are too dear to us all, not to be guarded with the utmost vigilance. The services performed cannot in our opinion be sufficiently estimated or rewarded. We need not say therefore, that we are not going to halloo on the public against the profession, or proclaim any war against its fees or emoluments. This in our eyes would be as idle and wicked as it would be vain and absurd. We shall, so far as we are able, support and protect the just rights and interests of the profession. But, to do this effectually, we

must not shut our eyes to what is passing around us. The consequences of a froward retention of old usages has been sufficiently shown in this Number; and we venture to assert that there is a strong impression on the public mind, and an expressed opinion by a considerable part of the profession, that a beneficial change may be made in shortening deeds.

There is surely, then, need for cautious but unbiassed inquiry as to whether there are any just grounds for this feeling. Let competent, experienced, and impartial men be directed to review our system of conveyancing, and report whether any alteration may be safely and properly made. If it be found that any further change is desirable, and it be thought moreover that the probable results of this change will be injurious to the profession, let it be seen whether it may not be accompanied by measures which will deprive it of this effect. Two of these at least occur to us which are well worthy of consideration. If a deed could be materially decreased in length by the proposed change, this surely would be, in the opinion of all, most desirable except on one consideration, that the remuneration for the deed is now measured by its length. But then it would be only fair and reasonable, if a great alteration as to length were introduced, that its length should cease to be the basis on which remuneration should be given, and that the skill, labour, and responsibility should be considered in awarding the proper remuneration. It would only be fair also to the profession, and would also tend to the interest of the public, that the law should, if necessary, be rendered more stringent as to the preparation of deeds and other documents by unprofessional and therefore unqualified persons. It is for the advantage of the community that all deeds and other formal instruments should be prepared by competent professional persons, and their rights which are purchased by large sums of money paid to the government, and by study and labour, should be amply protected.

All, however, that we now contend for is, that inquiry should be made. This inquiry is, as it appears to us, of quite as great importance to the interests of the profession as of the public. We are assuming that its results would materially shorten the length of deeds, and surely any thing

that shortens the labour of the lawyer would be for his benefit. We do not doubt, therefore, that this subject will receive the fair and candid consideration of the profession, and more particularly of that portion of the profession most qualified to judge of its merits — the conveyancers, and that very numerous body of solicitors who pay especial attention to conveyancing, who, from their education and practice, are little if at all inferior to many conveyancers.

As to the former class let us see what the Real Property Commissioners said: —

"We are bound in a particular manner to express our obligation to those gentlemen of the Bar who confine themselves to the department of conveyancing, on whom the practical administration of the law of Real Property at the present day chiefly falls, and whose opinions and established practice have long formed and must continue to form one of the foundations of that part of the law. These gentlemen, with hardly an exception, have liberally communicated to us the fruits of their experience and observation. *They have proved themselves to be free from prejudice and self-interest*, and have shown the utmost willingness to devote their time and thoughts to the public good. They have evinced a sincere desire to simplify and improve the law, to get rid of antiquated forms and fictions, and to render the transfer of real property more easy and less expensive. We derive considerable confidence from the reflection that we have the sanction of a large majority of this body for all the propositions which we have now to bring forward."

This was written in 1829. It is quite as applicable to the year 1844. We believe that the conveyancers are perfectly willing, at the present day, to enter into the consideration of this important change. With respect to the solicitors we gladly cite a portion of the Second Real Property Report, in which we fully and unreservedly concur.

"In considering the various effects which the establishment of a register will produce, we have turned our attention to the nature of the present emoluments of solicitors. The emoluments of the solicitors who conduct the business of conveyancing depend, in a great measure, on the number and length of deeds and abstracts, and the multiplication of copies: for all which they are very liberally paid. All these it is one of the objects, and of the probable results of a register to abridge. There is, however, a

considerable part of the duty of solicitors requiring much skill and care, and imposing great responsibility, for which they are at present very inadequately remunerated. We think it for the public good that solicitors should be liberally remunerated for their services. Considering the confidence reposed in them, and the intelligence and skill required from them, it is desirable they should be men of education and of honourable feelings, and should occupy a respectable station. *In our opinion, it would be highly inexpedient that the rank which they hold in the country should be lowered. It will, therefore, be necessary to provide for the remuneration of solicitors in a different manner.* Their fees for actual services should be higher than they are at present; and, perhaps, some mode of regulating those which now exist only with respect to costs and actions might be beneficially introduced. This subject requires great consideration and due attention to the suggestions which may be obtained from the leading members of that part of the profession."

We can only further say, that our own interests, as practising lawyers, would urge us to give full weight to these recommendations.

We must not close this article without briefly adverting to Mr. Wilson's able Pamphlet, which we have placed at its head. It proves sufficiently, if proof were wanting, that there is no unwillingness on the part of respectable solicitors to expose, with an unshrinking hand, the evils of the present system, or to employ large remedial measures. Without pledging ourselves to Mr. Wilson's plan, to which we shall return on a future occasion, we must, in justice, state that it demands full attention from the profession. Its main object is to save all trouble and expense in dealing with land *where the title is unencumbered.* We cannot now say more than that it has the advantage of being introduced in a style peculiarly elegant and captivating, showing at once the learning of the lawyer, and the feeling and good taste of the gentleman.

ART. XIII. — ON THE WRIT OF CERTIORARI IN CRIMINAL CASES.

The Practice of the Crown Side of the Court of Queen's Bench, with an Appendix containing the New Rules of Practice, a Collection of Practical Forms, Tables of Costs and Allowances, &c. By R. J. CORNER, Esq., Barrister-at-Law, and Mr. A. B. CORNER, of the Crown Office, London. Benning and Co. 1844.

AMONG the questions, respecting which the Criminal Law Commissioners have lately sought to obtain the opinions of their legal brethren, is one of no trifling importance, which "regards the removal of criminal proceedings, by certiorari or otherwise, from one court to another;" and, in order to ascertain whether any amendments are required in this branch of the law, it will be necessary to give a brief sketch of the existing practice.

A certiorari, so far as regards the criminal law, is a writ, directed, in the Queen's name, to the judges of inferior courts, commanding them to return into the Court of Queen's Bench any indictment or presentment that has been, or, in the case of misdemeanors, other than prosecutions for non-repair of bridges or highways[1], that may be preferred before them against some specified person, in order that the cause may be determined by the supreme criminal tribunal of the land.[2]

When, in consequence of the issuing of the writ, the indictment or presentment has been removed from the inferior court, the defendant must plead in the Court of Queen's Bench; after which issue is joined, and a record drawn up, which, if the case be a country one, may be taken down to the next assizes, either by the prosecutor or the defendant, and there entered at Nisi Prius among the

[1] 60 G. 3. c. 4. ss. 4. 10.

[2] 2 Bac. Abr. 9, 10.

list of causes: if, however, the proceedings be removed from the Central Criminal Court, or from the Middlesex or London Sessions, the cause will be tried in town, either at bar or at the sittings after term.

This writ, which is awarded during term by the Court of Queen's Bench, and in vacation by any one of the superior judges [1], may be *demanded* by the Attorney-General in all cases where the right of the Crown is in question, whether the application be made by him ostensibly on behalf of the prosecutor or defendant [2]: in other cases, the court or judge will exercise a discretionary power. But prosecutors may always obtain the writ, whatever the nature of the indictment may be [3], provided they can show, on affidavit, some satisfactory reason for making the application.[4]

Defendants, however, are not entitled to equal privileges; since indictments for certain offences, such as for keeping disorderly houses [5], for obtaining money or goods by false pretences [6], or for not repairing bridges [7], in cases where the inhabitants of the county are charged with the repair [8], cannot be removed by *them* from the court where the bills were found. Independently of these offences, for the strange selection of which by the legislature it would be impossible to assign any sensible reason, defendants are placed on the same footing as prosecutors, excepting only that the latter, on obtaining the writ, are fettered by no terms, while the former, unless in custody for want of bail, must first enter into recognizances, in such sum, and with such sureties, as the court or judge shall order, to appear and plead in the Court of Queen's Bench, and, at their own costs, to cause the issue to be tried at the next assizes, if the proceedings be removed from some country court, or in the next term, or at the sittings after such term, or at such other time as the court shall appoint, in the event of its being a town cause;

[1] 5 & 6 W. 4. c. 33. s. 1.; and 1 & 2 Vict. c. 45. s. 1.

[2] R. v. Clace, 4 Burr. 2458.

[3] See R. v. Davies, 5 T. R. 626.; R. v. Justices of Cumberland, 6 T. R. 194., 3 B. & P. 354., S. C. in error; R. v. Boultbee, 4 A. & E. 198.; R. v. Allen, 15 East, 341.; R. v. Spencer, 9 A. & E. 485.

[4] 5 & 6 W. 4. c. 33. s. 1.

[5] 25 G. 2. c. 36. s. 11.

[6] 7 & 8 G. 4. c. 29. s. 53.

[7] 1 Ann. stat. 1. c. 18. s. 5.

[8] R. v. Hamworth, 2 Stra. 900.

and further to give the prosecutor or his attorney [1] notice of trial, and, in case of conviction, to pay such costs to the prosecutor as the court shall assess.[2] If the defendant be in custody, he must be detained there until such recognizances are entered into, or until he be discharged by due course of law.[3]

Pausing here, the first incongruity, which cannot fail to strike the observer, is the invidious [4] distinction which prevails in favour of the Crown. The broad ground, which alone justifies the removal of an indictment by certiorari, is that a satisfactory trial cannot be obtained in the inferior court. If this be the case, every private person, whether prosecutor or defendant, should be entitled to demand a trial elsewhere: if this be not the case, why should the Attorney-General, on behalf of the Crown, be permitted to take a step productive alike of vexatious delays and ruinous expense? The defendant, in criminal proceedings, must pay his own costs, even though successful; he may therefore well complain of any privilege, which, being beneficial neither to the Crown nor the public, may, in bad times, become an engine of cruel oppression, and, even at the present day, must materially tend to harass and impoverish him. Nor is the defendant the less likely to feel, with acuteness, the injustice of this privilege, when he reflects that whatever causes may co-operate to render it impossible that his case should be fairly heard in the court below, he cannot, unless he be actually in custody, remove the proceedings into the Queen's Bench, without previously undertaking to cause the issue to be tried at his own costs—and this too, though he be entirely innocent of the offence which is imputed to him.

Another rule which, we conceive, requires amendment, is that by which defendants, charged with certain misdemeanors, are deprived of all power of having their conduct investigated before any other tribunal, than the court where the prosecutor has chosen to prefer the indictment. Why a party charged with obtaining money by false pretences

[1] 6 & 7 Vict. c. 20. s. 17.

[2] 5 & 6 W. & M. c. 11. ss. 2, 3.; 8 & 9 W. 3. c. 33.; 5 & 6 W. 4. c. 33. s. 2.; R. v. Hawdon, 11 A. & E. 143.; R. v. Hawdon, 1 Q. B. 464.

[3] 5 & 6 W. 4. c. 33. s. 2.

[4] So called by Williams J. in R. v. Boultbee, 4 A. & E. 507.

is to be debarred from a right to which a person who has embezzled the same amount is entitled, or why a fair trial is conclusively to be presumed, if the question before the sessions relate to the keeping of a gaming-house or a brothel, or to the non-repair of a bridge, but not, if it concern the omission to repair a highway, or the commission of any other nuisance, are questions to which no satisfactory answer can be given. The distinction is founded neither in sense nor in justice, and should no longer be permitted to prevail.

A more serious evil still remains to be noticed. A prosecutor may, as we have seen, obtain a writ to remove his indictment into the Court of Queen's Bench without the imposition of any terms; and the moment that the writ is issued he is at liberty to proceed, or not, with the trial as he shall think fit; while his witnesses, who were bound over to appear in the inferior court, are released from their obligation. The practical result of this state of the law is too frequently the following: the prosecutor is a mercenary man; he prefers some disgraceful charge, which for the present argument may be true or false, against a person of station; a bill is found, and the proceedings are removed into the Queen's Bench; intimation is then given to the defendant that, on the payment of a certain sum, no further steps shall be taken; the money is paid, and we hear no more of the matter. Thus, if the defendant be guilty, a flagrant violation of the law is shamelessly compounded; if he be innocent, unless he be a person of strong nerve, he is grossly pillaged. Again, the prosecutor may be a person of malignant disposition, determined, at all hazards, to ruin some humble object of his hatred. A specious falsehood is first told to the grand jury, either by the prosecutor himself, or by profligate witnesses, whom he can readily suborn, since they know full well that they practically incur no risk of an indictment for perjury, whatever statements they may make before that inquest; the jury find a true bill, and the indictment, as in the last case, is removed; the prosecutor refrains from proceeding to trial; the defendant, feeling that his character is compromised so long as the charge remains undetermined, is driven, at a ruinous expense, to make up the record, and to enter it

at the assizes. The case is called on; no prosecutor, no witnesses appear; the defendant is acquitted, and returns to his home a ruined, and still a suspected man.

We are aware that these abuses are not now of such frequent occurrence as they formerly were, because prosecutors, like defendants, are, by a statute of the last reign [1], obliged to found their application for a writ on some plausible reason; and, moreover, the judges of the Queen's Bench, possibly in consequence of the excessive press of business which devolves upon them, have discountenanced, as much as possible, applications of this nature: still we are firmly persuaded that, even at the present day, they occasionally, if not constantly, occur; and we confidently appeal to persons practically acquainted with the matter to support us in this assertion. If these writs of certiorari in criminal proceedings are still to be retained, and respecting their abolition we shall immediately offer some suggestions, we consider it indispensable that they shall only be granted to prosecutors, on the condition of their being bound, first to proceed with the trial at the earliest opportunity, and next, in the event of an acquittal, to pay such extra costs as, in consequence of the removal, the defendant has been compelled to incur; and further we deem it essential to justice that the witnesses should not be discharged from their obligation to appear and testify at the trial.

Having said thus much respecting the anomalies which exist in the practice of obtaining writs of certiorari, the next question which we propose to consider is, whether it be not both possible and expedient to abolish the writ in criminal proceedings. We have seen that the affidavit, on which the application for a certiorari is moved, must disclose some reasonable grounds for making it. These, in some cases, are defined by statute, as, for instance, if it be sought to remove from the sessions an indictment for the non-repair of a highway, it will be sufficient to show, by affidavit, that the right of the defendants to repair the highway will come in question [2]: for if such be the case, it can scarcely be expected that a tribunal,

[1] *5 & 6* W. 4. c. 33. s. 1.

[2] *5* W. & M. c. 11. s. 6.; *5 & 6* W. 4. c. 50. s. 95.; Corner's Crown-Office Forms, p. 32.

composed of country gentlemen, would be competent to decide a question, which must often depend on some abstruse principle of law. In other cases, it is generally stated either that difficult points of law are likely to arise; that the question is one fit to be tried by a special jury; that it will be necessary to have a view of the place in question; that local prejudices exist either against or in favour of the accused; that the circumstances are intricate; that it would be derogatory to the dignity of the defendant to stand at the bar of a criminal court, or that he could not, in that court, obtain the assistance of counsel of sufficient eminence.[1] It is not here meant that the court will certainly grant the rule, on an affidavit disclosing any one of these grounds separately; neither do we intend to say that it is necessary to state them all: but we cite these reasons, as being those which, either separately or collectively, are usually presented to the consideration of the court, and as affording a fair insight into the objects which the parties have in view in making the application.

Now, of these grounds, it is obvious that the last two are entitled to no sort of consideration. The former rests on the ridiculous assumption that disgrace attaches, not to the *proof* of the charge, but to the *place* where it is proved: the latter is altogether fallacious, since the ablest advocate in Westminster Hall will appear in any court, not indeed without a special retainer, but still at a less cost to the client[2], than will of necessity be incurred, should the proceedings be removed into the Queen's Bench, and the same counsel be there employed in conducting the defence. The objection to the inferior court, which is founded on the existence of local prejudices, is one which even now is of rare occurrence, and which, if stipendiary magistrates were appointed to preside at the sessions, could scarcely exist. If, however, on an indictment for election bribery, or on some other remarkable occasion, local party-feeling was found to prevail to such an extent, that a fair trial could not be had, either at the sessions or assizes, an obvious and simple remedy for this

[1] See form of affidavit in Corner's Crown Office, p. 31.

[2] *Sed quære* as to the expense. — Ed.

evil would be to enable either party to change the venue, on an application either to the court or to the committing magistrate. Of the remaining grounds, those which allege that the law is difficult of application, and that the facts are complicated, are obviously confined to indictments preferred at the sessions, and even with respect to such indictments would be entitled to far less weight, if professional chairmen were once established; while those which rest on the necessity for a special jury, and a view of the *locus in quo*, are the only two which apply to indictments found at the assizes, or at the Central Criminal Court. If, then, an act were passed enabling special jurors to be summoned to attend these courts [1], and authorising the presiding judge of every court which is competent to try an indictment, as also the several police magistrates [2], to make such orders respecting views as the justice of each case demands, it is clear that the necessity for obtaining a writ of certiorari, to remove proceedings from the assizes, or from the Old Bailey, would in all cases be obviated, while, even from the sessions, such writs would be rendered so much the less frequent, in proportion to the number of applications to remove, in which the necessity of obtaining a view is a material ingredient. As to the very few cases, in which it would be proper to remove indictments found at the sessions, either on the ground that abstruse points of law were likely to arise at the trial, or that the facts were such as ought to be submitted to the superior intelligence of a special jury, provision might be made for these, by authorising the justices at sessions to transmit the indictments to the assizes [3], and, in the event of their refusing to do so, by further empowering either party to apply to one of the superior judges for an order to that effect.

[1] This alteration was suggested in vol. xxxi. Law Mag. p. 271—273., where arguments in its favour are urged at some length.

[2] This alteration might be effected by simply extending to the judges sitting on the Crown side at the assizes, to the chairmen of the sessions, and to the police magistrates, the powers already conferred on the judges of the Superior Courts by 6 G. 4. c. 50. ss. 23, 24.

[3] The justices at sessions may even now, as it seems, exercise this power. R. v. Wetherell, R. & R. 381.; Turner's Case, 2 Lewin, C. C. 265.: but the act should place the question beyond all doubt.

We are not aware that by the adoption of these simple alterations any practical inconvenience could by possibility arise; while it is obvious that they would considerably diminish the laborious and perplexing duties of the Court of Queen's Bench, which is at present notoriously taxed very far beyond its strength, and would also cause material relief to the parties themselves in the important subject of costs. We are not prepared to show the extent of this relief, since the additional expenses incurred by removing criminal proceedings into the Court of Queen's Bench must of necessity vary much, in proportion to the length of the indictment, the number of the defendants, the extent of the opposition, and the delay that is occasioned; and moreover, the late alterations in the crown-office fees render it impossible to rely with any degree of certainty on the former averages. Still, we are amply warranted in asserting, that the extra costs, occasioned by removing proceedings by certiorari, must in all cases be considerable, and in some grievous; and if we have explained in our preceding remarks, that the objects, for which these costs are now incurred, might be attained at a far cheaper rate, and in a more simple and commodious manner, surely we are justified in proposing that the writ of *certiorari* in criminal cases be forthwith abolished.

ART. XIV.—THE LAW OF BANKRUPTCY AND INSOLVENCY.

An Act to amend the Law of Insolvency, Bankruptcy, and Execution, 7 & 8 Vict. c. 96. Royal Assent, 5th August 1844.

In all just and rational legislation upon the rights and duties arising out of the inabilities of parties to fulfil their pecuniary engagements, the first and most important object will be, to diminish the loss and the inconvenience which the creditor is made to suffer through the insolvency of the debtor, and to place him as nearly in the position in which

the engagements of the debtor entitled him to stand, as the altered circumstances of the debtor will permit. This being as far as possible secured, the next object will be, to relieve the debtor from all suffering, and from every inconvenience, not absolutely necessary for the purpose of enforcing the duty of payment to the extent of the debtor's own means, or of discouraging imprudence, and suppressing fraud and crime in others.

It would be difficult, if not impossible, to carry out these views fully, except by adopting a system which in all its parts should be framed in accordance with the principle stated above. In no country do the law-makers appear to have kept both these objects steadily in view. In England a systematic legislation on this subject can scarcely be said to have been attempted. The statute-book exhibits a constant course of oscillation between measures introduced solely for the protection of the rights of the creditor, and others of a contrary character, prompted by anxiety to alleviate the sufferings of the debtor, in which little attention is paid to the safety of the creditor.

It has begun to be felt that this alternate and unconnected legislation is not the best adapted for the commercial prosperity of the country, or for the purposes of ordinary life. A bill was submitted to Parliament on the 13th of May 1844 for the purpose of remodelling the law of insolvency, commercial and non-commercial, and reducing our conflicting legislation to one graduated system in conformity with the principles already stated. The measure so submitted had the benefit neither of party support nor of party opposition; and advanced no further than a second reading, notwithstanding this bill had been prepared by the direction of her Majesty's Government.

By the common law of England, the body of a freeman could not be held in custody except for some crime or breach of the peace. The power of arresting a defendant after judgment obtained against him, and even *pendente lite*, was given to the plaintiff in certain cases by a statute of Edward I., which had for its principal object the punctual fulfilment of commercial engagements. This proviso was afterwards extended to all cases in which a sum certain was demanded.

The object of the legislature in conferring this power upon creditors may be supposed to be fourfold: — first, to deter parties from entering into pecuniary engagements without a strong probability of their being able to fulfil those engagements. Secondly, by the fear of an arrest, to induce debtors, who require such a stimulus, to set about procuring the means of satisfying their liabilities. Thirdly, by the coercion of actual imprisonment to obtain payment out of such funds as would otherwise not be accessible. Fourthly, as a punishment for the wrong done to the creditor. Each of these objects was, no doubt, in many cases attained. But where the debtor was actually imprisoned, it frequently happened that he possessed no lands which could be made available to the creditor to a greater extent than might be attained to by a writ of *elegit*, and that he had no secret funds at his disposal. Under such circumstances, the imprisonment could operate only by way of punishment, or as a means of obtaining payment by working upon the compassionate feelings of others. The power of imprisonment was to be exercised at the sole discretion of the offended creditor; and imprisonment was frequently prolonged so as to create much unprofitable suffering — sometimes from suspicions entertained by the creditor of the existence of concealed funds — sometimes from the hope of acting upon the compassion of relations — sometimes from ill-will engendered by the loss which the creditor has sustained; and, it is to be feared, not unfrequently, as the means of obtaining some unjust preference or collateral benefit, or of enforcing a compliance with some other unreasonable demand. The power of taking the person of the debtor in execution was, when exercised, attended with this singular disadvantage to the creditor himself. As the body of a freeman was considered to be above all pecuniary estimation, the detention of the person was regarded as complete satisfaction for the debt upon which that detention took place, whatever might be the amount. The creditor was therefore shut out from all other remedies for obtaining payment of his demand, unless his rights were revived by the escape of the debtor, or, since the statute 21 Jac. 1. c. 24., by his death during the imprisonment. The debt, however great, was treated

as merged in the captivity of the debtor, as a term certain of 10,000 years merges in the uncertain and inappreciable duration of an estate for life.

The misery resulting to debtors and their families from the power given to their creditors of taking their persons in execution, without producing any corresponding benefit to the creditors, has induced the legislature in repeated instances to interpose by temporary palliatives. In 1836 the Common Law Commissioners made a report in which they recommended the abolition of arrest before judgment upon what is technically, but now somewhat incorrectly, called *mesne* process. This recommendation was adopted by the legislature, and was carried out by the 1 & 2 Vict. c. 110. The report also recommended the abolition of arrest in execution, or upon final process, and the substitution of more stringent remedies against the property of the execution debtor; by which it was hoped that all his available means might be placed within the reach of the judgment creditor. The act of 1 & 2 Vict. c. 110. did give the more extended remedies against property, but it left the power of imprisoning after judgment in the hands of the creditor. It was probably considered that no writ of *fieri facias* or other process could be made to operate effectually upon property which the debtor had fraudulently invested in the names of others, or upon property which, though standing in the debtor's own name, was locally situated beyond the reach of British law, and that the fear of imprisonment and its attendant disgrace was often productive of exertions which benefited the creditor, and which a mere sense of justice would have failed to produce. The evils resulting from the unrestrained power in the hands of the creditor, of taking and detaining the person of his debtor in execution, was felt to require a more summary and effectual remedy than could be obtained in the Insolvent Debtors' Court, acting under the provisions of the 1 & 2 Vict. c. 110. With this view the act of the 5 & 6 Vict. c. 116. was passed.

By this act two classes of persons are entitled to be relieved from actual, and protected against impending, imprisonment. These measures were accompanied by others which were intended to operate as safeguards to the interests of the creditors. In providing for the latter object, however, the legislature

appears to have been less successful. By the 7 & 8 Vict. c. 96. the relief afforded to the debtor against imprisonment is extended; but that statute has done little towards bettering the position of the creditor.

The description applied to the first class of persons relieved and protected from imprisonment by the statutes 5 & 6 Vict. c. 116., and 7 & 8 Vict. c. 96., is, "any person not being a trader within the meaning of the statutes *now* in force relating to bankrupts." The description of the second class is, "any person, being such trader, but owing debts amounting in the whole to less than 300*l*."

The first of these descriptions has given rise to a question of some difficulty. The act of 5 & 6 Vict. c. 116. received the Royal assent on the 12th of August 1843, which was the same day on which the Royal assent was given to the 5 & 6 Vict. c. 122., which extends the provisions of the bankrupt laws to apothecaries, carriers, and certain other traders, who were not liable to a commission or fiat under the former laws relating to bankruptcy. But the latter statute was not to come into operation till the 11th of November, 1843. It has therefore been held by the learned Commissioners of the Court of Bankruptcy, that a person carrying on the trade of an apothecary, carrier, &c., which trades were first brought within the operation of the bankrupt law, by the act of 5 & 6 Vict. c. 122., is entitled to the benefit of its provisions, however large the amount of his debts. The persons intended to be included in the first of the above-mentioned classes are, evidently, those who would not be entitled to relief through the bankruptcy laws, a condition which ceased to apply to apothecaries, carriers, &c. as soon as those laws were extended to such traders. But whatever may be presumed with respect to the intention of the legislature, the words "now in force" were considered too precise to admit of two constructions. This difficulty appears to be removed by the 7 & 8 Vict. c. 96. That statute gives, in a schedule, the form of a petition, in which the debtor negatives his being a trader within the meaning of the statutes "now" (that is, at the time of presenting the petition) in force relating to bankrupts, the truth of which statement is verified by the petitioner's affidavit. This appears to be a legislative declaration that the character

of trader or non-trader is to depend, as it undoubtedly ought to do, upon the state of the law existing at the time of the petition. In another class of cases the court or commissioner appears to have no power to relieve under circumstances in which it cannot have been intended to withhold relief. Where a trader is indebted in 300*l.* to parties who are indebted to him in 200*l.*, the actual amount of debt owing from him will be 300*l.*, although the available amount is only 100*l.* In this case the debtor would not probably be considered to be entitled to the benefit of the two acts in question, though no fiat could issue. From the obvious intention of the legislature to restrict the operation of the 5 & 6 Vict. c. 116. and the 7 & 8 Vict. c. 96. to cases in which no relief can be obtained under the bankrupt laws, there is perhaps not much difficulty in a question that is sometimes raised, whether a person who has contracted debts whilst a trader, but who has ceased to trade before the presenting of his petition, is entitled to the benefit of these acts as a non-trader, the discontinuance of the trade, whether *bonâ fide*, or resorted to solely with reference to the acts, not exempting the party from the operation of the bankrupt laws, or depriving him of the advantage which those laws afford.

The *trader* who applies for his discharge, or who seeks for protection under these acts, must be a person owing, in the whole, debts amounting to less than 300*l.* An allegation to this effect is contained in the trader's petition, but no mode is prescribed for testing the truth of the allegation, nor is there any provision, except an indictment for perjury upon the affidavit, as to the consequences of such an allegation being shown to be untrue. It seems to be unreasonable that proceedings taken under these acts should be liable to be rendered altogether void, by the discovery of some transaction which brings the debt up to 300*l.* It would, perhaps, be more convenient if the decision of the court or the commissioner, upon the first examination, were directed to be so far binding as to legalise all conveyances, &c. under the interim and final order of protection, and to be incapable of being impeached, except by a proceeding before the court or the commissioner by whom the protection was granted. At present there seems to be no reason why a debt long since barred by the Statute

of Limitations, should not be set up for the purposes of ousting the small trader from the benefit of these acts, or why proceedings under them should not be disturbed at any distance of time, inasmuch as the Statute of Limitations merely takes away the remedy by *action*, and does not destroy the debt itself.

No day being mentioned in either act for the commencement of its operation, they take effect respectively from the date of the royal assent. The legislature has not followed the course adopted in the Scotch Act of 5 & 6 W. 4. c. 70., which abolishes imprisonment for any debt not exceeding 8*l.* 6*s.* 8*d.* (or 100*l.* Scots, the debasement of the currency being exactly twelve times as great in Scotland as in England), but reserves to the creditor the power of imprisoning for debts incurred before the passing of the act (9th September, 1835), provided the imprisonment should take place before the 1st of January, 1840. By the Scotch statute the liberation of the debtor is postponed, upon the principle that the creditor ought not to be deprived of the security of a law in reliance upon which he had been induced to advance his money or to part with his goods. In framing the English statutes, the benefit resulting to the creditor from being armed with the terrors of an arrest appears to have been considered as too minute to justify a prolongation of the sufferings of a numerous body of debtors.

The debtor, whether in custody or at large, who comes within the description applied to either of the two classes mentioned above, is entitled to be discharged from custody, or protected against arrest, upon the presentment of a petition in the form prescribed by the schedule to the last act, and the granting of an interim order of protection, whether the facts contained in that petition are true or false. No notice is required to be given to the party at whose suit the debtor is in custody. There is no reason, indeed, for requiring notice, since, if it were given, the court or commissioner to whom the application for a discharge or for a protection is made appear to have no power to inquire into the truth of the matters alleged. Where, therefore, the petitioning debtor sees reason to apprehend that any material statement will be successfully controverted, he contents himself with the oppor-

tunity afforded him by the interim order of protection, for removing his person and his property beyond the reach of his creditors, and out of the jurisdiction of the court, before the day appointed for his examination, and gives the court or the commissioner no further trouble. This is an evil, however, which might perhaps be easily remedied by providing that the petitioner, if in custody, should remain there, or, if at large, should give security for his appearance, or place himself in the custody of the court until the examination had taken place.

The words of the 5 & 6 Vict. c. 116. s. 1. are, "*And it shall thereupon be lawful* for the judge or commissioner of the Court of Bankruptcy to whom, by any order of the court, the same shall be referred, or for the commissioner in the country to whom the petition shall be presented, to give, *upon the filing* of such petition, a protection to the prisoner from all process whatever against his person or property." In the vague and ambiguous language of modern statutes the terms "it shall be lawful" to do a certain act, are frequently employed to express a *command* that the act *shall* be done. In order to give effect to this apparent intention of the legislature, the courts of law have framed a rule of construction, not always of easy application, that wherever an act is authorised to be done *for the sake of justice*, or *for the public good*, the words "it shall be lawful," must be taken to mean "shall" or "it is hereby required." The commissioners of the Court of Bankruptcy, considering the clause to come within the above rule, appear to have been of opinion at first that they were bound, upon the presentment of a petition drawn up in the form prescribed, and supported by the affidavit of the petitioner, asserting, in general terms, the truth of the matters contained in the petition, to grant the interim order of protection as a matter of course. But looking at the numerous cases of persons, the debts of more than one of whom have exceeded 50,000*l.*, who have obtained their discharge from custody, and have removed with their property to foreign countries, without rendering any account, it is understood that the commissioners have begun to doubt whether the important first step of granting the interim order of protection is so entirely a ministerial act as was at first supposed.

The commissioner is empowered to direct, in the final order, that some allowance shall be made for the support of the petitioner out of *his* estate and effects. By this is meant that the petitioner is to be supported out of an estate once his, but which has been transferred to his creditors in lieu of larger amounts due to them. It is a tax for the support of the insolvent, to be levied exclusively upon those who have already suffered by his insolvency, instead of throwing the burthen on his friends or on the public. This is borrowed from the English bankrupt law. In France, and other continental states, the allowance of aliments to the insolvent and his family, depends upon the decision of a majority of the creditors, though, if that decision is favourable, the *amount* of the aliments, and the mode of affording them, is left to the authorities; yet in those countries we find no bankruptcy fund, as here, out of which the allowance might be taken without harshness to the debtor or injustice to the creditor.

Upon obtaining the final order, the petitioner is protected from all actions in respect of any debt contracted before the filing of the petition; and, on the other hand, all property acquired by the petitioner after the order, may, under certain conditions, be made available for the payment of his debts. This appears to be a much more convenient course than that provided by the Roman law of *cessio bonorum*, through which Cæsar sought and obtained popularity amongst the poorer citizens. The *Lex Julia* protects from imprisonment the insolvent debtor — not chargeable with fraud — who *withdraws himself* from his property (*cedit bonis*), or, in other words, abandons it to his creditors. This law of *cession*, which has been adopted with respect to non-traders in Scotland, France, and nearly all the continental states, after taking the debtor's present property, protects his person, but leaves him open to actions and also to executions against his after-acquired property, at the suit of individual creditors, both old and new. The new system is also preferable to the continental law of bankruptcy, under which, unless there be a composition (concordat), the bankruptcy is worked by distributing the effects, leaving the bankrupt, after the final dividend, liable to the action of each creditor for the un-

satisfied portion of his claims. The comparative merits of the system introduced by the 5 & 6 Vict. c. 116. ss. 9, 10., and of the *English* law of bankruptcy, will be considered in our next Number.

By the acts in question, the petitioner is to be a person who "shall have resided twelve calendar months" within the district. It is probable that the legislature meant that the period of residence should be twelve months *next* before the filing of the petition. But as this intention, if it existed, is not expressed, it has been considered that any twelve months, though not consecutive, will be sufficient. There seems, therefore, to be no reason why a residence within the district during the first twelve months of the petitioner's existence should not be regarded as bringing him within the terms of the enactment.

The petition is required to be signed by the petitioner in the presence of a person described as attorney or "agent in the matter of the said petition." It is understood that from the frequent use of the word "agent," when coupled with the word "attorney," as denoting an attorney who acts for the attorney immediately employed by the client, it has been supposed that the agent referred to in this form must be an attorney. This may perhaps be regarded as a somewhat forced construction to put upon the words "agent *in the matter of the said petition.*" The commissioners, however, feeling probably the inconvenience of allowing insolvents to be in the hands of persons over whom no salutary control could be exercised, have, it is believed, decided that the "agent" must be an "attorney at law." The form of attestation appears to require that *some* agent should be employed; which may often be a hardship upon the petitioner.

After the expiration of the time allowed by the interim order, or any renewal thereof, the petitioner who has been discharged from custody under it, may be again taken in execution. It is not stated whether fresh process must issue in such case. There seems to be no reason why the sheriff should not be empowered to retake the petitioner, or his property, if they can be found, upon process already executed, unless such process has been actually returned.

By the twelfth section of the 7 & 8 Vict. c. 96. it is

enacted, that when the assignee accepts a lease, or an agreement for a lease, to which the petitioner is entitled, "the said petitioner shall not be liable to pay any rent accruing after the filing of his petition, nor be in any manner sued after such acceptance in respect of any *subsequent* non-observance or non-performance of the conditions, covenants, &c." According to strict grammatical construction, the word "subsequent" would refer to the acceptance, whereas it ought, in justice, to be made to refer to the filing of the petition; as there can be no reason why liability to conditions and covenants should continue longer than liability to the rent.

There appears to be some confusion in the twenty-second and twenty-fourth sections of the 7 & 8 Vict. c. 96., as to the extent of the protection afforded by the final order. The twenty-second section protects the petitioner against the claims of indorsees or holders of negotiable securities, but it contains no provision in respect of the claims of parties who, as drawers, indorsers, or acceptors, may be called upon to pay the amount of bills for which the petitioner may be ultimately liable. The twenty-fourth section enumerates several species of debts which are to disentitle to the benefit of the acts. In this enumeration we find no mention of the costs of a suit in the ecclesiastical court for defamation, the costs of a vexatious defence, or the damages recovered in a suit for a malicious prosecution; nor is he excluded from the benefit of the acts by fraudulent preference. A voluntary preference may be legally fraudulent without involving moral guilt; but it may exist in a form quite as odious as fraud in contracting a debt. On the other hand, a person guilty of a breach of trust is excluded from the benefit of the acts. This was no doubt meant to apply to breaches of trust for the personal benefit of the trustee; but, as the clause stands, it will operate against a trustee who, to save the *cestui que trust* and his family from ruin, has, at his own personal risk, advanced money upon leasehold security, &c., where he was authorised only to take freehold security.

A great mass of suffering has been removed by the clauses for abolishing arrest upon final process in actions for debts not exceeding 20*l.* This enactment might perhaps be advantageously extended to other pecuniary demands which

are not strictly *debts*,—as the liability of the drawer of a bill of exchange, or of the indorser of a bill or note, and other collateral engagements.

Nothing in the shape of an equivalent is given to creditors for the loss of the coercion of imprisonment in cases of small debts. This might, without difficulty, be provided by a stop upon salaries, wages, &c., according to the Prussian ordinance of 24th January, 1843, to be noticed on a future occasion.

The power of imprisoning for fraud is given to the judge who "tries the cause." This seems to leave the case of a judgment by default, or on demurrer, or other issue in law, unprovided for.

Some difficulty has been supposed to arise upon the interpretation clause (sect. 73.) of the last act. We have seen that by the ninth section of the 5 & 6 Vict. c. 116. the assignees are entitled to claim, in the mode there pointed out, all property acquired by the petitioner after the making of the final order. By the 7 & 8 Vict. c. 96. s. 73. it is stated that in construing that act, the word "property" shall mean and include, &c.—"and all the future estate, right, title, interest, and trust of such petitioner in or to any real or personal estate and effects, within this realm or abroad, which such petitioner may purchase, or which may revert, descend, be devised, or be bequeathed or come to him *before he shall have obtained his final order.*" It has been suggested that these last words impliedly exclude from the operation of the act "properly coming to the petitioner *after* the obtaining of the final order." But it is to be remembered that, under the former act, the after-acquired property was not to vest in the assignee, in the same manner as his previous property, but was made the subject of a *claim* by the assignee, to be decided upon by the commissioner before the property could vest in the assignee.

The 5 & 6 Vict. c. 116. contained no provisions respecting the property of the petitioner in case the final order should be refused. This omission is supplied by the 7 & 8 Vict. c. 96. s. 16., by which the property is, upon such refusal, to revest in the petitioner, subject to the acts done by the assignee in the mean time. It may be questionable whether the delinquency upon which the refusal proceeds, should entitle the

petitioner to withhold from his creditors the partial satisfaction which the property in the hands of the assignee might produce. After an adjudication that the petitioner is not entitled to his discharge, it can hardly be said that he is the most proper person to administer the property; and it is difficult to see what right he has to require that the fund should be placed at his disposal, instead of being applied in rateable diminution of the liabilities which he has improperly incurred.

The great principle of the enactments contained in the 5 & 6 Vict. c. 116., and the 7 & 8 Vict. c. 96., appears to be that mere insolvency is not unnecessarily to be subjected to inconvenience or suffering, and that punishment is to be reserved for cases in which the liabilities of the insolvent have their origin in misconduct, or in which payment is contumaciously withheld, or in which the means of payment have been fraudulently diminished. In pointing out what appeared to be errors of detail, it has been our object to assist in carrying out the important principle of the enactments in which they occur. We have little doubt that this will be provided for by an amendment act in the next session, — if, indeed, the opportunity be not taken for consolidating and amending the whole law of bankruptcy and insolvency, for which we know the profession is anxious, for which the materials have been collected, and towards which the important step above alluded to has already been taken.

CORRESPONDENCE.

[In conducting this Journal we shall be willing under this head to insert any letters in opposition to the views maintained in our pages. But of course we expect that any such letters shall be in temperate language; and we may also hint that they must not be too long, as the space to be devoted to them is very limited.]

WE deem it our duty to give every publicity to the following interesting letter from the learned, eloquent, and venerable Lord President Hope, in defence of his friend and predecessor Lord Braxfield, who, with the interval of Lord Eskgrove, preceded him as Lord Justice Clerk, an office held by the Lord President for some years before his elevation to the chair of the other court.

To the Editor of Blackwood's Magazine.

SIR, Edinburgh, 25th October 1844.

I did not read Mr. Lockhart's "Life of Sir Walter Scott," and therefore it was only lately, and by mere accident, I heard that he had inserted an anecdote of Lord Braxfield, which, if it had been true, must for ever load his memory with indelible infamy. The story, in substance, I understand to be this — That Lord Braxfield once tried a man for forgery at the Circuit at *Dumfries*, who was not merely an acquaintance, but an intimate friend of his Lordship, with whom he used to play at chess: That he did this as coolly as if he had been a perfect stranger: That the man was found guilty: That he pronounced sentence of death upon him; and then added, "Now, John, I think I have *checkmated* you now." A more unfeeling and brutal conduct it is hardly possible to imagine. The moment I heard the story I contradicted it; as, from my personal knowledge of Lord Braxfield, I was certain that it could not be true. Lord Braxfield certainly was not a polished man in his manners; and now-a-days especially would be thought a coarse man. But he was a kind-hearted man, and a warm and steady friend — intimately acquainted with all my family, and much esteemed by them all. I was under great obligations to him for the countenance he showed me when I came to the bar, just sixty years ago, and therefore I was resolved to probe the matter

to the bottom. For that purpose, I directed the records of the South Circuit to be carefully searched, and the result is, that Lord Braxfield *never tried any man for forgery at Dumfries.* But I was not satisfied with this, as it might have been said that Sir Walter had only mistaken the town, and that the thing might have happened at some of the other Circuit towns. Therefore I then directed a search to be made of the records of all the other Circuits in Scotland, during the whole time that Lord Braxfield sat on the Justiciary Bench; and the result is, that his Lordship never tried any man for forgery at any of the Circuits, *except once at Stirling;* and then the culprit, instead of being a friend, or even a common acquaintance of Lord Braxfield's, *was a miserable shopkeeper in the town of Falkirk,* whose very name it is hardly possible he could have heard till he read it in the indictment. Therefore I think I have effectually cleared his character from the ineffable infamy of such brutality.

I understand that Mr. Lockhart became completely satisfied that this story did not apply to Lord Braxfield; and therefore has set it down, in his second edition, to the credit, or rather to the discredit, not of Lord Braxfield, but of a "*certain judge.*" But this does not sufficiently clear Lord Braxfield of it; because thousands may never see his second edition, or, if they did, might think that the story still related to Lord Braxfield, but that Mr. Lockhart had suppressed his name out of delicacy to his family; and therefore, as your excellent Magazine has a more extensive circulation in Scotland than the *Quarterly Review,* I beg of you to give this letter an early place. I understand one circumstance which satisfied Mr. Lockhart that the story did not apply to Lord Braxfield is, that the family had assured him that he never played at chess—a fact of which I could also have assured Mr. Lockhart. But the search of the records of Justiciary, which I directed to be made, is the most satisfactory refutation of the infamous calumny; and I cannot imagine how Sir Walter could have believed it for a moment. Certainly he would not, if he had known Lord Braxfield as intimately as I did. I owe a debt of gratitude to his memory, and am happy to have an opportunity of repaying it. I am, &c.

C. Hope.

Lord Braxfield was one of the greatest lawyers that ever appeared in Scotland, and a man of most acute and vigorous understanding. His manners were, as the Lord President admits, somewhat coarse, though the use of the Scottish dialect in all its *breadth* made them perhaps appear more coarse than they really

were; for in female society he was courteous and polite, like a gentleman of the olden time. He was one of the most upright and honest of men; all his sentiments were those of the highest honour; he had an instinctive and irrepressible scorn of mean and base conduct in whomsoever he observed it; and his disposition was kindly, for his feelings were warmer than his temper was hasty, and that haste was really the principal fault ever found in him.

It would therefore have been on every account most unfortunate had this fiction continued current; and there is great reason both for the Bench and the Bar to thank the Lord President for a proceeding which must extinguish it at once and for ever. But though this is now fully accomplished, more remains to be done. We must express our astonishment that Sir Walter Scott, whose "old friend," his biographer says, Lord Braxfield was, should have chosen to make his Lordship the subject of such a narrative at the Sovereign's table — who (says Mr. Lockhart) never forgot it, and often repeated it — with what additional fancies is not mentioned; but such stories "never lose in the repeating." Another thing should have struck Sir Walter Scott. The supposed convict is described as a "country *gentleman of good fortune*" residing near Dumfries. Could Sir Walter really suppose so gross a scene ever could have been enacted respecting such a person, without being well remembered by all, and by all reprobated? Certain it is, that no judge now would remain a week on the Bench after such a proceeding.

We also entertained some doubt as to the addition made of the cocked hat in the original story; and as to this we caused some inquiry to be made. A perfectly well-informed person writes as follows: — "As to the practice of the criminal judges generally, there is no doubt about it. In all my memory, the presiding judge in the high court, and the judge pronouncing sentence on circuit, has put on the cocked hat, with one exception. I am informed that President Hope, while Justice Clerk (which he was for a short time after the death of Lord Eskgrove), did not use it, considering it as an innovation from English practice. But I well remember that Eskgrove did use it, and all the other judges since his time have done so; Justice Clerk Boyle always. It is very singular that I can find no one who positively recollects whether Lord Braxfield used it or not; but it is strongly to be presumed from Eskgrove's practice. I am reminded that in the trial of Margarot for sedition, when he attacked Braxfield, and Lord Henderland took the chair, he put on his cocked hat to indicate that he in that matter was to act as presiding judge."

SELECTION

OF

ADJUDGED POINTS

RECENTLY REPORTED.

[An Index to these adjudged points, and a List of Cases, will be found at the end. After much deliberation we have come to the conclusion that a Quarterly Digest of *all* the reported cases is unsuitable to a work of this nature. We find, moreover, that there is already a Quarterly Digest, which has been published in a separate form, and continued for a series of years without interruption.]

JOHNSTONE v. BEATTIE. 10 Cla. & Fin. 42.

Foreign Guardians. — Jurisdiction to appoint English ones on the Infant coming to England.

IF a Scotch infant, having property and guardians in Scotland, come to England, the Lord Chancellor may appoint guardians in this country where the care and custody of the child is unprovided for. This, after much controversy and difference of opinion, was finally decided by the House of Lords in the above case, which proceeds upon the principle that foreign guardians have no authority here, and that their rights and duties cannot be recognized by the English Courts with reference to a child residing in this country; and therefore that an order for the appointment of guardians by the Lord Chancellor is under such circumstances a matter of course. Independently of the reason of the thing, a case considered precisely in point before Lord Hardwicke[1] was much relied upon by Lord Cottenham, from whose decision, when Chancellor, the appeal had been taken to the House of Lords;

[1] Ex parte Watkins, 2 Ves. Sen. 470. July, 1752. Petition that the Court would appoint a guardian of the personal estate of Anne Watkins an infant. The Governor of the Leeward Islands had appointed a guardian; but that failed as soon as the infant came to England; and there being no one before the Court who had a legal right to the guardianship, it devolved on the Court, which could now appoint, the infant being resident here. The question was which of the parties applying was fittest.

LORD CHANCELLOR. "It is not for me to determine. It must go to the Master."

where judgment of affirmance was carried, after long debate, by a majority of 3 to 2; the Lord Chancellor and Lords Cottenham and Langdale supporting the order complained of, and Lords Brougham and Campbell dissenting from it.

It was also held that a permanent appointment of Guardians by the Lord Chancellor ought not to take place without a previous reference to the Master: and this, as appears by the case adverted to, was likewise the opinion of Lord Hardwicke.

In the Matter of the Princess Bariatinski. 1 Phil. 375.

Lunacy — Alien.

An alien may be the subject of a Commission of Lunacy. This was decided by the Lord Chancellor in the case of the Russian Princess Bariatinski, where it was insisted that the person intrusted with the care and commitment of lunatics[1] in this country had no right to interfere with a party on whom a foreign jurisdiction had attached.[2] But upon the principle that the jurisdiction exercised under the Sign Manual in Lunacy was not an adverse but a protective jurisdiction, having for its exclusive object the benefit of the lunatic, the Lord Chancellor, in the absence of any precedents cited to the contrary, held it to be the duty of the Court to throw its shield over the person and the property of an individual in the situation of this princess — although an alien. "The Crown," his Lordship observed, "does not take possession of the lunatic's property for its own benefit; but, by its officers, takes it for the purpose of appropriating the income to the party's maintenance, and accumulating the surplus for him in case he recovers, or applying it according to the directions of his will, if he happen to have made one before he became insane. What could be more humane, or more consistent with the general character of the law of England, than such a course?"

In the Matter of Dyce Sombre. 1 Phil. 436.

Superseding a Commission of Lunacy.

In order to sustain a petition for superseding a Commission of Lunacy the lunatic must either appear, or be in such a situation as that he may be personally examined under the authority of the

[1] The care and commitment of idiots and lunatics do not belong to the Chancellor or Lord Keeper *ex officio*, but by virtue of a warrant under the royal sign manual, which may be granted to any other officer of the crown. The commission, however, and the superintendence of the conduct of the committee originate in the inherent jurisdiction of the Great Seal. 2 Sh. & Lef. 432.

[2] Dean of St. Paul's case, Vin. Abr. Tit. Lunatic (A. 3). Vattel, Law of Nations, B. 2. Ch. 8.

Great Seal. In this case the Lord Chancellor said, "I know of no instance where a Commission has been superseded without the appearance of the lunatic. The party is not found lunatic upon affidavit: the inquiry takes place under the Commission; witnesses are examined *vivâ voce*, the party himself appearing and being also examined by the jury. It would be extraordinary if, under such circumstances, the commission could be superseded upon the evidence of affidavits merely. Lord Eldon said it was a much more delicate matter superseding than issuing a commission. Issuing the commission is merely for inquiry: superseding it terminates the inquiry. I can conceive a case in which a commission might be superseded without the party's actually appearing in court: for instance, the case of a person labouring under some physical infirmity, so that he could not be brought up. But he must still, I apprehend, be in such a situation as that he may be examined by persons acting under the authority of the Great Seal."

WENTWORTH v. TUBB. 2 You. & Coll. 537.

Lunacy — Costs of an unsuccessful Traverse.

An attempt to traverse an inquisition of lunacy having proved unsuccessful, the question arose whether the costs incurred should be allowed out of the lunatic's estate. It was conceded that if the lunatic had been living, the Lord Chancellor might have exercised a discretion in favour of the solicitor; but here the lunatic was dead; and it was contended that it would be going too far to hold that the costs were payable as a debt out of his estate. Vice-Chancellor Knight Bruce, however, was of the contrary opinion. "It cannot be," his Honour observed, "that an alleged lunatic is so far deprived of the means of defending himself, as to be prevented from having the benefit of a solicitor, unless the solicitor be employed by a third party, or lose his costs if the proceedings are unsuccessful: yet that would be the result if the present objections were allowed. I apprehend the law to be, that if a man is alleged to be a lunatic, whether truly or not, he may employ (as far as he can be said to exercise volition on the subject) a solicitor, not only to resist the commission, but afterwards for the purpose of traversing it; and that although the proceedings fail, the lunatic's estate is liable for the costs, subject to this, that if anything fraudulent or unfair, or perhaps I may go as far as to say frivolous or litigious, appears to have taken place on the part of the solicitor, the Court may say that no debt arises. There is no evidence of that nature here; and therefore the amount of costs not being impeached, I must take it to be a fair debt."

PARKER v. MARCHANT. 1 Phil. 356.

Whether a Balance at a Banker's is Ready Money or only a Debt.

Where the intention is plain, the words "ready money," occurring in a will, are sufficient to pass the testator's balance at his banker's, although, in strictness of language, such balance is only a debt. This point was the subject of very copious argument upon an appeal from a decree of Vice-Chancellor Knight Bruce, whose decision was affirmed by the Lord Chancellor; his Lordship observing that, "as from the frame of the will there was strong reason to conclude that the testator intended the money at his banker's to pass, the only question was, whether the terms 'ready money' he had used were sufficient for the purpose. Now, in construing a will of personal property, the terms are to be interpreted according to the ordinary acceptation of language in the transactions of mankind; and nobody can doubt that, in the ordinary use of language, money at a banker's would be considered ready money. Every body speaks of the sum which he has at his banker's as money:—'My money at my banker's' is a usual mode of expression. And it is emphatically ready money, because it is placed there for the purpose of being ready when occasion requires; it is received upon the understanding that it shall be so ready. If a man goes to his banker, the money is counted over to him on the table. If he sends an order for the money, it is counted out to his servant or the person in whose favour that order is made. It is therefore ready money according to the ordinary acceptation of these terms among mankind." This being the case, and it being moreover evident that such was the intention of the testator, his Lordship concurred with the Vice-Chancellor in holding that the words "ready money" were sufficient to pass the balance at the banker's.

This decision may at first sight appear to run counter to Carr v. Carr[1], where Sir W. Grant gave a celebrated judgment. In that case the testator bequeathed to the plaintiff "whatever debts might be due to him (the testator) at the time of his death;" and the question was, whether a cash balance at a banker's passed by this bequest. It was contended that such balance could not be considered a debt in the contemplation of the testator; for, though strictly speaking it was a debt, yet it was, in the common opinion of mankind, regarded as money *deposited* with the banker. Sir W. Grant decided that the balance ought to pass as a debt. It was not, he said, a *depositum*. A sealed bag of money might, indeed, be a *depositum;* but money paid in generally to a banker could not be so considered. Money had no earmark; and, when paid

[1] 1 Mer. 541. n.

into a banker's, he always opens a Debtor and Creditor account with the payor. The balance, therefore, must be considered as a debt, and must pass by that description. Such was the opinion of Sir W. Grant, which was adverted to in the following terms by the Lord Chancellor in disposing of Parker v. Marchant:—"There being in Carr v. Carr a distinct bequest of debts owing to the testator, and there being nothing to show a contrary intention on the face of that will, Sir W. Grant decided, after some consideration, that the banker's balance would pass under the description of a debt; and nobody can question the correctness of that decision. But it does not appear from any thing that Sir W. Grant stated on that occasion, assuming the report to be correct, that, if there had been sufficient on the face of the will to manifest an intention that the balance at the banker's should pass under the description of ready money, he would not have given effect to it." The cases of Parker v. Marchant and Carr *v.* Carr, therefore, may well stand together.

It must be observed that, in Parker v. Marchant, the sums in the banker's hands were balances upon ordinary banking accounts of no larger amount than the average sums usually kept at his banker's by the testator. If this had been otherwise, the Lord Chancellor held that the circumstance would have deserved consideration.

MIDLAND COUNTIES RAILWAY COMPANY v. OSWYN. 1 Coll. 78.

Bequest of "Money, Goods, Chattels, Estates, and Effects" will pass Real Property.

Vice-Chancellor Knight Bruce has decided that a bequest of "money, goods, chattels, estates, and effects" will pass real estate; his Honour thus expressing himself:—"It lies in the first instance upon those who say that the real estate has not descended to show that it has not descended. But when they produce a will properly executed and attested, purporting to give all the testator's money, goods, chattels, estates, and effects, the burthen is shifted; and it lies on those who say that the real estate is not included in the will to shew that it is not included. I apprehend that in this case it is for the heir to show that the proper construction of the will is the limited construction of the general words. Unless the realty be included under the words "estates" and "estate" those words are mere superfluities; for the words "goods, chattels, and effects" would of themselves carry the personalty. This, too, is the will of an unlearned man, and I think that I should act against the soundest rules of construction if I were to hold the general words "estates" and "estate" to be limited by the other words. I must therefore hold that the real estate passes by the will."

LINDSELL v. THACKER. 12 Sim. 178.

Devise— Trust Estate.

This case is of importance in questions arising upon Sir Edward Sugden's Trustee Acts.

The testator made his will in these words :—"I hereby give and bequeath *all my property*, whatsoever and wheresoever the same may be at the time of my decease, unto my loving wife *for her sole use* for ever.

The Vice-Chancellor of England held that by this devise trust estates did not pass; his Honour being of opinion that the limitation to the sole use of the wife indicated an intention on the part of the testator that all the property included in the devise should be enjoyed by the wife *beneficially*, and consequently that the devise did not extend to a mere dry legal estate. His Honour commented upon Braybrooke v. Inskip[1], and particularly referred to that passage where Lord Eldon treats it as a mark of intention that a trust estate should not pass, "when, if it did, it would be incapable of such a large species of enjoyment as the testator appears to have intended to give in every part of his property."

GRIFFITHS v. GALE. 12 Sim. 354.

New Will Act — Testamentary Appointment.

In this case the Vice-Chancellor of England held that the 33d section of the act 7 Will. 4. & 1 Vict. c. 26. does not apply to the case of a testamentary appointment. His Honour considered that the term "lapse" was wholly inapplicable to appointments, and that the legislature in that section contemplated only devises and bequests properly so called, that is, dispositions of property of which the testator was owner. His Honour also remarked, that if the 33d section were to extend to testamentary appointments, it would have the effect of controlling the disposition of property made by persons who had died long before the passing of the Act, which is expressly declared (s. 34.) not to extend to wills made before the 1st day of January 1838.

HARRISON v. ELWIN. 3 Q. B. Rep. 117.

New Will Act — Attestation by one unable to write.

In this case the will had the names of two parties, Crofts and Galor, subscribed as witnesses. Crofts had written his own name, but Galor, who was called as a witness, said that Crofts had held his (Galor's) hand, "and wriggled it about on the paper," and that the attestation to the will was so written. Galor was unable to

[1] 8 Ves. 417.

write or read: but he and Crofts had attested the will at the testator's request. In all other points the execution of the will was undisputed. It was suggested against the validity of Galor's attestation, that the signature of a witness unable to write for himself could not be proved if brought into question after his death. The Court of Queen's Bench, however, considered this sort of inconvenience as inseparable from all modes of attestation; and held that Galor's signature must be taken to be valid, although he was unable to write, and had his hand guided on the occasion by another person.

BROOKE v. KENT. 3 Moore Pri. Co. R. 334.

New Will Act—Alterations subsequent to the Act in a Will of previous Date.

Obliterations and alterations made subsequent to the 1st of January 1838 in a will of previous date must, to be effectual, be executed with the solemnities required by the New Will Act; and if they are not so executed, and it is further apparent that the testator did not intend a revocation of the bequests altered, but only meant to substitute others in their place, probate of the testament will be decreed in its original form. Whether the testator intended to revoke the original will or not, can, in such case, only be ascertained by the rules of evidence which have been applied whilst the Statute of Frauds was in force as to wills.[1] These important points were decided by the Privy Council in Brooke v. Kent[2], and the judgment of the Court, as pronounced by Dr. Lushington, though too long for insertion in this place, deserves serious attention.

BATEMAN v. PENNINGTON. 3 Moore 223.

Probate granted of a Will which was dated and signed in Pencil.

The general doctrine of the Ecclesiastical Courts is, that pencil alterations in a will are *primâ facie* to be held deliberative, and those in ink final. But this presumption may be rebutted, as in Bateman v. Pennington before the Judicial Committee of the Privy Council, where (reversing a decision of the Prerogative Court of Canterbury,) probate was granted of a paper written in ink, but dated and signed in pencil, with the addition "in case of accident I sign this my will;" having also an attestation clause unsigned[3]: Lord

[1] As to which see Bibb. d. Mole v. Thomas, 2 W. Bl. 1043.; and Onions v. Tyrer, 1 P. W. 343.

[2] See as to the effect of an inoperative alteration in a will before the new Will Act, Locke v. James, 11 M. & W. 901.

[3] The date in pencil was October 5. 1837, so that the case did not come under the operation of the Will Act.

Brougham, who pronounced the judgment of the Judicial Committee, observing, "all the cases show that the fact of the signing being in pencil, though *primâ facie* justifying a presumption that the act is only deliberative, yet it may be shown to be otherwise: and so the presumption against a will having an attestation clause without witnesses may be repelled. And in either case, if the facts in this allegation are proved, the legal presumption would be negatived, and the appellant entitled to probate." Probate granted accordingly.

Cholmondeley v. Lord Ashburton. 6 Beav. 86.

"Next of Kin according to the Statute of Distributions"—Settlor's Widow excluded.

A sum of 10,000*l.* was limited by the settlement of George Cholmondeley, in the event (which happened) of there being no issue of his marriage with Catherine Francis, upon the following trust:—"In trust for such person or persons as would at the decease of the said George Cholmondeley be entitled to his personal estate as his next of kin, according to the Statute of Distributions, if the said George Cholmondeley had died intestate without having been married to the said Catherine Francis."

He afterwards, upon the death of Catherine, contracted marriage with Mary Townsend. He died in 1830, leaving two children his next of kin, and Mary his widow. She claimed under the foregoing trust to participate in the 10,000*l.* therein mentioned.

Lord Langdale, however, decided against this claim, and remarked that cases of this kind were never quite satisfactory, in consequence of the popular meaning which in common parlance is attached to the words "next of kin according to the statute." His Lordship said, that if the words "next of kin" had been omitted, he should have considered the widow entitled to a share in the fund; but as she was not by law one of the next of kin, his Lordship declared the fund to belong exclusively to the children, they being the only parties legally entitled under the statute to the designation of George Cholmondeley's next of kin.[1]

Ramsden v. Fraser. 12 Sim. 263.

Heir—Executor—Leaning of Courts of Equity towards the Heir.

An estate had been sold, and before the time appointed for the completion of the contract, the vendor died intestate as to the property in question. His heir immediately entered into the receipt of the rents, and continued to receive them until the time

[1] The construction of the words "next of kin," where they are not accompanied by any reference to the Statute of Distributions, may be seen in the cases of Withy v. Mangles, 4 Beav. 358.; Elmsley v. Young, 2 Myl. & Keen, 82.

appointed for the completion of the sale. It thereupon became a question whether the rents thus received belonged to the heir, or to the executor of the vendor. The Vice-Chancellor of England held that the personal representative had no equity. "The law," said his Honour, "favours the heir, rather than the executor[1]: and my opinion is, that what the heir has received he is entitled to keep."

LORD WALSINGHAM v. GOODRICKE. 3 Hare. 122.

Privileged Communication — Case and Opinion of Counsel.

It is now settled that communications between a client and his solicitor may have the protection of privilege where the solicitor is the party interrogated, although they do not relate to any litigation either commenced or anticipated. But where the client himself is the party interrogated, the precise limits of the privilege are still matter of some controversy and disputation. Dealing with this latter question, Vice-Chancellor Wigram remarked that "the first point decided upon the subject was that communications between the solicitor and client pending litigation, and with reference to such litigation, were privileged: upon this there was now no question. The next contest was upon communications made before, but in contemplation of, and with reference to litigation expected, and which, in fact, afterwards took place; and it was held that the privilege extended to these cases also. A third question then arose with regard to communications after the dispute between the parties, followed by litigation, but not in contemplation of, or with reference to, that litigation; and these communications were likewise protected. A fourth point, which appears to have called for decision, was the title of a defendant to be protected from discovering in the suit of *one* party cases or statements of fact made on his behalf, by his legal adviser, on the subject-matter in question after litigation commenced, or contemplated with *other* persons on the same subject, and with a view to the assertion of the same right. Sir J. L. Knight Bruce held[2] that those cases relating to the same question, although having reference to disputes with other persons, were within the privilege; and I perfectly concur in that decision." His Honour, Vice-Chancellor Wigram, further observed, that in a case before Lord Chancellor King, (Radcliffe v. Fursman[3])

[1] "In all cases where it is a measuring cast betwixt an executor and an heir, the latter shall in equity have the preference; per Lord Chancellor Macclesfield, 2 P. Wms. 176.;—and to the same effect per Lord Hardwicke, see 3 Atk. 689. where he says, 'it has been the rule of the Court to give the turn of the scale in favour of the heir.'"

[2] 1 You. & Coll. 82.

[3] 2 Bro. P. C. 514. Tom. Ed.

the bill charged that the defendant himself well knew that the bonds in question had not been paid; and that he had so stated in a case prepared for the opinion of counsel. The defendant demurred to so much of the bill as required him to disclose this alleged case, the name of the counsel, and the opinion delivered. The demurrer was overruled by Lord King as to the *case*, but allowed as to the *counsel's name* and the *opinion*. This decision having been affirmed by the House of Lords, his Honour with some expressions of undisguised reluctance held himself bound by its authority; and accordingly, in the above case, determined (upon a motion that the defendant should produce documents in the schedule to his answer), that written communications which had passed between the defendant and his solicitor before any dispute between the parties, were privileged *only in so far as they contained legal advice or opinion*, although relating to the matters which formed the subject of the suit.

COOPER v EMERY. 1 Phil. 388.

Vendor and Purchaser — Period for which a good Title must be shown.

A good title must still be carried back for 60 years, notwithstanding the 3 & 4 W. 4. c 27. This point, which had been for some time in a state of considerable uncertainty, was determined by the Lord Chancellor in this case; where his Lordship held that the statute did not introduce any new rule upon the subject, and that to lay down any new rule, shortening the period, would affect the security of titles. It was true a 60 years' title was better now than it was before; but the Lord Chancellor did not think *that* a sufficient reason for shortening the period; for adopting 40 years, or, as it had been suggested by a high authority[1], 50 years, instead of the 60. His Lordship, in short, was clearly of opinion that the rule ought to remain as it is, and that it would be dangerous to make any alteration.

VESEY v. ELWOOD. 3 Drury & Warren, 74.

Vendor and Purchaser — Estate pur auter vie — Fall of Life.

The rule respecting a purchaser's liability to all contingencies affecting the estate subsequently to the date of his purchase was stringently exemplified in this case, where a decree had been made for the sale of the defendant's interest in lands held by him for the life of John Irwin. Mr. Vesey having become the highest bidder, deposited in court one-fourth of the purchase money on the 12th of May. On the 16th of May the common order was made to confirm the sale unless cause were shown within eight days,

[1] 2 Sug. V. & P. 138.

and was served on the following day. Before the expiration of the eight days, and before an order absolute to confirm the sale could have been obtained, John Irwin, the *cestui que vie*, died: whereupon Mr. Vesey objected to complete the purchase by paying the residue of his purchase money, and applied without success to the Master of the Rolls, to be discharged from the purchase. On the matter coming by appeal before Lord Chancellor Sugden, his Lordship confirmed the order of the Master of the Rolls, and ordered Mr. Vesey to complete his purchase. His Lordship declared it to have been settled that a purchaser in common cases is the owner of the estate from the time of the contract, and from that period must bear every loss,[1] and is entitled to any benefit, so as to be liable to damage by fire or by the death of a *cestui que vie*, and to be entitled to profit arising from accidental improvements, such as the dropping of a life where a reversion is the subject of sale. His Lordship then adverted to an anomaly in sales by the Court; viz. that a purchaser is never sure that he will remain the purchaser, until the absolute confirmation of the report prevents the opening of the biddings: but his Lordship held that this circumstance made no difference, and that if a sale were not so disturbed, the purchaser, from the time of the purchase in the Master's office, was in the same situation as a purchaser out of court is from the date of his contract.

Humphries v. Horne, 3 Hare, 276.

Vendor and Purchaser — Interest of Purchase Money.

After a sale and conveyance of lands, the purchaser alleged that the deeds did not extend to the whole of the property comprised in the contract. He thereupon filed a bill for specific performance, and obtained an injunction to restrain the vendor from suing out execution on a judgment which he had recovered in an action for the purchase money. On a motion by the vendor to dissolve the injunction, the Court continued it upon the terms of the plaintiff, paying a part of the purchase money to the vendor, and paying the residue into Court. The money thus paid into Court was *never invested;* and on the bill being ultimately dismissed at the hearing, the Vice-Chancellor Wigram held that the plaintiff was liable to pay interest on the purchase money remaining in Court, and

[1] See Paine v. Mellor, 6 Ves. 349.; and 1 Sug. Vend. & Pur., 10th ed. 468—472. The civil law carried the principle still further, for by that system the *periculum* was thrown on the purchaser *before* he acquired the property, which did not pass by the contract, but solely by delivery, according to the maxim *traditionibus, non pactis, rerum dominia transferuntur.*

that the vendor was not obliged to apply for the investment of the money, or to take the consequent risk of the rise or fall of the funds.

COOPER v. EMERY. 1 Phil. 388.

Whether Vendor must covenant for production of all Documents stated in the Abstract.

It appears to have been the opinion of some conveyancers that a vendor is bound to covenant for the production of all documents stated in the abstract of title; and this view of the matter was adopted in the decision of the Vice-Chancellor of England [1], on the ground that the vendor, by abstracting them, had shown that he considered them necessary to make out a good title. But upon an appeal from this decision the Lord Chancellor over-ruled it [2]; observing, "I do not think that merely because an instrument is stated in the abstract of title, it therefore follows that the purchaser is entitled, as a matter of course, to a covenant to produce it. Such a rule would be injurious to purchasers themselves: for it would induce parties to withhold all information but what they were strictly bound to give."

KING v. WILSON. 6 Beav. 124.

Vendor and Purchoser — As to rendering Time of the Essence of the Contract.

Upon the sale of estates, where time is not stipulated to be of the essence of the transaction, a difficulty is frequently experienced either in enforcing or in repudiating the contract, in cases where great or improper delay in completing it has taken place on one side. In the above case, however, which came before Lord Langdale at the Rolls, and in which the parties had differed upon the mode of removing an objection to the title contained in the abstract, the purchaser's solicitor wrote a letter in these words:— "If this objection be not removed within a week, I shall consider my client no longer bound, and of this I beg to give you formal notice." And Lord Langdale held, that on principle the purchaser had a right thus to proceed, though in the particular case he considered the time limited by the notice to be too short.

CALVERT v. GODFREY. 6 Beav. 97.

A Purchaser under a Decree must see that the Court has Jurisdiction to order a Sale.

In this case it was not denied that all proper parties were before the Court, or that the decree was regular in point of form; but the purchaser objected that the Court had no jurisdiction to order a sale, the only ground for the decree having been that a sale would

[1] 10 Sim. 609. [2] Cooper v. Emery, 1 Phil. 388.

be beneficial to the infant to whom the property belonged. Lord Langdale, Master of the Rolls, upon a petition from the purchaser to be discharged from his purchase, held that there was no jurisdiction in the Court to make such a decree, and ordered him to be discharged with payment of all his costs, charges, and expenses, including the costs of his petition to be discharged.[1]

Hewitt v. Foster. 6 Beav. 259.

Responsibility of Trustees for the acts of a Co-Trustee.

This case furnishes an illustration of the liability of trustees to answer for losses occasioned by the default of a co-trustee. The fund which formed the subject of suit had been transferred into the joint names of two trustees, pursuant to the directions of a will of which one of the trustees, D. Hewitt, was sole executor. At the request of the Hewitt who represented that a considerable part of the fund was required for payment of the funeral expenses, debts, and legacies of the testator, the co-trustee, J. Foster, joined in selling out the fund. Hewitt received the proceeds, 2000*l.*, and at the same time promised to give a mortgage security for so much as might not be required for the aforesaid purposes. It happened that there was a considerable surplus, as Hewitt applied only 55*l.* in payment of debts &c., and he retained the remainder to his own use, but afterwards gave Foster some securities for the amount. Hewitt afterwards fell into difficulties, and as the securities could not be realised, Lord Langdale, Master of the Rolls, decreed that Foster should be answerable for the loss, and that he should replace so much of the stock as had been unnecessarily sold out, and should account for the dividends in arrear, and pay all the costs of the suit; the Court considering that Foster's concurrence in lending the fund to his co-trustee was a direct breach of trust.

Mathews v. Brise. 6 Beav. 239.

Trustee held responsible for a loss occasioned by the failure of Brokers.

Here, although the Court allowed that a trustee had acted throughout with an anxiety to do what was best for the parties interested in a trust fund, yet he was compelled to make good a loss sustained by the failure of a broker. The trustee had trust money in his hands to the amount of 6,000*l.*, which he intended to lay out on a mortgage security. Pending the necessary delay in completing the transaction, he invested a large portion of the

[1] Ordinarily it has been deemed sufficient for a purchaser's security, that all proper persons are parties to the cause. See Lord Redesdale's judgment in Bennett v. Hamill, 2 Scho. & Lef. 566.

money in Exchequer bills, in order to prevent the fund from lying unproductive in the hands of his bankers down to the time when it would become fruitful on the mortgage. This investment was approved by the Court as judicious and provident. The trustee, however, unfortunately placed the Exchequer bills, undistinguished from others, in the hands of his brokers, who thus acquired the power of disposing of them as they thought fit without the concurrence of the trustee: and before the mortgage transaction was completed, the brokers became bankrupt, when it was discovered that they had sold 4,000*l.*, part of the Exchequer bills, and applied the produce to their own use. Lord Langdale M. R. held the trustee to be liable for the amount thus lost, on the ground of his having omitted to take proper precautions for protecting the Exchequer bills, which he might have done by a specific distinction and appropriation of the identical Exchequer bills at the time when he delivered them to the brokers. The trustee was therefore charged with the value at the bankruptcy of 4,000*l.* Exchequer bills with interest at 4*l.* per cent.[1]

Cape v. Bent. 3 Hare, 245.

Obligation of Trustees to proceed with the trust management notwithstanding a Suit against them.

The institution of a suit against trustees for the administration of the trust does not necessarily suspend its execution. There is no reason why the mere institution of a suit which may never be prosecuted should have this effect. Vice-Chancellor Wigram, so holding, at the same time observed, that if the Court "has assumed the execution of the trusts, it will be highly inconvenient, if not impracticable, for the trustees afterwards to act independently of the Court: the Court, however, in the absence of any misconduct on the part of the trustees, does not deprive them of the exercise of their discretion. It only requires them to act under its control. But the mere filing of a bill cannot have the effect of preventing trustees from doing acts necessary to the due execution of the trusts which are imposed on them. Such a rule might in many cases operate to destroy the trusts altogether."

Bullock v. Wheatley. 1 Coll. 130.

Personal liability of Executor.

A testator directed that his executors should get in his outstanding personal estate "as soon as conveniently might be" after his decease. They omitted to get in a sum which had stood for

[1] This case (Mathews v. Brise) is before the Lord Chancellor on appeal, and stands for judgment.

years before the testator's death, upon the security of a bond of his own solicitor. That solicitor became bankrupt; and the money was lost. The question was whether the executors were personally liable to make good the amount. Vice-Chancellor Knight Bruce decided in the affirmative, observing, "It may be true, as the executors say, that this solicitor was, up to the time of his bankruptcy, believed by them, and generally reputed and considered to be a man of credit and substance, and ample means. Neither that circumstance, nor the fact that he was, and had been from the year 1828, trusted by the testator, as a debtor without security, nor the degree of delay or discretion allowed by the general rules of this Court, or by the particular terms of the will in question (in which I do not forget the words 'as soon as conveniently may be,' or the words 'in such parts thereof as they may think proper'), can in my opinion justify the course taken by the executors; or rather their omission." With reference to an allegation that the executors were guided by the advice of the solicitor whom the testator himself had trusted, his Honour said, "A trustee committing a breach of trust is not protected from its consequences by the circumstance that he honestly took and followed the opinion of his solicitor, whatever remedy he may have against that solicitor; nor can it make any difference, that the solicitor was also the solicitor and adviser of the author of the trust."

Duncroft v. Albrecht. 12 Sim. 189.

Specific performance—Railway shares.

Specific performance of a contract to transfer a certain quantity of stock in the public funds will not be enforced in equity, because any quantity of such stock may be at any time had in the market[1]: but this rule does not apply to the case of Railway shares. The defendant, who had made an agreement for the sale of 50 shares in the London and South-Western Railway Company, demurred to a bill filed for specific performance of the contract. The demurrer, however, was overruled by the Vice-Chancellor of England, who was clearly of opinion that railway shares, being limited in number and not always to be had in the market, had no

[1] This rule was first laid down by Lord Chancellor Parker, in Cudd v. Rutter, 1 P. Williams, 570.; where, in a suit for specific performance of a contract for the transfer of certain South Sea stock, his Lordship, reversing a decree of Sir Joseph Jekyll, determined "that a court of equity ought not to execute any of these contracts, but leave them to law, where the party may recover damages, and with the money so recovered may, if he please, buy the quantity of stock agreed to be transferred to him."

analogy to 3 per cents, or any stock of that description; and this decision has since been affirmed by the Lord Chancellor.

SANDON v. HOOPER. 6 Beav. 246.

Mortgage—Extravagant outlays by Mortgagee in Improvements.

This case is an illustration of the rule that a mortgagee has no right "to improve a mortgagor out of his estate;" or, in other words, to lay out money at his own discretion, in increasing the value of the property to such an extent as to augment the burden of the incumbrance, and render it impossible, or unreasonably difficult, for the mortgagor to redeem.

The defendant was a mortgagee who had brought an ejectment, and obtained possession of the mortgaged property. During his possession, he pulled down two cottages, and made extensive alterations. The original mortgage money was 300*l.*; and, on the bill being filed for redemption, he claimed a further lien for 300*l.* laid out in substantial repairs and lasting improvements.

The court, however, held that a mortgagee can only claim allowance for such repairs as are necessary for the support of the property, or for such further outlay as the mortgagor has authorised, or has, after notice, acquiesced in: and that the mortgagee has no right to make it more expensive for the mortgagor to redeem, than the necessary reparations and the protection of the title will require.

APPLEBY v. DUKE. 1 Phil. 272.

Mortgage—Foreclosure—Official Assignee.

In a suit of foreclosure, where an official assignee is made a defendant as representing an insolvent mortgagor, he is not entitled to his costs from the plaintiff, although he may have received no assets of the insolvent wherewith to pay them. This point, which had occasioned no little contrariety of decision, was determined in this case, where the Lord Chancellor, upon a review of the authorities, asked "Why should the mortgagee suffer, or his security be affected, because by the acts of the mortgagor his interest in the mortgaged premises has been assigned to another? The assignee represents the mortgagor. On what ground can he, consistently with the established principles of this Court, be entitled to costs? It is said that he does not take the assignment by his own voluntary act; that it is cast upon him by operation of law. But he accepts the office to which he knows the assignment to be an incident; and in doing so he must be considered as accepting the assignment. It is said the case is a case of hardship. If it be so, the legislature must provide the remedy. Unless the legislature, shall so declare, the remedy must not be at the expense of the

mortgagee. In my view of the question, the case is not affected by the state of the insolvent's assets." Claim disallowed.[1]

SALKELD v. JOHNSTONE. 1 Hare, 196.

Tithes — Effect of Lord Tenterden's Limitation Act, 2 & 3 Will. 4. c. 100.

Lord Tenterden's Limitation Act, shortening the time required in claims of exemption from tithes, does not destroy the right to tithes upon mere proof of non-payment or non-render for the period mentioned by the statute. Prior to that statute all lands of laymen were, *primâ facie*, liable to the payment of tithes as matter of common right. "Mere non-payment of tithes," says Sir Samuel Toller[2], "although from time immemorial, does not amount to a discharge without showing some special ground of exemption." But, notwithstanding this general rule, there were certain cases in which a layman might successfully claim exemption from tithes. The title which carried this privilege with it was a title to lands proved to have been formerly parcel of the possessions of one of the greater monasteries at the time of their confiscation. Not only, however, was it required that the lands should have belonged to one or other of these larger religious houses, but it must also have been proved that they were holden by them discharged of the payment of tithes at the date of their dissolution. Now, Lord Tenterden's Act was not intended to give a capacity for exemption from tithes where such capacity does not exist before. It merely shortens the period *previously required* for exemption from tithes, in cases where a capacity for such exemption existed by reason of the title to the land being deducible from one of the greater monasteries. In such cases, but in such cases only, the claim of exemption may, under the act, be established upon evidence of non-payment or non-render, for a period of two incumbencies (not being together less than sixty years), and three years of a third incumbency. This was the decision of Vice-Chancellor Wigram, after a very laboured and learned consideration of the question.

BATEMAN v. PINDER. 3 Q. B. Rep. 574.

Statute of Limitations, 21 Jac. c. 16. — Effect of part Payment after Plea pleaded.

The Statute of Limitations had been pleaded to an action on a joint *and several* promissory note. At the trial evidence was

[1] See also Clarke *v.* Wilmot, 1 Phil. 276., where a similar question was decided by the Lord Chancellor, upon the same principle in the case of a *mesne* incumbrancer, who had become bankrupt.

[2] Toller on Tithes, p. 163. ed. 2.

given, that on the 4th of August, 1841, *after plea* pleaded, Binns, one of the makers of the note, paid the attorney for the plaintiffs the sum of one pound, and at the same time said that he brought it on account of the note. Upon this evidence the learned judge directed a verdict to be found for the plaintiffs, but gave the defendant leave to move to enter a nonsuit. The motion being made accordingly, the Court of Queen's Bench were unanimously of opinion, according to the doctrine in Tanner *v.* Smart[1], that to prevent the operation of the statute there must be a distinct promise *before action brought*, and that the subsequent payment made by Binns formed no answer whatever to the action.

SALTERS' COMPANY v. JAY. 3 Q. B. Rep. 109.

Easement — Light — Custom of London — Statute of Prescription, 2 & 3 Will. 4. c. 71.

By the ancient custom of the City of London every person possessed of a messuage, or an ancient foundation of a messuage, within the City, was at liberty to "exalt and erect" a new messuage upon the same site against and opposite any contiguous messuage and its windows, and by means of such building to darken or obscure such windows or lights, unless there were some special agreement in writing to the contrary. Such being the case, the question was, whether this ancient custom was not put an end to by the general provisions of the 3d section of the 2 & 3 Will. 4. c. 71., enacting that when the access and use of light to and for any dwelling-house, &c. shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, *any local usage or custom to the contrary notwithstanding*, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

The Court of Queen's Bench held unanimously that the statute affected the custom of London; and that if a party desirous of building on an ancient foundation within the City neglects to exercise his right within twenty years, the custom will not protect him in afterwards building his house in such a manner as to darken the lights of a contiguous dwelling-house.

ENGLAND v. DOWNS. 6 Beav. 269.

Trust Settlement of Stock in Trade, — Separate Use.

Where stock in trade is made the subject of settlement, it has frequently been a question of some nicety, whether the trusts extend to articles of a like description which have been substituted for those

[1] 6 B. & C. 602.

originally comprised in the settlement. This point lately came before the Rolls' Court in the above case, where Joan Mason, a widow, carrying on business as a victualler, previously to her second marriage, settled her household goods, furniture, plate, linen, china, books, stock in trade, brewing utensils, and all other her effects, upon certain trusts, to the exclusion of her intended husband; and Lord Langdale M. R. said he thought nothing could be more manifest, having regard to the nature of the property thus assigned, than that it never was or could have been intended that precisely the same articles, of which the stock in trade then consisted, were to continue subject to those trusts that were then created. It appeared that in the ordinary course of the business, on the sale of certain articles, the proceeds were laid out in the purchase of articles of the like kind; and in this way the stock in trade, which was subject to the trusts of the settlement, was in a continual state of fluctuation. Upon a subsequent sale, therefore, of the victualling business and stock in trade, his Lordship held, that the stock in trade, though not ultimately composed of the same articles as at the time of the execution of the settlement, was still the stock in trade contemplated by that deed, and subject to its trusts and provisions.

SADLER v. LEE. 6 Beav. 324.

Bankers — Powers of Attorney — Liability for Acts of Copartners — Insanity of Partner.

This case is one of great importance to bankers and other firms holding powers of attorney for the transfer of stocks and the receipt of dividends, as it shows, that where a power, granted by a constituent to the members of a firm, likewise enables an *individual* partner to exercise the authority, the members *for the time being* of the firm are collectively responsible for the proper and regular use of the power by each member who is named in it; and a newly introduced partner, participating in this responsibility, may be rendered personally liable for the misconduct of his co-partners in the irregular or fraudulent use of powers granted to them previously to his becoming a member of the firm, and communicating no personal authority to himself.

The facts of this case will require a succinct statement for the right understanding of the decision of the Court.

The plaintiffs and one Lucas were trustees of a large sum of stock, and in 1825 they executed the ordinary power of attorney, authorising William Sparks, Richard Sparks, and John French, bankers at Guildford, jointly *and severally* to receive the dividends and sell the capital.

In 1828 French died, and was succeeded in the firm by Lee. In 1830, Lucas, the trustee, died; and in 1838 Richard Sparks died. The trustees continued to deal with the firm without regard to these changes in its membership.

Shortly after the execution of the power, the bankers transmitted it to their London broker, by whom it was deposited in the proper office at the Bank of England. The dividends were for many years held at the disposal of the trustees, or dealt with according to their directions; and nothing occurred to afford them the least intimation of the insecurity of the principal fund until shortly after the death of William Sparks, in 1840, when it was discovered that he, without the knowledge of his copartners, had at different times sold out portions, exceeding in the whole 10,000*l.*, of the stock. It appeared also, that the proceeds of such sales had always been carried to the credit of the firm in the books of their London correspondents, and entered as received "per Mr. Sparks," No misconduct, however, had occurred previously to the year 1832, at which time French, the banker, and Lucas, the trustee, were both dead.

Lee having become insolvent and a bankrupt, the suit was instituted by the surviving trustee to obtain satisfaction from the estates of Richard and William Sparks for the spoliation of the trust fund. The claim was strenuously resisted by Richard's representatives, on the ground of the power of attorney being *several* as well as joint. They relied also on the absence of all proof of privity or collusion on the part of the members of the firm, and particularly on the ignorance of Richard Sparks, he having been imbecile for several years before his death, though he had ostensibly attended to the business. Marsh *v.* Keating[1], which arose out of Fauntleroy's forgeries, was much dwelt upon in the argument as an analogous case.

The Master of the Rolls decided four points;—1st. That the power of attorney, though several as well as joint, was nevertheless confided to the joint care of the whole firm; and that by their placing it in the hands of their joint agent, without special directions, they had culpably enabled an individual partner to make an improper use of the power, so as to render the whole firm liable for the consequences;—2d. That Richard Sparks, having the means of knowledge within his power, might, by due attention to the accounts, have discovered the irregularities which had occurred; and that for the protection of the public, the Court must impute to each member of a firm the knowledge which, in the discharge of a

[1] 8 Bli. 651.

plain duty, he ought to possess;—3d. That the alleged imbecility of Richard Sparks was no protection to his estate, he having regularly attended at the bank, and there being no proof that he was really insane; and that, though confirmed and incurable insanity is a ground for dissolving a partnership, mere evidence of a party's diminished capacity for business will not induce the Court to consider a partnership as dissolved *quoad* such party;—4th. That the *cestuique trust* having elected to treat the plaintiffs, and not the bankers, as their debtors, the liability of the defendants was to be measured by the amount of money, properly paid by the plaintiffs, in replacing the stock, or satisfying the claims of the *cestuique trust.*

BRYDGES v. BRANFILL. 12 Sim. 369.

Partners — Fraud — Firm of Solicitors.

One of the principles which governed the preceding decision, was likewise applied to the case of a firm of solicitors. In the course of a transaction confided generally to the firm, but conducted exclusively by the senior partner, who alone conmmunicated with the clients, and arranged on their behalf the necessary proceedings for the object in view, a pecuniary fraud of great magnitude was committed. The two junior partners were totally unaware that any fraud or irregularity had been committed or contemplated. But the Vice-Chancellor of England declared them to be personally responsible, although he was satisfied that they had no knowledge or suspicion, either of the fraudulent character of the transaction, or of the circumstances which constituted the fraud, until long after its completion. His Honour, however, proceeded upon the rule of law applied in the foregoing case, and in Marsh *v.* Keating[1], and held the innocent partners liable, because they had the means of knowledge, and were bound to use ordinary diligence in acquiring such knowledge as was necessary for securing the right conduct and performance of the business of their office.

HEDLEY v. BAINBRIDGE. 3 Q. B. Rep. 316.

Custom of Merchants, whereby a Partner may bind the Firm — How far applicable to a Firm of Attorneys.

The implied authority of co-partners to draw bills of exchange or promissory notes in the name of their firms, is confined to mercantile partnerships, and does not obtain in the case of attorneys. The defendant, Mr. Bainbridge, an attorney, was sued on a promissory note for 600*l.* signed by his partner Mr. S., in the name

[1] Ubi sup.

of the firm, for the amount of a sum of money deposited with Mr. S. by the plaintiff, for the purpose of being laid out on a mortgage. At the trial the plaintiff was nonsuited. On a motion to set aside the nonsuit, the Court of Queen's Bench held that the authority of partners in trade to bind the firm by negotiable instruments, arose from the custom and law of merchants, which is part of the general law of the land; but there being no custom or usage or necessity that attorneys should be parties to negotiable instruments for the purposes of their business, their Lordships refused to set aside the nonsuit.

BONSOR v. COX. 6 Beav. 110.

Exoneration of Surety.

John Cox, as surety for Richard Cox, joined in signing two promissory notes to the firm of Cox and Morrell, upon an agreement that the firm should advance the amount to Richard Cox *by a draft at three months' date.* Instead of giving such a draft, Cox and Morrell, without the concurrence of John Cox, made a direct and immediate advance of the whole sum to Richard Cox. Under these circumstances the Court held that John Cox, the surety, was released from his liability; and, per Lord Langdale, M. R., "a man may have reason to believe that a person in pecuniary difficulties may effectually redeem his affairs, if allowed time, and may be willing, on the assurance of the required time being allowed, to become surety for the payment of a particular debt *at the end* of that time, and yet would not become surety unless such time were fully assured to the principal debtor. These are circumstances, which a person advancing money on the security, and claiming the benefit of a suretyship, does not appear to me to have any right to alter." And his Lordship further observed, that the voluntary and precarious forbearance of the creditor to demand payment during the time for which the surety had stipulated, was not equivalent to positive and assured freedom to the debtor from liability for the same space of time.

HOCKING v. ACRAMAN. 12 M. & W. 170.

2 & 3 Vic. c. 29. — Notice of Act of Bankruptcy.

Notice of a docket having been struck is not "notice of a prior act of bankruptcy" within the meaning of 2 & 3 Vic. c. 29. Lord Abinger, in the case given above, after stating that the Court was called upon for the first time to construe the clause of an Act, which required notice of an act of bankruptcy to invalidate a *bonâ fide* transaction between a creditor and the bankrupt, decided that it was better to adhere to the precise words of the Act, than to sub-

stitute something else in lieu of that which the statute requires. "If," said his Lordship, "notice of a docket having been struck is to be constructive notice of an act of bankruptcy, why should not all the preparatory steps to the striking of the docket be also notice to the like effect? and if so, the inquiry would be endless. Parke B., in agreeing with the Chief Baron, was not prepared to say that notice should be given of some specific act of bankruptcy, in cases where it clearly appeared that the party *knew* that an act of bankruptcy had been committed.

IN RE THOROLD. 1 Phil. 239.

Bankrupt — Annulling a Fiat.

By the 24th section of the 5 & 6 Vict. c. 122., a bankrupt may dispute the validity of the fiat, provided he do so within twenty-one days after the advertisement of the bankruptcy in the Gazette. In the present case, the question was whether the Court of Review could admit his impeachment of the fiat after the twenty-one days had expired. The Lord Chancellor (reversing an order of the Chief Judge of the Court of Review) held the contrary; observing that "by the 23d section of the 5 and 6 Vict. c. 122., the bankrupt is allowed five days after being served with a duplicate of the adjudication to show cause against its validity. If he omits to do so, notice of the adjudication is to be published in the London Gazette. Still, however, he is not precluded from disputing the fiat, but he must do this within a certain limited time. For, by the 24th section, if he shall not within twenty-one days after the advertisement of the bankruptcy in the Gazette have commenced an action, suit, or other proceeding to dispute or annul the fiat, the Gazette containing such advertisement shall be conclusive evidence in all cases as against the bankrupt, that such person so adjudged bankrupt became a bankrupt before the date and suing forth of such fiat. A petition to the Court of Review to annul the fiat is, I think, obviously comprehended within the words "other proceeding" in this section. But the proceeding as well as the action or suit must be commenced within twenty-one days. The rule is, I think, imperative. It may be too rigid; but the Court, I conceive, has no authority to relax it. If it should be found inconvenient or productive of hardship, the legislature must apply the remedy."

CLARK v. MULLICK. 3 Moore Pri. Co. R. 252. 279.

Bankruptcy how proved in India — Foreign Rules of Evidence.

The peculiar rules of evidence adopted in one country, whether established by the practice of its Courts, or enacted by the Legislature for the government of those Courts, cannot be extended to

regulate the proceedings of Courts in another country, when inquiries are instituted respecting transactions that took place in the former country. This proposition, which was more or less clearly recognised in Bunn v. Thornton[1], Haber v. Steiner[2], and the British Linen Co. v. Drummond[3], has been finally established in Clark v. Mullick[4], where it was held, that the statutes, which have been passed to facilitate the proof of bankruptcy and assignment in the Courts of this country, do not extend to the Courts of India, and consequently in those Courts the plea of non-assumpsit will put the bankruptcy and assignment in issue without any notice, and the bankruptcy must be proved by such evidence, as would have been required, had no statutory regulations been made.

JONES v. SMITH. 1 Phil. 244.

Constructive Notice of an Incumbrance.

Where a party has notice of a deed which does not *necessarily* affect property, upon the security of which he is about to lend money, and where he receives an assurance from the person he is dealing with—that in point of fact it does not affect the property in question—where moreover he, acting with perfect good faith, relies on that assurance, but it afterwards turns out that he has been deceived by the representations made to him, he will not, under such circumstances, be fixed with constructive notice, so as to be deprived of the benefit of his security. This was strongly exemplified in the present case, which came before the Lord Chancellor by appeal from a decision of Vice-Chancellor Wigram. There the question was, whether the party advancing the money ought not to have made further inquiry, and insisted on an inspection of the deed. Affirming the decree of the Court below, his Lordship said:—"The question resolves itself into this, whether where a party is informed of the existence of an instrument which may, but does not necessarily, affect the property he is about to purchase, or upon which he is about to advance money, and it is at the same time stated that the instrument does not affect that property, but relates to some other property, whether if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled and that the instrument does relate to the property, he is under such circumstances to be

[1] 6 Ad. & El. 185.

[2] 2 Bing. L. C. 202. [3] 10 B. & C. 903.

[4] 13 Law J. N. S. Ex. Ch. 300. per Tindal C. J.; 12 M & W. 349. id. citing Mason *v.* Hill, 5 B. & Ad. 1.; 2 N. & M. 747.; 2 Law J. N. S. K. B. 118. S. C. and Wright *v.* Howard, 1 S. & S. 190.; 1 Law J. Chan. 94.

fixed with notice of the contents of the instrument? Undoubtedly where a party has notice of a deed, which from the nature of it *must* affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of that deed and of all other deeds to which it refers; but where a party has notice of a deed which does not necessarily — which may or may not — affect the property, and is told that in fact it does not affect it, but relates to some other property, and the party acts fairly in the transaction and believes the representation to be true, there is no decision that goes the length of saying that if he is misled, he is fixed with notice of the instrument. I am not disposed to extend the doctrine of constructive notice; and in expressing this opinion I believe I act in conformity with the opinion frequently expressed by my immediate predecessor." The question in this case arose upon a bill filed by the eldest son of the marriage, who was tenant in tail under the settlement.

SELBY v. JACKSON. 6 Beav. 192.

Deeds executed by a Party confined in a Lunatic Asylum sustained.

The plaintiff was a wine merchant, who had fallen into commercial embarrassments, and had become subject to a mental disorder, attended with delusions and occasional paroxysms of violence. The defendants were the father and brothers of the plaintiff's wife, and had voluntarily come forward to make arrangements for his benefit with his creditors. He took a part in these proceedings, but during their progress it became necessary to place him in an asylum; where he so far recovered his mental faculties, that he was allowed to go and reside at the house of one of the defendants. Here he was again consulted on the state of his affairs; but he shortly afterwards relapsed, and was replaced in the asylum, where he continued for more than a year. The defendants in the meantime proceeded in the negotiations with the creditors, and in May, 1840, a statement of the plaintiff's affairs, and of the terms made with the creditors, were communicated to the plaintiff. Notice was at the same time given to him of the intended preparation of the deeds in question; and in July, 1840, while the plaintiff was still in the asylum, and under personal restraint, the defendants attended him with the deeds for his execution. They were assured by the medical superintendant, that the plaintiff was in a rational and competent state of mind to execute the deeds, which were accordingly read over to him in the presence of medical men; and after some alterations had been made at the platntiff's own suggestion, he signed the deeds. The arrangement with the creditors consisted partly of a composition, the greater proportion of which the de-

fendants by the first deed personally undertook to pay; and, in consideration of the liabilities thus assumed, they obtained from the creditors a release for the plaintiff's benefit. By the other deed the defendants, for their own indemnity, took from the plaintiff an assignment of his estate and effects, and by virtue of this instrument carried on his business for him during his illness. Subsequently to the completion of the deeds, the defendants also made considerable advances of money to satisfy the creditors. The plaintiff, on recovering his liberty, filed his bill to set aside the deeds; and although he admitted them to have been prepared with the highest sense of prudence, yet he alleged that, at the time when he signed them, his state of mind was such that his person was fettered to protect him from inflicting injury upon himself; and it appeared that, in fact, only his right arm was at liberty for the purpose of enabling him to sign the deeds.

The Master of the Rolls observed, that there was no allegation of fraud against the defendants, no pretence that coercion was used, or any stratagem or contrivance employed to compel or induce the plaintiff to do an act in any way tending to the *personal benefit* of the *defendants*. There was no pretence of any imposition, and no allegation that the plaintiff had not the means of understanding, and was not capable of understanding the effect of what he did. It was admitted also by the plaintiff, that the defendants were actuated only by motives of kindness towards the plaintiff and his family; and that the execution of the deeds was a very prudent measure, and greatly to the plaintiff's advantage.

His Lordship, therefore, refused to set aside the deeds, and held that the Court would not take from the defendants the property in their hands, without making them an equitable allowance for the expenses and liabilities which they had incurred.

The decision was afterwards affirmed by Lord Lyndhurst C.

PALSGRAVE v. ATKINSON. 1 Coll. 91.

Appointment — Conditions annexed.

Where an appointment is made in pursuance of a power, with conditions, restrictions, or requests unwarrantably annexed, the latter are simply void, but the execution of the power is valid. Thus in the above case a party executing a power by his will appointed a house in Mecklenburgh Square to his son, declaring his "wish and request that he (the son) would not sell or dispose of his interest in the said house to any person whomsoever." It afterwards became desirable to sell this house; and the question was whether the vendor could give a good title. Vice-Chancellor

Knight Bruce decided in the affirmative, declaring the house saleable.[1]

ATTORNEY-GENERAL v. FOORD. 6 Beav. 288.

Charity Lease for Ninety-nine Years.

In this case Lord Langdale, M. R., decided that a lease (not being a building lease) for a term of ninety-nine years of charity property, at a fixed pecuniary rent, and without any stipulations for repairs or improvements, was not sustainable in equity, there being no special grounds for protecting the transaction. The property included in the demise consisted of half an acre of land, a public house, two cottages and a stable.

ATTORNEY-GENERAL v. PARGETER. 6 Beav. 150.

Charity Lease for Two hundred Years.

A husbandry lease of charity lands, for a term of 200 years, at a small fixed pecuniary rent, without any other consideration, cannot, in the absence of special circumstances, be supported in equity; and a lease granted on such terms in the year 1695 was set aside by Lord Langdale, M. R., against a party claiming under a purchase for valuable consideration.

The lease contained a reservation of the mines and minerals, and also an exception of the hares and other game, with liberty for three of the trustees to hawk upon the lands; and the lessee covenanted to preserve the game, to keep the buildings in repair, to use upon the land all the hay, straw, and fodder, and the manure arising therefrom, and to manure the land in a good and husbandly manner; and under these circumstances, it was contended that this was not a husbandry lease, and that the custom of the country warranted such a demise. But Lord Langdale declared his opinion, that notwithstanding the reservations and exceptions, the lease was a husbandry lease, and that such a lease, for a term of 200 years, could not stand, without special grounds to support it. His Lordship also said, upon the evidence regarding the custom of the country, that the attempt to prove it was unnecessary, and that if any number of such leases had been proved, they could not have established the custom.[2]

[1] See Alexander *v.* Alexander, 2 Ves. Sen. 644., where Sir Thomas Clarke, M. R., said, "Suppose a power to a man to appoint 1000*l.* among his children. If he appoint the whole 1000*l.*, and annexes a condition that they shall release a debt, or pay money over, the appointment will be valid, and the condition will be only void."

[2] According to the general rule, farming leases of charity lands, with common covenants, ought to be confined to the ordinary term of twenty-one years. See Attorney-General *v.* Backhouse, 17 Ves. 283.; Attorney-General *v.* Green, 6 Ves. 452.

HILTON v. EARL OF GRANVILLE. 1 Cra. & Phil. 283.

Injunction to restrain the working of a Mine refused, although Plaintiff's House was (by reason of the working) in danger of damage, and even of destruction.

Motion by the plaintiff for an injunction to restrain the defendant, as lessee of the coal and iron-stone mines beneath the manor of Newcastle-under-Line (belonging to the Crown in right of the Duchy of Lancaster) from working the same in any way calculated to damage or endanger certain copyhold messuages of plaintiff within the manor.

It was not denied by the defendant that the mining operations in question might have the effect of injuring, and perhaps of endangering, or even destroying, the plaintiff's property. But the question was whether, regard being had to the circumstances of the case, and to the state of the law applicable to manorial rights, this apprehended injury or danger afforded any ground for an injunction.

It appeared that the Crown had been in the habit of granting leases of this manor downwards from the reign of Richard II.; and that there had been a very long-continued custom of working the mines in utter disregard of superficial damage.

The plaintiff, moreover, had been tardy in applying to the court, —in fact he had not filed his bill until the operations had come so near the foundation of his houses that the only mode of securing their preservation would be to stop entirely the working of the mines.

Considering, therefore, that it was the duty of a party calling on the court to protect property, pending the decision of a legal right, to establish, at least, a strong *primâ facie* case in support of his application, and that it was also incumbent on him to show that he had not been guilty of any undue delay in seeking its interposition; considering, moreover, the great expense of these mining operations, and that the injury consequent upon a suspension of them might perhaps prove irreparable; and looking, on the other hand, to the nature of the injury which the plaintiff might suffer, supposing, upon a trial at law, that he should turn out to be right, and the small value of his houses as compared with the produce of the mines, as well as the facility of amply compensating him, if it should appear that he was really entitled to compensation;—the Lord Chancellor,[1] on the whole case, was of opinion that he should

[1] Cottenham. The reader is requested to observe that, where the name of Lord Cottenham is not mentioned, the Chancellor's decisions in this number of the Law Review are all by Lord Lyndhurst.

not be properly exercising the jurisdiction of the court were he to stop the works at that stage; but he should put the parties in a position which would enable them, with the least possible delay, to have the question at law decided. Motion ordered to stand over; plaintiff to bring an action; and defendant to admit damage, in order to facilitate the trial of the legal right.

HARMAN v. JONES. 1 Craig & Ph. 299.

Injunction — Province of a Court of Equity to protect Property till the Determination of the Legal Right.

This case was disposed of on principles similar to those which determined the last.

The Vice-Chancellor (Shadwell) had granted an injunction. Upon appeal, the Lord Chancellor[1] held the order wrong, inasmuch as it not only omitted to give direction for an immediate trial at law, but in fact prevented any trial at law to determine the legal right. The province of a court of equity in such a case, his Lordship held, was not itself to attempt the decision of legal rights, but to protect property till those legal rights should be determined by the proper jurisdiction; an object which the court, in granting an injunction, should (whether asked or not) put in a train of speedy accomplishment.

PERRY v. TRUEFITT. 6 Beav. 66.

Injunction — Property in Trade Marks.

The plaintiff, Perry, had purchased from Mr. Leathart, the inventor, a recipe or secret for making a composition to encourage the growth of the hair, and he vended this composition under the title of "Perry's Medicated Mexican Balm." The defendant, Truefitt, subsequently made and sold an article which he denominated "Truefitt's Medicated Mexican Balm;" and he acknowledged that he adopted the name from the plaintiff's composition. It appeared, however, that he had carefully abstained from selling his composition as that of Mr. Perry, who in his labels and cards described his own article as an extract from vegetable balsamic productions of Mexico, but gave no evidence of this; and further stated it to be "*made from an original recipe of the learned J. F. Von Blumenbach, and recently presented to the proprietor by a very near relation of that illustrious phisiologist;*" whereas the inventor appeared to be Mr. Leathart.

On the ground of the misrepresentation contained in the passage just quoted, Lord Langdale refused an injunction to restrain Truefitt from vending his composition under the title of Medicated

[1] Cottenham.

Mexican Balm; thus following the decision of the present Vice-Chancellor of England in Pidding *v.* How [1], where his Honour refused an injunction to the plaintiff on account of his public misrepresentations as to the composition of a tea called by him "Howqua's Mixture." The Vice-Chancellor there said, "It is a clear rule laid down by courts of equity not to extend their protection to persons whose cases are not founded in truth." And as to the question of property in the words "Medicated Mexican Balm" as a trade-mark, Lord Langdale said, "A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person. I own it does not seem to me that a man can acquire a property merely in a name or mark; but, whether he has or not a property in the name or the mark, I have no doubt that another person has not a right to use that name or mark for the purposes of deception; and in order to attract to himself that course of trade, or that custom, which, without that improper act, would have flowed to the person who first used, or was alone in the habit of using, the particular name or mark."[2]

STARTUP v. MACDONALD. 7 Scott's N. R. 269.

Tender — Legal time of the day for delivery of Goods.

In this case the defendant had contracted to buy of the plaintiffs ten tons of linseed oil, "to be free delivered by the plaintiffs to the defendant within the last 14 days of March, 1838, and paid for at the expiration of that time in cash, deducting 2½ per cent. discount."

The oil was not tendered for delivery until half-past eight o'clock at night on Saturday the 31st March, when the defendant refused to receive it, alleging as a reason the lateness of the hour.

Upon an action being brought for the price of the oil, the jury found by a special verdict that there was full and sufficient time before 12 o'clock at night for the plaintiffs to deliver and for the defendant to examine, weigh, and receive into his possession, the whole of the ten tons of oil. The Court of Common Pleas, however, held the tender

[1] 8 Sim, 477.

[2] It appears by the report that Lord Langdale inclined to the opinion that there could be no property in a trade-mark; but he considered that the point ought to be raised in an action to try the legal right.

insufficient: but upon error in the Exchequer Chamber, the judgment of the Common Pleas was reversed, Lord Denman dissenting. The grounds of this ultimate decision are summed up by Mr. Baron Rolfe in these terms:—"The act of delivering goods, or paying money, being an act requiring the concurrence of both the contracting parties, of him who is to receive, as well as of him who is to deliver; and not only their concurrence, but their concurrence at the same time and place: the question necessarily arises, in the absence of express stipulation, when and where it is to be the duty of the parties to meet for the purpose of joining in that common act, which can only be effected by the co-operation of both—at what hour of the day is the one party to attend to deliver or pay, and the other to receive. Necessity has in these cases given rise to the law on the subject. As the parties have by the hypothesis been silent on the subject, the law has to some extent stepped in to supply their deficiency, and has said that the party who is to receive is bound to attend at a reasonable place, and wait till a reasonable hour for the purpose of receiving what the other party is bound to deliver. If the party bound to deliver or pay does not come and make the tender then, when the reasonable hour is past the party who is to receive is no longer bound to attend; he is not bound to expect that the other party will come at an unreasonable hour; and he will be guilty of no default by departing. If the party who is bound to make the tender afterwards comes to the place where it ought to be made, and is then prevented from making a tender by reason of the absence of the other contracting party, he cannot allege that absence as an excuse for not performing his contract. Having neglected to attend at a reasonable time, he has by his own act made it impossible that he should make a tender, unless he afterwards, and before the expiration of the period limited by the contract, actually finds the other contracting party; but if he does find him, and actually makes a tender of the goods in time to enable him to examine, weigh, and receive what is tendered, the contract is then performed so far as relates to the party who is to deliver, and no question of reasonable time arises."

Mr. Justice Patteson said, he apprehended the general rule of law to be, that where a thing is to be done on a certain day, it may be done at any time before twelve o'clock at night, unless there be any particular usage to the contrary, as in the case of the presentment of bills of exchange. With reference to the case before the Court, his Lordship added, that if the plaintiffs, when they went to tender the oil at half-past eight at night, had found the premises of the defendant closed, and neither himself nor any one entrusted

by him to receive goods present on the spot, no tender could have been made, and the plaintiffs would have been in fault for not coming at a time when the defendant could be found, he not being bound to wait on his premises till twelve at night.

COATS v. CHAPLIN. 3 Q. B. Rep. 483.

Carriers — Consignor — Right to sue.

The plaintiffs, manufacturers at Paisley, received, in August 1840, a verbal order from the agent of Morison & Co. of London for a quantity of goods; but no directions were given as to the mode of sending the goods to Morison & Co. On the 18th of August the plaintiffs sent the goods by the Paisley and Glasgow carrier in a truss directed to Messrs. J. & J. Morison, London, and at the same time sent an invoice by post, in a letter bearing the same direction. The letter reached its destination, but the goods never did. It appeared that the goods were delivered on the 22nd of August at the Grand Junction Railway Company's office at Liverpool, and on the 25th of August were put into the hands of the defendants at the London terminus of the London and Birmingham Railway Company for delivery to the consignees in London.

Upon the defendants being sued as common carriers, for non-delivery of the goods, the question arose whether the plaintiffs, the consignors, could maintain the action, it being contended by the defendants that the property in the goods had passed to the consignees; but the Court was of opinion that delivery by a consignor, *of his own accord*, to a carrier, was not a delivery to the consignee; and that in the present case the property continued in the vendors, who were accordingly at liberty to treat the goods as their own, and to maintain an action against the carriers for the value. Judgment for the plaintiffs.

ACTON v. BLUNDELL. 13 Law J. N. S. Ex. Ch. 289.; 12 M. & W. 324, S. C.

Right in underground Watercourse.

No action is maintainable against a landowner, who, in carrying on mining operations in his own land in the usual manner, drains away subterranean water, which flows under his neighbour's land or supplies his neighbour's well. This point, which was decided in the Exchequer Chamber, in Acton v. Blundell, is important, as it decides that the right to the enjoyment of an underground spring, or of a well supplied by such spring, is not governed by the same rule of law as that which applies to, and regulates, a watercourse flowing on the surface. The rule which governs a surface water-

course is well established: "each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above."[1] This rule is founded mainly on the publicity of the enjoyment and its long and uninterrupted continuance: "each man knowing what he receives, and what has always been received from the higher lands, and what he transmits, and what has always been transmitted, to the lower:" but in the case of a well sunk, no proprietor knows what portion of water is taken from beneath his own soil, how much he gives originally, how much he transmits only, or how much he receives; and until the well is sunk, the very existence of an underground spring may be wholly unknown. Besides, the consequences of adopting the rule applicable to running streams in the case of underground watercourses might be most disastrous; since a man, by making a well in his own land, perhaps to supply a cottage, or a drinking place for cattle, might, on the one hand, prevent the owner of land, in which the spring originates, from improving his land by necessary drainage, and, on the other, might deprive another neighbour of the right of working mines of inestimable value. Influenced by these considerations, and corroborated by the authority of the Roman lawyer Marcellus, the Court, while they intimated no opinion as to what might be the rule of law with respect to an ancient well, held that the right to the enjoyment of subterranean springs "falls within that principle, which gives to the owner of the soil all that lies beneath its surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he interrupts or drains off the water collected from underground springs in his neighbour's well, the inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action."

[1] 12 M. & W. 349. per Tindal C. J.

SMITH v. MARRABLE. 11 M. & W. 5.; C. and Marsh. 479. S.C.
SUTTON v. TEMPLE. 12 M. & W. 52.
HART v. WINDSOR. Id. 68.

Landlord and Tenant — How far Law implies an undertaking that the premises demised shall answer the Tenant's purpose — Nuisance. — Bugs.

These three cases are of considerable practical value, as they illustrate and explain that important branch of the law, which defines the relative rights and duties of landlords and tenants. The first was an action of assumpsit for use and occupation, to which there was a plea of non-assumpsit. The action was brought to recover a balance of five weeks' rent of a furnished house at Brighton, and the defendant who had taken the house, upon a written agreement, for six weeks from the 15th of Sept., but had left it on the 22d, paying a week's rent, urged that he was not liable for the remainder of the term, inasmuch as the house was so infested with bugs, that it was impossible to remain. Witnesses being called, who proved the serious nuisance occasioned by these vermin, Lord Abinger told the jury, that in point of law every house must be taken to be let on the implied condition, that there was nothing about it so noxious as to render it uninhabitable, and a verdict was, in consequence, found for the defendant. A new trial was moved for, on the ground of misdirection, and it was contended that the nuisance must be made the subject of a cross action, but the Court supported the ruling of his Lordship. Parke B. cited Edwards v. Etherington (R. & M. 268.; 7 D. & R. 117. S. C.) and Collins v. Barrow (1 M. & Rob. 112.), as "fully warranting the position that if the demised premises are encumbered with a nuisance of so serious a nature, that no person can reasonably be expected to live in them, the tenant is at liberty to throw them up;" and Lord Abinger observed that, independent of the authorities, the case was one which common sense alone enabled the Court to decide. "A man who lets a ready-furnished house surely does so under the implied condition or obligation — call it which you will—that the house is in a fit state to be inhabited. Suppose, instead of the particular nuisance which existed in this case, the tenant discovered the fact, unknown perhaps to the landlord, that lodgers had previously quitted the house, in consequence of having ascertained that a person had recently died in it of plague or scarlet fever; would not the law imply that he ought not to be compelled to stay in it? I entertain no doubt whatever on the subject."

Doubts, however, were entertained in Westminster Hall, and the

case of Sutton v. Temple, next to be adverted to, did not tend to remove them. That was an action of assumpsit for the use of certain pasture land and the eatage of the grass thereon growing. The plea was non-assumpsit. It appeared at the trial that the defendant had in writing agreed to take of the plaintiff twenty-four acres of eddish, situate, &c., from September till April, at a fixed rent; and it was proved that, immediately on taking possession of the land, he stocked the eddish with fifteen beasts, eight of which died before the end of October, in consequence of a poisonous substance having been spread over the field without the landlord's knowledge. The defendant thereupon declined any longer to stock the eddish, but the plaintiff did not resume possession till after the expiration of the term. The question was, whether, under these circumstances, the plaintiff was entitled to recover, and this turned upon the further question, whether, on a demise of aftermath, for a specific term at a certain rent, there is any implied contract or condition on the part of the lessor, that it shall be reasonably fit for the purpose for which it is taken. The Court decided this last point in the negative. Lord Abinger and Parke B. endeavoured to distinguish this case from that of the entomological case mentioned above, on the ground that *there* the contract was of a mixed nature, being for a house and *furniture* fit for immediate occupation, and the furniture constituting in fact the more material part of the bargain, and being intended for a specific purpose. They urged that Smith v. Marrable was like the case of taking a ready-furnished room in an hotel, which is hired on the understanding that it shall be reasonably fit for immediate habitation; or of hiring a carriage, which breaks down on the journey, in which event the party letting it is liable; or of ordering medicines, which, when supplied, are found unsuitable for the patient, and for which the chemist is consequently entitled to no compensation. They then contended that the present case stood upon very different principles, the action being brought for the fulfilment of a certain contract applicable to land; and although Gurney and Rolfe Bs. doubted the soundness of the distinction taken between this case and that of Smith v. Marrable, the whole Court finally held, that, if a person contract for the use and occupation of land for a specified time, and at a specified rent, he is bound by that bargain, even though he took it for a particular purpose, and that purpose be not attained. Several instances were put by the Judges in illustration of this rule. Suppose a tenant takes a farm with the view of making an income, and his object fails; or suppose he hires aftermath, and puts no cattle into the field; or sup-

pose he takes land on a building lease, and, owing to running sand underneath, it proves impossible to build upon it; or suppose a house be taken, in order to be converted into a hospital, and being in an unhealthy situation it turns out to be unfit for that purpose; in these and the like cases, the doctrine *caveat emptor* applies, and the lessee will not be justified in refusing to fulfil his contract by payment of the rent. "The word 'demise,'" said Parke B., "certainly does not carry with it any implied undertaking that the property demised shall be fit for the purpose for which it is taken; the law merely annexes to it a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term. If it included any such contract as is now contended for, then in every farming lease, at a fixed rent, there would be an implied condition that the premises were fit for the purpose for which the tenant took them, and it is difficult to see where such a doctrine would stop."

Shortly after this case was decided, the question was again mooted in Hart v. Windsor. That was an action of debt upon an agreement in the nature of a lease, whereby the plaintiff agreed to let to the defendant an unfurnished house and garden for three years at a certain rent, the defendant agreeing to keep the premises in repair; by virtue of which the defendant entered upon the premises, and continued there until a quarter's rent became due. The plea alleged that the house was let for the purpose of being inhabited, but that the defendant could not reasonably inhabit it by reason of its being infested with bugs, and consequently left it before the quarter's rent became due, giving notice thereof to the plaintiff. The jury found that the facts stated in the plea were true, but the Court, on a motion for judgment, *non obstante veredicto*, held that the plea was no answer to the action, as the law implied no contract, condition, or warranty on the part of the landlord, that the house should be reasonably fit for habitation. Mr. Baron Parke, who pronounced the judgment of the Court, after referring to the pleadings, and noticing as very important three special objections, which had been urged to the validity of the plea in this case, namely,—1. that the defendant had actually occupied the premises; 2. that garden ground was demised together with the house; and lastly, that the defendant had agreed to preserve the house in tenantable condition,—rested the decision on the broad ground, that, under a lease of a house or lands for years, the only implied obligation on the part of the landlord to his tenant is for quiet enjoyment, the contract relating only to the estate, not to the condition of the property. In support of this view, his Lordship cited several old authorities,

which showed that a tenant could neither maintain an action, nor be exonerated from payment of rent, if the house demised was blown down or destroyed by fire [1]; or gained upon by the sea [2]; or the occupation rendered impracticable by the king's enemies [3]; or, where a wharf demised was swept away by the Thames.[4] He then noticed Smith v. Marrable, and the decisions on which he had relied in that case, admitting that these last were not law, and that Smith v. Marrable could not be supported on the ground on which his judgment was rested; but he repeated, though apparently with some misgivings, the distinction that had been taken by Lord Abinger, namely, that that case was not a lease of real estate, but a mere demise of a ready-furnished house for a temporary residence at a watering-place. His Lordship concluded by observing that it was "much better to leave the parties in every case to protect their interests themselves, by proper stipulations, and if they really meant that a lease should be void by reason of any unfitness in the subject for the purpose intended, they should express that meaning."

Dodd v. Acklom. 7 Scott. N.R. 415.

Joint Lessors — Parol surrender to one.

By a written agreement of 7th Oct. 1842, Acklom, the defendant, became tenant to Dodd and Davies, of a house in Leicester Square, at the yearly rent of 105*l.*, payable quarterly. After entry, he found that the superior landlord had a considerable claim for arrears of ground rent, and that there was also an arrear of land tax for which the Crown had the power of entering. He found moreover that, by reason of the non-payment of water rate, the supply of that commodity to the premises had been entirely cut off. Under these circumstances, feeling averse to continue in the occupation of the premises, his wife, before the first quarter's rent became due, delivered the key to the plaintiff Dodd, one of the lessors. Dodd accepted the key; and afterwards joined with Davies in bringing an action of debt against Acklom for use and occupation. At the trial, there was evidence to show that Davies had committed the management of the matter to Dodd; and Mr. Justice Erskine told the jury, that if they thought Mrs. Acklom had authority from her husband to relinquish the premises by delivery of the key, and that Dodd received it with authority in that

[1] Monk v. Cooper, 2 Str. 763.; Balfour v. Weston, 1 T. R. 310.; and Ainslye v. Butler, there cited.

[2] Taverner's case, Dyer, 56. a.

[3] Paradine v. Jane, Alleyn, 26.

[4] Carter v. Cummins, cited 1 Chan. Ca. 84.

respect to act for Davies, that would amount to a surrender by operation of law, and the plaintiffs would not be entitled to recover. The jury gave a verdict for the defendant. The question as to the sufficiency of the surrender was brought before the full court upon a motion for a new trial; and their Lordships were unanimously of opinion, that the question had been properly put to the jury, and that a proper verdict had been returned.[1]

STANLEY v. HAYES. 3 Q. B. Rep. 105.

Lease — Covenant.

This case is of practical importance with reference to the construction of one of the common covenants in a lease. The defendant, the lessor, had demised four messuages to the plaintiff for 60 years at an annual rent of 60*l.*: and by the deed, he covenanted in the usual way that the plaintiff, paying the rent, &c., should quietly enjoy the demised premises during the term, "without any let, suit, trouble, denial, disturbance, eviction or interruption whatsoever, of, from, or by the lessor, his heirs or assigns, or any other person or persons lawfully claiming or to claim by, from, or under him, them, or any of them." Shortly after the execution of the lease, the collector of land-tax entered on the premises, and made a seizure of some goods as a distress for arrears of land-tax due from the lessor before the demise. Upon this the lessee brought an action of covenant against the lessor for damages. The defendant demurred generally to the declaration.

In the course of the argument, Lord Denman C. J. inquired whether the lease contained any covenant against the defaults of the lessor: and it appeared that there was none.

The Court was unanimously of opinion, that the distress was not a proceeding within the terms of the covenant: and held that the words of the covenant related to disturbance by persons claiming by title *from* the lessor. In the present case the claim was *against* him.

CHAPPLE v. COOPER. 13 Law J. N. S. Ex. 286.

Infant — Necessaries — Undertaker's Bill. — Obligation of a Widow to bury her husband.

An infant widow is liable for expenses which an undertaker has, by her order, incurred in conducting the funeral of her deceased husband; though it would seem that an infant child or more distant relation would not be responsible upon a contract for the burial of

[1] See Whitehead v. Clifford, 5 Taunt. 518. Mollett v. Brayne, 2 Campb. 103.

his parent or relative. Alderson B., in giving the judgment of the Court of Exchequer, discussed very elaborately the general principle by which the validity of an infant's contracts is governed. After stating that an infant can contract so as to bind himself, either where the subject-matter of the contract is necessary for him, or where the contract is plainly for his benefit, and after illustrating these propositions by numerous instances, and pointing out that in all cases there must be personal advantage from the contract derived to the infant himself, his Lordship observes, that this principle alone will not be sufficient to decide the present case, as it will be difficult to say that there is any personal advantage necessarily derivable to an infant from the mere burial of the corpse of a deceased person. He then urges that, as the law permits an infant to make a valid marriage, and all necessaries supplied to his wife are, in point of law, necessaries to himself; and as, moreover, decent Christian burial is part of a man's own right, and may be classed as a personal advantage, and as reasonably necessary for him, so the burial of his wife, who is *persona conjuncta* with him, may be deemed reasonably necessary for him, and as such he may make a binding contract for it. If, then, an infant husband may contract for the burial of his wife, is not an infant widow in a similar situation? In the case of the husband, the contract will be made after the death of the wife, and so after the relation which gives validity to the contract is at an end to some purpose; but still he may contract for this, because a contract for the burial of her who, by marriage, is *persona conjuncta* with himself, is as a contract for his own personal benefit; and consequently a contract for burial of the husband should be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy, for the above reasons, constitutes no defence.

Doe v. Coombs. 3 Q. B. Rep. 687.

Evidence — Stamp — Presumption.

Upon the trial of an ejectment, a deed of release was produced, which had no *ad valorem* stamp upon it, but appeared by marks remaining upon it to have been formerly stamped. The stamp itself, however, was obliterated; and no evidence was given to account for the state of the deed. At the trial the deed was received as evidence: a motion for a new trial was refused, Lord Denman observing: — "The onus lies upon the party attacking a deed which appears to have been properly executed. The Stamp Acts superadd the necessity of something beyond execution: but

the party impeaching the deed ought to show the want of that requisite." And his Lordship further stated, "that if the appearance of the deed, combined with the probability that parties would take care of their own interest, gave reason to infer that a stamp had been affixed, the Judge was entitled to say that the instrument had been properly completed, and to receive it in evidence."

HOOD and SANDERS v. PHILLIPS. 6 Beav. 176.

Solicitor and Client — Suit instituted without Authority.

A point of considerable importance to suitors arose in this case. A solicitor without any authority from Sanders, who was a poor man, made him a co-plaintiff in the cause. The bill was dismissed with costs, and the defendants having issued a subpœna for costs, Sanders was attached for non-payment, and lodged in prison. Under these circumstances Lord Langdale, M. R., held, that notwithstanding the want of authority in the solicitor, the Court could not exonerate Sanders from the claims of the defendants in respect of the costs of the suit, and that he was bound to preserve the declared rights of parties to a cause. His Lordship thereupon made the same order as in Wade *v.* Stanley[1], that the solicitor (who was also a party to the cause) should pay the costs for which Sanders had become liable, but declared that he could not release Sanders from his imprisonment until those costs were paid. The defendants having consented to Sanders's immediate release, his Lordship then refused to put him under any terms which would prevent him from suing the solicitor in a court of law for damages.[2]

WIRE v. BERESFORD. 3 Dru. & Warr. 276.

Benefice — Judgment — Priority.

This was a suit instituted in the Irish Court of Chancery for the purpose of obtaining the benefit of an annuity deed executed in favour of the plaintiff by the Rev. W. Beresford, rector of Niniscara, in the county of Cork. By the deed in question, which was dated in May 1835, Mr. Beresford had demised the glebe and tithes of his rectory to the plaintiff for the term of 99 years, if he should so long live, as a security for the payment of the annuity. As further securities he had also executed a bond and a warrant of attorney to enter up judgment thereon. By the annuity deed it was also expressly provided that the plaintiff should be at liberty to issue execution on the judgment, and also to take such further proceedings as would enable him to obtain from the bishop of the diocese a sequestration,

[1] 1 Jac. & W. 674.
[2] See Doe v. Keon, 1 Jebb & Bourke, (Irish Q. B.) 194.

or allocation of the income of the benefice for payment of the annuity. In pursuance of the warrant of attorney judgment was entered up against Mr. Beresford upon the bond in Easter term 1835, but no execution had issued.

In Trinity term 1841, the defendant Newman for the first time issued execution upon a judgment recorded against Mr. Beresford in 1831, several years previous to the date of the plaintiff's annuity deed; and as this judgment, if entitled to priority over the annuity deed, would considerably impair the plaintiff's security, the bill was filed to ascertain the rights of the parties.

Two questions were argued in the cause: 1. as to the validity of the charge imposed on the benefice by the annuity deed; 2. as to the priority of the annuitant over the execution creditor: and both points were decided in favour of the plaintiff.

Upon the first question Lord Chancellor Sugden said, "The right of the plaintiff is as strong as if a conveyance had been made to him of lay property."[1]

Upon the second question his Lordship said, that a judgment *quà* judgment created no lien on a benefice; that common-law execution could not issue upon it against the benefice; and that recourse must be had to the bishop in order to obtain a sequestration. His Lordship therefore decided that the annuitant of 1835, having a direct charge on the living, was to be preferred to the judgment creditor of 1831, who had acquired no lien by the record of his judgment, and did not issue execution upon it till 1841.

Exparte Pasley. 3 Drury & Warren, 34.

Authority of the Great Seal to remove a Coroner.

Lord Chancellor Sugden has held that the Great Seal of Ireland has inherent authority to remove a coroner from office for incapacity and misconduct, there being no statute in force in that country corresponding to the English Act 25 Geo. 2. c. 29. In the case before his Lordship a petition had been presented by the freeholders of the county of Dublin, stating that J. P., one of the coroners, was incapacitated by occasional mental derangement; that he was addicted to intemperance, and had been found drunk in the public street; and that he had been convicted of a conspiracy to obtain money on false pretences, and had been sentenced to imprisonment for six months. It was therefore prayed that a writ *de coronatore exonerando*, and one *de coronatore eligendo*, might issue to the sheriff of the county: and his Lordship directed the writs to issue.

[1] In this respect it will be observed that the law of Ireland differs widely from the law of England.

LANCASTER v. EVORS. 1 Phil. 349.
MICKLETHWAITE v. ATKINSON. 1 Coll. 173.

Answer to a Bill in Equity must be full — Distinction in the case of an Infant, or Person of unsound Mind, without Committee.

A defendant who answers to a bill in equity is bound to answer fully. Thus in Lancaster *v.* Evors (which came before the Lord Chancellor on appeal from the Rolls), where the plaintiff asserted that certain outstanding judgments had been purchased by defendant for small considerations, and where he interrogated him as to whether or not he had purchased them, and for what consideration; the defendant was not considered to have sufficiently answered by merely saying that he was a purchaser for a valuable consideration without notice. "There is no principle," the Lord Chancellor observed, "more clearly established in the court than this — that when a party answers, he is bound to answer fully. If he has a defence against the equity set up by the plaintiff, and wishes to avail himself of that defence without making any discovery as to facts that are alleged on the bill, he must avail himself of that defence, according to the nature of the case, either by demurrer or by plea." This rule, however, does not hold in the case of an infant[1], neither does it apply where the defendant, being of unsound mind and without committee, answers by his guardian; — as appears by what fell from Vice-Chancellor Knight Bruce in Micklethwaite v. Atkinson. There his Honour said, "The question in this case is, whether it is regular to except for insufficiency to the answer of a defendant of unsound mind answering by a guardian appointed in the manner usual in such cases, there not having been any commission of lunacy, and there not being therefore any committee of his person or estate. I am not aware of the existence of any authority directly on the point. If the answer stands on the footing of an infant's answer, insufficiency must, I suppose, be out of the question. The question before me is, whether, the defence being by answer, the Court is to compel the answer to be full. The case of Barrett v. Tickell[2] happening to occur to my recollection after the argument, I have referred to Mr. Jacob's report of it. Lord Eldon says there, that the plaintiff can have no discovery from Charles Tickell, 'for, in his state of mind, he is unable to disclose any thing.' Now Charles Tickell had answered by Joseph as his guardian, Charles himself having become lunatic, but no commission having been taken out." After some further com-

[1] Mitford on Eq. Pleadings, 315.

[2] Jac. 154.

mentary upon the case of Barrett v. Tickell, the Vice-Chancellor thus concluded: "I have reason to believe that I am not the only judge of this Court whose opinion it is that a plaintiff cannot except for insufficiency to the answer of a defendant of unsound mind, against whom a commission of lunacy has not issued, answering by his guardian."

ST. KATHERINE'S DOCK COMPANY v. MANTZGU. 1 Coll. 94.

A Foreigner's answer need not be in his native tongue.

The answer of a foreigner to a bill in equity has been usually taken in his own language, with a sworn interpretation. But this is not matter of absolute necessity; for, in the above case, Vice-Chancellor Knight Bruce stated, "that he was not aware of the existence of any rule that a foreigner, however ignorant of the English language, is bound to put an answer on the file in his own language. With respect to what had been said upon the supposed difficulty of indicting a defendant for perjury in a case like the present, the defendant had *elected* to answer in a language not his own; and his Honour wished it to be understood, though it was not necessary to give a positive opinion on the subject, that he did not accede to the argument that an indictment could not be sustained on such a case."

TAYLOR v. RUNDALL. 1 Phil. 222.

Answer by a Partner as to contents of Partnership Books.

Where a defendant is interrogated as to the contents of the books of a company in which he is a partner, and the question is one which he is bound to answer if he can, it is no excuse for not answering to say that the books are in the custody of the officer of the company, and that his partners will not allow him access to them. The Lord Chancellor, in so ruling, said, "Is it sufficient for a party who is required to speak as to the contents of such documents as are in his custody, possession, or *power*, to say that he cannot comply with the order because his documents are wrongfully withheld from him? I think not. Suppose an agent withholds papers belonging to his principal: would the statement of such a wrongful act be an excuse for not producing them, or not speaking as to their contents? Lord Cottenham put the case of a solicitor wrongfully withholding papers of his client as affording no excuse for the non-production. The Court, that noble and learned person said, would allow the party time to vindicate his right. A party is bound to inspect and answer to the contents of all documents that are in his possession or *power;* and all which

he has a right to inspect, provided he can enforce that right, are in his power."[1] See next case.

STUART v. LORD BUTE. 12 Sim. 460.

Answer—Sufficiency—Answer by a Partner as to Documents belonging to the Firm.

In this case the defendant, Lord Wharncliffe, put in an answer stating that certain documents belonging to a colliery firm, of which he was a member, were in the joint custody of himself and his co-partners; and that the co-partners had refused his application for liberty to inspect or take copies or extracts from the documents in order to enable him properly to answer the interrogatories of the bill.

The Vice-Chancellor of England deemed this answer insufficient, there being no statement of any contract or obligation requiring Lord Wharncliffe to apply to his co-partners for leave to do an act which, in the absence of any special contract, he had power as a partner to do of his own authority.

WESTCOTT v. CULLIFORD. 3 Hare, 265.

Costs to a Plaintiff whose Bill is dismissed.

The jurisdiction of the Court to give the plaintiff costs, where his bill is dismissed, has been doubted. Unless the Court be administering a fund, the decree must be personally against the party. And it does not appear that there is any precedent for that course. This was the opinion of Vice-Chancellor Wigram in Westcott v. Culliford, where his Honour thus expressed himself: — "In Thomason v. Moses[2], Lord Langdale thought that the Court had jurisdiction to give the plaintiff his costs, notwithstanding the dismissal of the bill, where it had a fund to administer, and where the case was one in which the opinion of the Court on the question in the cause was necessary to be taken before the executors would properly administer the estate. He, the Vice-Chancellor, had been informed by Lord Langdale that Sir John Leach had laid down that principle, and the rule, if cautiously applied, seemed right. It was, however, a rule to be applied with caution; for in cases where executors could not safely administer the fund without the declaration of the Court, a number of bills might be filed by different legatees requiring the decision of the Court as to the validity of their several claims, and if, although their claims should be disallowed, they were all to be paid their costs of their different suits, it might lead to injurious consequences."

[1] In exparte Shaw, Jac. 270., Lord Eldon said, that "if documents which a party was bound to produce were in the hands of his solicitor, and he could not produce them without paying his bill of costs, he must pay it."

[2] 5 Beav. 77.

LANE v. BARTON. 1 Phil. 364.

Court of Chancery always open — Common Injunction dissolved in the Long Vacation.

The Lord Chancellor said "that the Court of Chancery was always open both for granting and dissolving injunctions; and that it was competent to the Court to appoint any day that the Judge might think fit for hearing a motion. It would be most unjust that a party having obtained judgment at law should be prevented from issuing execution during the whole of the long vacation, notwithstanding he had put in a full answer denying all the equity of the bill." [1]

LORD HARBOROUGH v. WARTNABY. 1 Phil. 394.

Motions of course out of Term.

The Lord Chancellor laid it down "as a general rule of practice for the future, that motions of course may be made out of Term as well as in Term, and on any day, whether a seal day or not."

NICHOLSON v. HAINES. 1 Coll. 196.

Affidavits on further Directions.

On the hearing of a cause for further directions, an affidavit was tendered in support of a fact not included in the Master's finding. Vice-Chancellor Knight Bruce said that he "could not receive an affidavit on further directions; but he thought that this was a matter as to which a general order of the Court might be useful."

HENDERSON v. HENDERSON. 13 Law J. N. S. Q. B. 274.

Colonial Decree — Action of Debt thereon.

An Action of Debt will lie upon a decree made upon the equity side of a Colonial Court, not indeed when the decree involves collateral and provisional matters, to which a Court of Law can give no effect, but where the suit terminates in the simple result of ascertaining a clear balance, and an unconditional decree that one individual must pay it to another. In such an action the Court of Law will not consider pleas, raising questions upon the merits of the case, which, if constituting a defence, should have been pleaded in the Colonial Court; but it will presume in favour of the justice of the decree, unless it can be shown in the clearest light that the foreign law, or at least some part of the proceedings of the foreign Court, are repugnant to natural justice. In the case above given these points were elaborately discussed in the written judgment: Lord Denman observing that, although the Court of Chancery might, as recently decided in the House of Lords [2], give effect to

[1] See Fielding v. Capes, 4 Madd. 393.

[2] Houlditch v. M. of Donegal, 8 Bligh. N. S. 301.

the foreign decree, this circumstance did not exclude other Courts from interfering, where, from the simple nature of the decree, they were capable of giving a remedy equally complete, and much more expeditious. The Court in this case declined expressing an opinion as to whether an action would lie on a decree of the High Court of Chancery to recover a sum, which that Court might simply and unconditionally have directed a party to pay.[1]

BROWARD v. DUMARESQUE. 3 Moore Pr. Co. R. 457.

Appeal formâ Pauperis.

An appeal to the Privy Council *in formâ pauperis* will be allowed, if the appellant by his petition and affidavit allege that he is not worth 5*l.* besides his wearing apparel, &c.

FISHER v. WALTHAM. 1 Dav. and Meriv. 142.

Bubble bet.

Demurrer in assumpsit on a wager. The defendant was an articled clerk, with whom the plaintiff had bet eight bottles of wine, that he, the defendant, would pass his examination for admission to practise as an attorney. The defendant passed his examination, but refused to pay the bet. Lord Denman C. J. in the course of the argument took notice, that the defendant might have won the bet, if he pleased, by not passing the examination, and had the event in his own command: and upon this ground the Court allowed the demurrer.

BROWN v. CLARKE. 12 M. & W. 25.; 1 Dowl. & L. 409. S.C.

New Trial — Costs.

This case deserves notice, as fixing a rule of practice that may be of no trifling consequence to litigants. The rule is this, that, wherever, by the default of the jury, or by their defect of finding a verdict, on the first trial, the parties have gone down to trial a second time, the party ultimately successful is entitled only to the costs of the trial in which he succeeds, and this, too, though the associate has indorsed the record as a *remanet.* The Court held that the case was analogous to that of a *venire de novo,* where each party pays his own costs.

[1] See Henley v. Soper, 8 B. & C. 16.; 2 M. & R. 153.; 6 L. J. K. B. 210, S. C.; Carpenter v. Thornton, 3 B. & Al. 52.; Sadler v. Robins, 1 Camp. 253.; Rupell v. Smith, 9 M. & W. 810.; 11 L. J. N. S. Ex. 308. S. C.; Smith v. Nicolls, 5 Bing. N. C. 208.; 8 L. J. N. S. C. P. 92. S. C.

HARRISON v. DIXON. 12 M. & W. 142.
WHITTINGTON v. BOXALL. 12 Law J. N. S. Q. B. 318.

Pleading — Trespass.

In trespass *de bonis asportatis*, a plea denying that the goods are the plaintiff's puts in issue not only the *possession* of the goods, but the *property* in them. This point was decided in Harrison *v.* Dixon; but the pleader, who relies on this case as an authority, must bear in mind that the Court of Queen's Bench have held in Whittington *v.* Boxall, that, in trespass *quare clausum fregit*, such a plea puts in issue only the possession, and therefore, if the defendant not only contests the possession of the plaintiff in fact, but also relies on title, in case actual possession is proved by the plaintiff, he cannot rest his defence on this plea, but must plead in confession and avoidance. The distinction between these two cases appears to be, that the plaintiff's title to *goods* can be disputed by the defendant only by denying his possession; whereas, if the question relate to the title to *land*, a plea of *liberum tenementum* may be put on the record. It is proper, however, to observe, that the case of Whittington v. Boxall is directly opposed to a case in the Exchequer[1]; and, in Harrison v. Dixon, Parke B. intimated a doubt as to its correctness. His reasoning, as reported, is as follows:—"Before the new rules, the general issue, not guilty, put in issue the plaintiff's title, because, under that plea, the defendant might dispute both the fact of the trespass, and also the fact that it was committed on the plaintiff's close. Now the plea, denying the close to be the plaintiff's, is a denial of his title to the same extent as he would have been obliged to prove it under the general issue."

IN RE PEACH. 13 Law J. N. S. Q. B. 249.
IN RE HARRISON. Id. Exc. 259.

Attorney's Bill — Payment by Note — Taxation.

The new Act respecting attorneys[2] provides, by the 41st section, that the *payment* of an attorney's bill shall not preclude the Court or Judge, to whom application shall be made, from referring such bill for taxation, provided the application be made within twelve calendar months after payment; and the Courts of Queen's Bench and Exchequer have decided, in the cases above cited, that, where a client has given his bill of exchange or promissory note in discharge of the bill, the twelve months shall run, not from the date of the instrument, but from the time when it fell due, and was actually paid.

[1] Parnell *v.* Young, 3 M. & W. 288.
[2] 6 & 7 Vic. c. 73.

Exparte Benthall, 7 Scott, N. R. 407.

Attorney who changed his Name entered by his new Name.

There had been contradictory determinations by the Courts of Queen's Bench and Common Pleas respecting the right of an attorney who had changed his name to be entered upon the roll by his new name. In Exparte Hayward, 5 Scott, 712., the Court of Common Pleas refused to allow such an alteration, holding it to be mere matter of fancy. But the Court of Queen's Bench, in Exparte Ware, 6 Dowl. 311., made a different decision.

In the present case the Court of Common Pleas, notwithstanding the case of Exparte Hayward in the same Court, granted a rule for entering on the roll of attornies the name of Francis "Benthall," in lieu of his former name of "Bentall."

INDEX TO CASES.

INDEX TO ADJUDGED POINTS.

POSTSCRIPT.

SEVERAL events connected with the profession have very recently occurred which should not in a professional journal remain entirely without notice. Mr. Justice Erskine has retired from the Bench, from the state of his health. He was created Chief Judge of the Court of Review in 1832, when that Court was established, and was promoted to the Common Pleas in 1839. It would be impertinent for us to say more on the present occasion; than that he was an able, careful, and learned judge. He has been succeeded by Mr. Erle, whose appointment has given general satisfaction. It is highly to the credit of the Lord Chancellor, that in the distribution of his judicial patronage, so far at any rate as the superior courts are concerned, he has overlooked all other considerations than fitness for the office. No one can say that during his chancellorship he has not selected the best men he could find; and his last appointment has not discredited his former impartiality and penetration. We know not any one thing for which the country should be more grateful than this. In selecting the judges of the superior courts (as indeed in all judicial situations) party feeling should be laid aside; and it is to be observed that this can be done the more safely, as men peculiarly fitted for judges are very rarely strong partisans.

Mr. Holt, who was appointed by Lord Bexley Vice-Chancellor of the County Palatine of Lancaster, has died. He was the author of a work on the Law of Libel, somewhat noticed in its day, and some other works. Mr. Horace Twiss has succeeded him, with the general approbation of the profession. The equity jurisdiction of this court has been recently extended.

Some sensation has been created by the public notice taken at the Central Criminal Court of certain irregular practices among the *regular* practitioners of that court. All that we can say in this matter, if the practices alleged be true, which they seem to be, is that they show that this court, and the corresponding sessions, are governed by rules different from those recognized by all other courts and all other sessions in this country; and this, perhaps, has been long the professional understanding as to them. The only defence made has been, "Oh! it is true I did so and so; but then I am no worse than Mr. A., and Mr. B., and Mr. C., who are doing the like every day:" to which Messrs. A. and B. and C. make no

reply. We do not know that these offences can be otherwise reached than by the general reprobation and contempt of all who really have any respect either for themselves or their profession; but we have reason to think that the matter is under the consideration of the benchers. We have heard of a case perhaps even more gross than these occurring in another court; but as this is certainly *sub judice*, we cannot enter into it. The good that we anticipate from these disclosures is, that they may call attention to the present state of legal education, and lead on to the proper steps being taken to reform it.

It is said that the Local Court Bill is certainly to be passed in the next session; *it is said* that Mr. Watson will renew his motion for a Committee as to the Chancery Compensations: and we think both these rumours may turn out to be true, although we have no other authority for them. There is more certainty in a Bill to amend the Insolvency and Bankruptcy Act (7 & 8 Vict. c. 96.), which we have reason to believe will be introduced either by the Government or Lord Brougham. How often is it to be regretted that the only mode of legislation in this country is to carry a principle by one act, and then to work it out by amendment acts. For this no one is to blame: it is the system; and to that attention has been directed in the present Number.

While on this subject we may also remark on the manner in which the Transfer of Property Act was carried. It was brought in at the commencement of the session, and read a first time; it was then allowed to slumber until the end of July, no step being taken in it—the general opinion of the profession being that it was not to be proceeded with. It was, however, then rapidly moved through the remaining stages in both Houses without a word being said, and was passed certainly without due notice or consultation. Indeed we have heard that it was sent to one learned Judge for his opinion and report, who set aside a day for looking at it, but on happening to take up a newspaper on the appointed day, found that it had already become law!

A meeting of the equity bar has taken place at Westminster, to consider the insufficiency of the present rooms allotted to the two new Vice-Chancellors, and a deputation was appointed to wait on the Lord Chancellor on the subject, to represent that proper courts should be given to them; a representation which surely it should never have been necessary to have made.

A further reduction of fees in office copies in Chancery has been made in the present term.

Michaelmas Term, 1844.

LAW BOOKS RECENTLY PUBLISHED.

New Commentaries on the Laws of England (partly founded on Blackstone). By Henry John Stephen, Serjeant-at-Law. Vol. iii. Price 24*s*.

The Law and Practice in Bankruptcy, as altered by the New Statutes, Orders and Decisions. By Basil Montague, Esq. Q. C., and Scrope Ayrton, Esq., Barristers-at-Law. The second edition, by John Herbert Koe, Esq. Q. C., and Samuel Miller, Esq., Barristers-at-Law. In 2 vols. 8vo. Price 2*l*. 2*s*.

A Treatise on the Practice of the Court of Chancery, with an Appendix of Forms and Precedents of Costs adapted to the last New Orders. By John Sidney Smith, late of the Six Clerks' Office. Third edition, revised and enlarged. 2 vols. 8vo. Price 2*l*. 10*s*.

The Law and Practice in Bankruptcy, as founded on the recent Statutes. By J. F. Archbold, Esq., Barrister-at-Law. The tenth edition, by John Flather, Esq., of Lincoln's Inn, Barrister-at-Law.

The New Chancery Practice; being a condensed Treatise of the Practice of the Court of Chancery as altered by the recent Statutes and Orders, and by the abolition of the Six Clerks' Office. By Hubert Ayckbourne, Esq. Price 14*s*.

The Practice in the Offices of the Masters on the Plea Side of the Superior Common Law Courts at Westminster; showing the Principles and Rules observed by the Masters on the Taxation of Costs, and other matters. By Thomas Dax, Esq., one of the Trustees of the Court of Exchequer. Price 15*s*.

A Book of Costs in the Courts of Queen's Bench, Common Pleas, and Exchequer, including the Crown and Queen's Remembrancer's Offices, also in Bankruptcy and the Court for Relief of Insolvent Debtors', in Conveyancing, and miscellaneous matters. Second edition, containing the new Directions upon the Lower Scale and Queen's Prison Fees, with a full Index. By Owen Richards. Price 18*s*.

Precedents of Mortgages, Transfer of Mortgages, and Conveyances of Mortgaged Property, extending to Freehold, Copyholds, and Leaseholds, and introducing New Forms of Copyhold Mortgages, obviating, without injury to Lord, Steward, Copyholder, or Solicitor the present Difficulties in the effecting Transfers of Copyhold Securities, and realising Payment by Sale of the Property, with References to the Stamp Duties, Cases decided thereon, &c. By Rolla Rouse, Esq., Barrister-at-Law. Price 18*s*.

The New Practice of Attornies in the Courts of Law at Westminster, with Forms including the recent Statute as to Attornies, and the Cases decided thereon; also an Appendix, comprising Questions of Practice, by which the Errors in Proceedings may be detected, and the proper mode of taking advantage of them adopted. By John Frederick Archbold, Esq. Barrister-at-Law. In 2 vols. 12mo. Price 1*l*. 12*s*.

The Law of Warrants of Attorney, Cognovits, and Consent to Judges' Orders for Judgment, with Forms. By Benjamin Coulson Robinson, Esq., of the Middle Temple, Barrister-at-Law. 12mo. Price 6*s*.

A Treatise on the Law of Defamation, with Forms of Pleadings. By George Wingrove Cooke, Esq., of the Middle Temple, Barrister-at-Law. 12mo. Price 14*s*.

Harrison's Analytical Digest of all the Reported Cases determined in the House of Lords, the several Courts of Common Law in Banc, and at Nisi Prius and the Court of Bankruptcy, from Michaelmas Term 1756 to Easter Term 1843, including also the Crown Cases reserved, and a full Selection of Equity Decisions, with the Manuscript Cases cited in the best modern Treatises, not elsewhere reported. The third edition, by R. Tarrant Harrison, Esq., of the Middle Temple. In 4 vols. 8vo. Price 6*l.* 16*s.* 6*d.*

A Practical Treatise on the Laws, Customs, and Regulations of the City and Port of London, as settled by Charter, Usage, Bye-Law, or Statute. By Alexander Pulling, Esq., of the Inner Temple, Barrister-at-Law. 8vo. Price 18*s.*

Macqueen's Practice of the House of Lords: a Practical Treatise on the Appellate Jurisdiction of the House of Lords and of the Privy Council; together with the Preface on Parliamentary Divorce, with a Selection of leading Cases. By J. F. Macqueen, Esq., of Lincoln's Inn, Barrister-at-Law. 8vo. Price 1*l.* 11*s.* 6*d.*

A Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. By Henry Roscoe, Esq., of the Inner Temple, Barrister-at-Law. Sixth edition, with considerable additions, by Edward Smirke, Esq., Barrister-at-Law. 12mo. Price 24*s.*

Chitty's Treatise on Pleading and Parties to Actions, with Second and Third Volumes, containing Modern Precedents of Pleadings, and Practical Notes. The seventh edition, corrected and enlarged. By Henry Greening, Esq., of Lincoln's Inn. 4 vols. 8vo. Price 4*l.* 10*s.*

TO CORRESPONDENTS.

We must take this opportunity of expressing our sincere thanks for the offers of assistance that we have received; many of which are very valuable.

We have endeavoured in every case to give a private answer to them through our publisher; and if we have failed in any instance, we trust that this general notice will be received as an apology. If we have not availed ourselves of any of these offers in the present Number, it is because to that extent our arrangements have been long complete. We regret, however, that some delay has taken place in the publication of this Number, which was almost unavoidable; but we do not anticipate that it will again occur.

NOTE TO ART. I., p. 24.

The number of codes referred to in Art. I., we find, is much below the truth. There have been eight given since the beginning of the present century, and there are eleven in all Europe, besides those of France.

THE

LAW REVIEW.

ART. I.—LORD CHANCELLOR ELDON.

The Public and Private Life of Lord Chancellor Eldon, with Selections from his Correspondence. By HORACE TWISS, Esq., one of Her Majesty's Counsel. 3 vols. 8vo. pp. 1646. London. Murray, 1844.

IT is inconsistent with the plan of this work to give elaborate criticisms of books that appear, though their subject may often be such as recommend them in a peculiar manner to the attention of the legal profession. We do not therefore intend at present to review fully or formally the volumes before us, and especially we mean to give no extracts from them; but after pointing out their merits which are great, and their defects which are comparatively few, we shall proceed to lay before the reader such observations upon the subjects handled in them, and more especially upon the eminent person whose biography they contain, as appear to be most conducive towards preserving the truth of contemporary history, free from the errors or perversions with which party or personal feelings are but too apt to pollute its stream or divert its course.

It would be very inadequate praise of Mr. Twiss to say that he had performed his task respectably. He has done it extremely well, both in maintaining, generally speaking, a candid and fair tone, in judiciously selecting his materials, and in adopting a style of composition, plain, correct, well suited to his subject, seldom offending against the rules of sound taste. The profession, of which he is an esteemed member, and to the honours of which he is well entitled, are

laid under great obligations to him for his work, obligations no way less than those which he has conferred upon the worthy and distinguished family who have furnished him with his materials, in so far as those were not accessible to all in the known history of Lord Eldon's times. There is great distinctness in his narrative, and it is well varied and enlivened by such extracts from the correspondence of the Scotts as tend to bring the reader acquainted with their nature and habits: it is interspersed with such explanations and explanatory references as help to spare the reader trouble; and it is not loaded or encumbered with dissertation, though the author is never disposed to shrink from the remarks which his own opinions seem to call for. If the main object of a biographical composition be, as it doubtless is, to present us with a lively picture of him who is its subject, then has Mr. Twiss amply attained it; for no one can rise from reading his book without having impressed on his mind a very distinct portraiture of Lord Eldon's private and personal character, although he may also have occasion to cast a darker shade than the writer has done upon some parts of it, and to bring certain weaknesses more into relief, which his friendly pencil has left obscure. It is a different but a higher praise to which he is entitled, that the opinions, though not disguised, are not obtruded, of the biographer himself, and that an exemplary spirit of fairness, and even forbearance, seems to guide his mention of those who were Lord Eldon's, as they are his own, adversaries in the party contests of the day.

The main defect of the work is, that the Politician occupies a disproportioned space, and the Lawyer's dimensions shrink in the same degree. Yet Lord Eldon was little of a statesman, and indeed describes himself a year after his first Chancellorship had expired, as being "no politician" (letter to Lord Melville, vol. ii. p. 17.); and he was, on the other hand, a very great lawyer, beside holding the Great Seal for nearly five-and-twenty years, much longer than any of his predecessors. Yet the "Life of the Lord Chancellor" is much more filled with accounts of parliamentary speeches, in which he never had any excellence, and in which he took no kind of delight, than with accounts of either his forensic or his judicial exertions. Of the sixteen or seven-

teen hundred pages whereof these volumes consist, not fifty are devoted to trace the peculiar qualities of his conduct as an Equity Judge, an office he filled for a quarter of a century, filling likewise the greater part of twenty volumes of reports with his cases; for the ninety pages that precede this portion of the book are only a defence against the charge of delay, or rather an argument in explanation of that charge; a couple of pages record all that is said of his success as a Common Law Judge, although he valued himself more upon that than upon any portion of his public life, and indeed held the office of Chief Justice above a year and a half; while of his qualities as an advocate hardly any thing is said beyond a full account of the State Trials in 1794, although he was at the Bar three-and-twenty years, during eleven of which he held its highest offices. There are still living many members of the profession who could have given Mr. Twiss accurate information both regarding Lord Eldon's forensic powers and his abilities as a Common Law Judge; but indeed the reports are sufficiently full to afford materials on the latter subject; while, for describing his Equity proceedings and his conduct of Appeal business in the House of Lords, there are incomparably more rich materials than are to be found to illustrate the judicial history of all his predecessors together; the reports which we have in the time of Lord Northington being both meagre and incorrect, those of Lord King somewhat better, those of Lord Hardwick extremely poor, and those of Lord Thurlow the very worst of the whole. This defect is a very serious one in Mr. Twiss's book, and makes it probable that, with all his great and acknowledged merits, it will be found that he has left the Life of *Lord Chancellor* Eldon, *Lord Chief Justice* Eldon, and Sir John Scott, to be yet written, unless he shall make a very considerable addition to those volumes in the subsequent editions, to which we nowise doubt the work will come.

If the volumes of Vesey, Merivale, Swanston, and Bligh have been too little resorted to, the Anecdote Book of Lord Eldon has perhaps been too much cited. For dates and facts no authority could be more unexceptionable or more valuable. As a repository of jests it is of far less merit, not only because the noble collector's taste in this kind was far from

being very fastidious, though his excellent good humour gave his oral pleasantry considerable zest which his "Note or Memorandum in writing" cannot retain, but because we shall presently find that his habits of hesitation when he came to reduce his narratives into a written form really took away the greater part of their original racy flavour.

Our last exception to Mr. Twiss's work is, that he gives too indiscriminate credit to all the materials in his possession. He does not weigh and select, but assumes that whatever he is told by any of the family as having been by Lord Eldon told to them, must be equally authentic with what he finds presented under his Lordship's own hand, or communicated by Master Farrer. Now he ought to have recollected how very unlikely it was that ladies, especially elderly ones, should retain an accurate recollection of matters out of their ordinary beat, and frequently much above their comprehension, and he ought, in proportion, to have sparingly drawn from this source. We shall, in the sequel, see ample reason to confirm this remark; indeed, to satisfy our author himself that he has thus been led into material error.

Our duty of greatly commending the book suffers no very considerable drawback from the exceptions which we have now made; and indeed our praise would have been of little value to a manly honest mind, had it been rendered wholly indiscriminate by the omission of all just censure. We now proceed to make a few reflections suggested by the work and by its subject.

Nothing can be more amiable than the light in which Lord Eldon's private character appears throughout Mr. Twiss's pages. The kindness of his nature, the warmth of his affections towards his family, the gentleness of his temper, the scrupulous anxiety to discharge his duties as a son, a father, a husband, a brother, are beyond all praise. Whether we find him in the earlier struggles of his married and his professional life, oppressed with the ills of a narrow income and the inquietude attendant upon an increasing family and a precarious professional advancement, or enjoying by his honest industry the splendid fruits of his talents, and his patience, and his toils; whether we contemplate him in his father's home, among his brothers and sisters, or in his own,

with the wife of his bosom to his ardent affection for whom he had made such sacrifices encountering for her such risks; whether we regard his fond and dutiful correspondence with his parents, one of whom lived to see him a Peer and a Chief Justice, or his steady and grateful attachment to his illustrious brother and early benefactor; or see him who was formed to be the delight of society and to be charmed with its enjoyments, leading the life of a recluse on account of his wife's nervous habits; or view him unbending his careworn brow to play with his grandchildren — in all these postures and relations of his life we observe but one picture, without a flaw and without a shade. It would be easy to fill our page from that of Mr. Twiss with proofs of this, though not easy to compress them within a reasonable compass; but we prefer a general reference to the judicious selections of our author, promising the reader a pleasing enjoyment in their perusal, and especially impressing on our young friends in the profession the lesson they are fitted to teach, that the most profound learning, the most severe industry, sometimes stimulated by want, sometimes by ambition, the two great corrupters of the human heart, are not incompatible with the gentlest nature, or calculated to shut out the most tender influences from the bosom.

We have mentioned his wife, and this leads us to the subject of his marriage. He eloped with Miss Surtees from her father's home in Newcastle, she descending from her room by a ladder to join him. They were married in Scotland, by a clergyman of the Established Church, who thereby incurred (of which Mr. Twiss seems not to be aware) the penalty of ecclesiastical censure, though the marriage was valid, as indeed it would have been had no clergyman at all interfered. The young couple returned to Morpeth the same day, and, finding no room in the inn, were accommodated by the landlord giving them up his own for the bridal chamber. The parents of both parties in a short time forgave this great breach of discipline; but Lord Eldon often appeared afterwards to have it in his eye; and on one occasion, having expressed himself strongly on the impropriety of such an act where a ward of Court had been carried off to Gretna Green, he said that it was an offence not to be lightly thought of;

on the contrary, one which called for a well-spent after-life to redeem it. The hearers merrily said, "My Lord Chancellor is plainly insinuating a compliment to himself." It is a somewhat singular thing that at the same time the head of the Ecclesiastical Establishment, the head of the Law, and the Great Officer of State next but one to the Chancellor should all have made runaway marriages. When Mr. Brougham, in answer to Mr. Baron Wood's reprobation of runaway matches in Lolly's case at Lancaster, mentioned that, bad as it might be, the same thing had been done by the Archbishop of Canterbury, the Lord Chancellor, and the Lord Privy Seal, the learned Baron said, "I don't believe it"—and so put it to the jury, observing, however, that it was immaterial to the question of bigamy, which they were trying. But he beckoned to the learned counsel while the jury were deliberating, and asked how the fact stood; and upon being told laughed very heartily, never having heard it before except as regarded the Chancellor.

From this early imprudence, and the stinted income to which it led, may be very certainly traced the habits of economy and retirement so often confounded in Lord Eldon's case with parsimony, for which charge these habits were made the foundation. An expensive man he certainly never was; a careful man he as certainly always proved, and always was right in being. To the imputation of anything like avarice or stinginess, in the ordinary sense of the word, he was not at any time liable. He was a charitable man: he was, to the certain knowledge of many in the profession, a generous benefactor; he gave many sums of money to a considerable amount away in kind assistance to unfortunate brethren at the Bar, and to poor clergymen, whom he had no other means of relieving; he volunteered to our personal knowledge a handsome sum when a subscription was making for an aged and learned lawyer fallen into bad circumstances; he at once defrayed the expense of publishing a law book, which was so precarious a speculation that no bookseller could be found to undertake it; and when its success enabled the author to repay the 200*l.* which he had given, he refused it, saying, he wanted to make a present of a valuable work to the profession. Not only did he voluntarily give up 2,500*l.* a-year of his salary to

the Vice Chancellor, thus sacrificing between 30,000*l.* and 40,000*l.*, but he likewise paid, in the course of his Chancellorship, 30,000*l.* in gains remitted, and money given to different officers of his Court. We estimate his largesses at a moderate sum when we put them at 80,000*l.*, during his official life; and we would respectfully request those who are so ready with their accusations of parsimony against Lord Eldon, because he gave fewer dinners and assemblies than his neighbours, to have the great goodness to suspend their own entertainments with their slanders, and to be only one-tenth part as ready as he was with their money in relieving real distress. Next to the gratification which we enjoy in rescuing Lord Eldon's memory from such aspersions, will be our satisfaction at having opened the sluices of useful benevolence, when we closed those of groundless malice.

Much of this malignity was no doubt caused by party spirit, of which such slanderous falsehoods are the natural fruit. The same disposition exaggerated the faults and failings of his public character; but here there was a sufficient foundation on which faction might build. To this unfavourable side of the picture we must now turn, and we have some fear that the pen which traces these lines having hitherto been dipped in oil, may now appear to frequent the gall-cruet; yet we are only conscious of a devotion to truth, and are as entirely free from all party and all personal prejudices as the most indifferent spectator of the age which is past, or even the most partial friend of the great man who so prominently figured in its affairs.

In turning from his private to his public character, we are at once struck with the manner in which nature is laid down and art taken up, — an art too, which did not assuredly reach the perfection of self-concealment. A good deal of the warmth which prevails in his expressions when speaking or writing to his family, and the anxiety to be safe and right, with the correlative dread of going wrong, no doubt may be said to have followed him in his public displays, and to have occasioned the frequent professions of principle and appeals to conscience which distinguished him more than any other speaker, insomuch that he obtained a kind of nickname from hence, much more than from that Conscience of which he had

the custody, together with the Great Seal. But this was not all, nor anything like all; that was manner, form rather than substance. There was more self-delusion, and more deception of others by a good deal, than these habitual phrases implied. It is not pleasing to use a harsh and even a vulgar expression; but from the charge of canting, and even of much canting, this very eminent person was far from being free. Whether or not he really deceived himself, may be a question; that he did endeavour to deceive others, there is no question; and that his success was very partial we take to be equally clear. There is so remarkable an example of this in the work before us that we must examine it at more length; for it sheds no little light upon the character of Lord Eldon's mind.

Not once, but repeatedly, and not in one, but in various forms, he would represent his acceptance of the Great Seal as forced upon him, as not according with his own inclination, as only occasioned by his regard for a promise which he had given to George III., when he was raised to the office of Chief Justice of the Common Pleas. Now there is the most positive certainty that this cannot be an honest representation of the fact.

In the first place, the Chancellorship was a much better office on a merely prudential calculation of profit and loss than the Common Pleas, which he affects to lament having been obliged to sacrifice. The retiring pension of Chancellor was better than the salary of Chief Justice, and to that four thousand a year for life he was entitled without either expense or labour if he had lost the Great Seal four and twenty hours after he took it. He had, in addition to this, the almost equal certainty of an official income for some time at least, ranging from eighteen to two and twenty thousand a year. With his habits, two years of this gave him an ample fortune to leave his children, in addition to his former professional gains, had his life been cut short. The continuing in the Common Pleas gave him no such possibility. Therefore, the Great Seal was incomparably more lucrative, and less attended with risk than the Chief Justiceship.

Secondly, he was fully more at home in a Court of Equity than in one of Law, because most of his time, and for the last eleven years all his time, had been passed in Chancery. Nor will it suffice to say in answer to this, that he sat with three

Judges at Law, while in Equity he sat alone; for at Nisi Prius, the real test of a Common Law Judge, he sat quite alone, and had to dispose of points as they arose, without any time for deliberation, reflection, consultation, or doubt. To know as he must do, if he went into Chancery, that no point ever could arise to take him by surprise — nay, none on which he did not know incomparably more than any of the Bar before him, must have been an exceeding great relief to a man so nervous and so hesitating. It was a comfort wholly denied to him when addressed at Nisi Prius by Serjeants Lens, Best, Shepherd, or by the Erskines, the Gibbs's, the Garrows of the day.

If, however, it be said that the responsibility of a Cabinet minister was what he shrunk from, we are to recollect that they who placed him in the Common Pleas exacted, as a condition of his promotion, the taking a peerage with it, and that he thus became bound to aid them in debate, nearly as much as if he sat on the woolsack. Besides, who is green and ignorant enough to believe that against this political responsibility, not new to one who had been long Attorney-General in the most trying times, and had never betrayed any want of due resolution, he must not have set off the glory of accession to the throne of the legal profession, "by merit raised to that eminence" of more than regal state which in every lawyer's mind so

"far
Excels the wealth of Ormus or of Ind?"

Whoever believes Lord Eldon to have been wholly indifferent to the pleasures of power, the possession of the most brilliant rank, the discretion of naming all the Judges, all the Masters in Chancery, some twenty vast sinecure places, seventy bankrupt commissioners, registrars and clerks innumerable, down to giving his body servants places of between two and three thousand a year, distributing professional rank in all the courts, appointing all magistrates, and between nine hundred and a thousand livings in the Church, at the rate of above eighty in each year — to say nothing of the being inrolled as a great Judge among the Nottinghams, the Hardwickes, perhaps surpassing them all — may string his mind a peg higher, may tax his credulity a degree farther, and bring himself to think it possible that this splendid destiny was forced upon him, re-

luctant, and only desirous of remaining in the unenvied obscurity, how respectable soever, of the Common Pleas.

But it is remarkable enough, that though he is for ever insinuating, and in some sort even affirming this, he cannot quite bring himself roundly to assert it as a fact. He seems conscious of the draft he should be making on the faith of his readers or hearers, and rather tells all that may force them to draw the inference, than himself makes the allegation. His plea is somewhat argumentative, and so somewhat bad. Let us just examine it a little.

In Vol. i. p. 33. we find him recording in his Anecdote Book, that the King made it a condition of the Common Pleas, "that I would promise not to refuse the Great Seal "when he might call on me to accept it." This condition, he adds, prescribed by his Majesty, "I thought I could not "refuse to accede to." Now must not any man with the tithe of Lord Eldon's acuteness have perceived that the giving this promise was in truth voluntarily accepting the Great Seal? True, he says he did so in order to get the Common Pleas; but still he did accept it of his own free will. Then observe, he does not venture to say that he at all deprecated the condition thus imposed.

Again, he tells Mr. Farrer that, having given his promise to the King, "he could not do otherwise than fulfil it." And he told Mrs. Foster "that he was fond of that Court, "and never could have quitted it for the Chancellorship; "but his promise was given." This assertion that he would not have quitted the Common Pleas but for his promise, is not at all to be found in any of Lord Eldon's letters or notes, nor is it given by Mr. Farrer or any one else; and we shall presently see how much less accurate a reporter that lady is of Lord Eldon's conversations. His letter to Mr. Swire upon the occasion (i. 371.), his letter to Lord Kenyon (p. 365.), contain no such positive averment. He only says to the latter that he "may be compelled to quit this little Court, "in which he should have wished to end his days," — which may mean anything or nothing. Indeed this soft compulsion, this tender violence, this hard necessity of keeping a promise to take the first office in the law, as a condition of obtaining the third, resembles the kind of covenant he was so fond of

saying he had made with himself on many occasions,—engagements which have mighty little weight on even the most strictly conscientious, from the peculiar circumstance of the covenantor and covenantee happening to be one and the same person, and a release being thus with singular facility obtained.

He is, but for very different reasons, anxious to represent himself as owing his promotion to the King, and not to Mr. Addington. No doubt the royal words passed which he has recorded; and no doubt the King calls him "his Chancellor," especially when out of his mind. It is, however, certain that kings are exceedingly apt to use this phraseology. William IV., we happen to know, did use it much more explicitly to one of his Chancellors than his father is said to have done respecting Lord Eldon; and yet that Chancellor never considered himself as otherwise than the colleague of Earl Grey; like all his other colleagues, proposed to the Crown for the high office he held; and like all his other colleagues, absolutely prohibited by every tie of honour and even of common honesty from making or favouring any attempt against the government, of which he was so important a member. Little would it have availed him, if detected in any intrigue with the common adversary, to plead that he was the King's Chancellor; that his majesty had distinctly told him he so regarded him; that he had in plain terms said, "Other Chancellors came into office as members of the "government, and as proposed by its chief; but you hold your "office from me; you are my Chancellor." As words of compliment such expressions were received with the deference and gratitude such gracious condescension called for; as constituting any substantial difference between himself and his colleagues, they had no meaning at all: and accordingly, when in 1832 the Chancellor was, both in the closet and by letter, asked to form a government which should substantially carry the Reform Bill with the help of Lord Ellenborough and others, the answer was, not that as the King's Chancellor he could take this course, but that as Lord Grey's colleague it was utterly out of the question,—an answer which was not soon forgiven by the monarch, nor perhaps ever forgotten.

It must not be supposed either that these remarks are

introduced without an object, or that the statement of Lord Eldon which called them forth was made without an object far more important than the mere love of gossip or gratification of personal vanity. We now proceed to the grave charge against his Lordship, to meet which his statement was manifestly introduced; to support which it has become necessary to make the foregoing observations on that statement.

As long as Mr. Pitt conceived that the Addington ministry which he had set up only made peace which he could not have done, and only prevented the Catholic question being carried, which he ought not to have tamely acquiesced in, and possibly too as long as the novelty of a quiet and idle life made retirement tolerable to his active, ambitious mind, he gave his support, cordially enough, to the men he had installed in office and recommended in Parliament. But he appears never to have been well reconciled to the notion of his puppets refusing to obey the wires; and still less could he brook their being able to go on dancing of themselves, without any impulse or guidance from his hand. He felt that the time was come for resuming his high office; and he joined his former adversaries, the Whigs, as well as a body of his former allies, the Grenville and Windham party, in as determined and as factious an opposition as ever ministry had to encounter. The whole of his own heavy artillery, whether of declamation or of sarcasm, was brought to play upon the Treasury Bench from his position on an eminence behind, termed his Hill-fort, after the military phraseology of the East; the lighter weapons of wit in prose and in rhyme were freely used, and to his inexpressible contentment, by his young friends the Cannings and Freres, and others of the Anti-Jacobin Club: the alliance was become even cordial with Mr. Fox, who lent himself, in an evil hour for his fame, to the most factious attack upon his illustrious friend, Lord St. Vincent's naval administration; and Mr. Pitt had now made up his mind to the absolute necessity of removing the Addingtons, and the Hobarts, and the Hawkesburys, but especially the chief of the Government and his connections, and forming a ministry upon a basis broad enough to comprehend Mr. Fox, and Mr. Windham, and Mr. Grey, as well as Lord Grenville. Nothing more bitter or more personal was ever known in

party struggles than his short and successful campaign, in conjunction with these his former adversaries, against his former friends, the men he had set up, and who had disappointed him by declining the part of puppets which he was pleased to assign them in the administration of our national affairs, — puppets clothed with all the responsibility which he on his part declined, while he elected to hold all the power.

Now the charge against Lord Eldon is, that he held communication with Mr. Pitt during this period of his opposition to Mr. Addington; and although we cannot fix the precise time at which this intercourse commenced, it is proved by evidence under his own hand, that it was subsisting and continued while he continued and subsisted Chancellor in Mr. Addington's Cabinet, and that it was kept carefully concealed from that able and injured statesman. It had happened to us to hear Lord St. Vincent expressing, as one main ground of the Government being defeated, when with the hearty support of the King he considered the struggle as anything but desperate, the secret understanding between Lord Eldon and Mr. Pitt, or, as he phrased it, the enemy having a friend in the citadel who opened the gates to him. It had also been the lot of the writer to defend Lord Eldon against this charge, deceived by his resistance in the House of Lords to Lord Grenville's powerful assaults; and when we ascribed the gallant old veteran's suspicions to a professional prejudice against lawyers, we had been answered, and truly, by the assertion that he was never in his life prejudiced against the profession, but, on the contrary, numbered among its members some of his most intimate friends and choicest companions. But the proofs adduced in the work before us put all doubt to flight, and render it necessary to defend Lord Eldon, not by denying the fact, but by pleading, in justification, something like the wary and subtle distinction taken by himself between a King's Chancellor and a Premier's colleague.

Five days after Mr. Pitt's motion against Lord St. Vincent, when the charge of coalition was openly made against him and Mr. Fox, and feebly denied by either, we find a communication opened between Mr. Pitt and Lord Eldon — and by whom? By Lord Eldon himself — who sent Mr. Pitt

a letter by his son, then a member of the House of Commons. It appears from Mr. Pitt's answer (i. 438.) that Lord Eldon had asked him to give him an interview. Mr. Pitt cheerfully assents, and declares his willingness to put the Chancellor "completely in full possession of all the sentiments and "opinions by which his conduct could be regulated" in the crisis which, he said, must very soon ensue. The negotiation appears to have been interrupted by some turn in the King's health; but it was resumed on the 22d of April, the day before Mr. Fox's motion, which was defeated by so small a majority that it led to the resignation of the ministers. Now there might be some doubt as to the former communication being withheld from Mr. Addington, although the use of the words "confidentially" and "full possession" seems pretty clearly to show that it was only with Lord Eldon Mr. Pitt communicated. The letter of April 22d, leaves no doubt whatever that the intercourse was wholly clandestine. Mr. Pitt sends him a letter to be delivered to the King, which he is desirous may be delivered before Mr. Fox's motion comes on, and that stood for the 23d. He leaves the letter unsealed, and refers it to Lord Eldon's discretion whether it shall be given to the King or not before the motion. He adds a strict injunction of secrecy, requiring that the contents of his letter "shall not be communicated to any one except the King "himself;" and then says, "I am the more anxious you "should see what I have written, because I cannot think of "asking you to undertake to be the bearer of a letter ex-"pressing sentiments so adverse to the Government with "which you are acting, without giving you the previous "opportunity of knowing in what manner those sentiments "are stated." (Vol. i. p. 440.) Another letter of the same date leaves the discretion of delaying this letter entirely to the Chancellor, who was to decide whether or not it could with propriety be given on that day to the King. But it is plain that the doubt thus suggested related to the state of the King's mental health. A council being held on the 23d at which the King presided, the negotiations went on, and Mr. Twiss, with an inconceivable inattention to the charge hence arising against the Chancellor, says that the personal intervention "of Mr. Addington was necessarily out of the

"question," and so the King relied on Lord Eldon. No doubt; for the object of the negotiation was to turn out that gentleman, and place Mr. Pitt and his other enemies in his office. In the House of Lords when this negotiation had made some considerable progress, we find Lord Eldon asking Lord Stafford to postpone his motion, in terms of extreme feeling and even vehemence. Their solemnity is a little ludicrous when we see in what kind of a business he had been engaged, and also reflect that all the pother related to putting off a motion. "I am determined to fulfil as long as I "have a drop of blood in my veins my duty to his Majesty "and the country" (not a word respecting Mr. Addington, his chief). "Upon my most awful sense of what I think "my duty to both, my conduct has been, is, and ever shall "be regulated; and this paramount consideration now in- "duces me to join in"—one supposes some great affair— "in recommending the noble Marquis, as far as the opinion "of an humble individual may be deserving of attention, to "postpone his motion." The awful sense of duty, of course, ended in Mr. Pitt's taking Mr. Addington's place, and retaining Lord Eldon in that office of Chancellor, which it cost him so much originally to bear holding, and which his conscientious regard to his former promise seems now to have made it necessary he should hold under Mr. Addington's successful enemy, as he had submitted to hold it under Mr. Addington himself. We are not told whether he communicated to Mr. Pitt his Royal Master's note of May 5., in which he speaks of "his excellent Chancellor," but expresses a hope Mr. Pitt will not desire to see him, and will "rather pre- "pare another essay combining as many empty words and "little information as the former"—but his Majesty expresses the "great pleasure he will have in receiving Lord "Eldon at the time named by himself."

Let us for a moment consider these somewhat strange proceedings. Lord Eldon unknown to Mr. Addington opens a communication with Mr. Pitt, leader of a combination whose avowed object was the removal of Mr. Addington — an object pursued for a year before with bitter hostility and with every aggravation of personal attack, descending even to the grossest scurrility. Mr. Pitt at once listens to Lord Eldon's overtures, and professes his entire readiness to give him "confidentially

" the fullest information of his own views and plans." The King's insanity suspends this negotiation for a month. Mr. Fox, another leader of the united opposition, has a motion announced, the avowed object of which was, as its result proved, the breaking up of Mr. Addington's administration. That motion was made with Mr. Pitt's entire concurrence, and received his powerful support, which Mr. Fox, in his reply, " was proud to acknowledge as he was to observe the " entire concurrence of Mr. Pitt, with respect to the weakness " and incapacity of Mr. Addington's ministry." The day before this, Mr. Pitt sends to Lord Eldon, Mr. Addington's most distinguished colleague, a letter which he wishes him to give the King after reading it, but forbids him expressly to let any one else know a syllable of its contents; in other words, requires this whole transaction to be kept concealed from Mr. Addington, against whom Mr. Pitt's charges of incapacity were to be placed before the sovereign by Mr. Addington's colleague, behind Mr. Addington's back. Does the Chancellor send back this letter? Does his mind revolt at this insulting proposal? Does he tell Mr. Pitt that he must find another channel through which to poison the royal ear against his chief? Does he even make it one condition of his carrying the letter, that Mr. Addington shall first see it? Oh, no! Nothing of the kind! He submits to Mr. Pitt's requisition that Mr. Addington shall be kept in the dark; he meets Mr. Addington in council as his confidential colleague, with Mr. Pitt's letter in his pocket, explaining to the King why he is heading a coalition of parties for Mr. Addington's destruction, the only point on which these parties could agree; he delivers the letter to the King, who despises it as full of empty talk and no substance, — a sort of King's speech made by the great master of talk, of whom Mr. Windham said, that he verily believed he could make one off-hand; — and the upshot of the whole intrigue is, that Mr. Pitt shoves Mr. Addington out of his place, which he takes himself, and retains his coadjutor in the business as Chancellor, " his ally, within the besieged garrison, who opened " the gate to him under cloud of night while the rest slept—" according to the gallant old admiral's notion, though we do not find in these volumes any record of Mr. Pitt having betokened much personal confidence in this ally, during the

few remaining months of his life. It is no kind of exception to this remark, that when Lord Eldon made a little bluster, as he was exceedingly apt to do when it cost nothing, about Mr. Pitt's expressing a hope that he had given no bias to the King's mind against admitting Mr. Fox into the new government, Mr. Pitt was quite satisfied with his assurance to the contrary. The suspicion was not at all unnatural when Lord Eldon's strong expressions against such a coalition are considered. He tells Lord Melville in 1807, that he had informed Mr. Pitt, in 1804, of his resolution to retire from office should the coalition take place. All we know is, that Mr. Pitt pressed the admission of Mr. Fox upon the King as strongly as he thought he could; and we are left in no uncertainty that he chose to run the risk of losing Lord Eldon's assistance in his Cabinet. But whether he really ran any very great risk of such a loss, is another question. Nothing is more common than after the event has proved the danger to have been trifling, to speak in that easy tense, the preter-pluperfect subjunctive; nothing is more common than the use of strong assertions when speaking in that obscure and safe tense — strong in exact proportion as there never can exist a possibility of disproving them. Lord Eldon would probably have protested vehemently; predicted lavishly; grumbled both long and low in all his letters, as we find him doing against all his colleagues for almost all the years of his long Chancellorship. Threats of resigning and of refusing to act another day, he no doubt would have employed, especially in private letters which Mr. Pitt never could see. Yet nothing is more likely than that he would soon have discovered the impossibility of finding another Chancellor fit for the office, the absolute necessity of his overcoming his private scruples for that public duty of which he had always so "awful a sense;" and which he solemnly vowed to perform "while a drop of blood remained in his body." Above all he would have opportunely recollected that he was the King's Chancellor; and therefore was no colleague of Mr. Fox, and that he had the same right to lie in wait for an opportunity of tripping up his heels, as he had for performing the same office by Mr. Addington; and so we probably should have seen him holding on the Great Seal, the object of his par-

ticular aversion, "while he had one drop of blood left in his "body."

In the composition of the new Cabinet Mr. Fox and his party were omitted, because Mr. Pitt yielded to the King's objections, personal against Mr. Fox. Lord Grenville and Mr. Windham refused to enter the Cabinet without him. Mr. Fox himself was most fair and reasonable upon the subject. He showed his accustomed magnanimity as regarded his personal interests; for we have the best ground for knowing that he professed his willingness to accept a foreign mission, should his absence remove the difficulties interposed by the King's obstinate resolution; the place named was Vienna, to which he would have gone as ambassador.

Another omission in the new Cabinet deserves to be mentioned; Mr. Canning, the staunch adherent and personal favourite of Mr. Pitt, the bitter adversary of Mr. Addington, whom he had persecuted for years in prose and in rhyme, by squib, by nick-name, by epigram, by small talk out of doors, and by small speech within was wholly left out, relegated to an obscure post, while his friend and patron, whom he had kept in a roar at the Doctor's expense for years, and had celebrated in songs about weathering the storm, preferred to him for Cabinet office such sages as Lord Westmoreland, such orators as the Duke of Portland, such wits as Lord Camden; and, in order to make his own omission the more palatable, placed his rivals and contemporaries, Lords Hawkesbury and Castlereagh, subjects of his jocular as well as serious attacks, Cabinet ministers over his head. The dislike of Mr. Canning by these two noble persons was constant, and it was shared by Lord Eldon to its fullest extent. Their familiar name for him was that commonly given to the enemy of mankind, the seducer of our first parents; and the letters of Lord Eldon in these volumes never make mention of him without some token of bitter personal aversion.

There remains to be considered a third charge against Lord Eldon in his political capacity, and it is perhaps the most grave of the three. It is the one against which he most frequently and earnestly sought to defend himself, with what success the documents before us, brought forward in his behalf, may enable the reader to determine for himself; it being

observable that he can have none of the adverse evidence before him in forming this opinion. We allude to the accusation of having suffered George III. to transact business when his mind was in a state of disease that rendered him incapable of discharging the functions of his exalted office.

It is plain that the royal mind was in an unsettled state when the Great Seal was given to Lord Eldon. Mr. Twiss himself makes this remark, and naturally enough, when he finds Lord Eldon relating that the King put the Great Seal under his coat, which he had buttoned above and below, and plucking it out said, "I give it you from my heart." Well may his Lordship say he never could understand what made the King so fond of him; for up to that moment he never had enjoyed the least opportunity of knowing him more than any one of his twenty millions of subjects. Immediately after this scene, insanity broke out — or rather was publicly announced; and Lord Eldon could not resign the Common Pleas, though he held the Great Seal, which he had received from the hands of the royal patient. A fortnight after we have a rambling and indeed insane letter from "His Majesty," to "His Chan-"cellor," as he calls him, concluding with these words, "How "soon will the shins of Pepper permit him to take the coif?" — alluding to the Master of the Rolls, Sir Pepper Arden, being appointed Chief Justice in Lord Eldon's room. At the same date the royal assent to some most important bills was given by the King's commission. A fortnight later, 16th May, 1801, we have a mad-doctor's letter (Willis) to the Chancellor, distinctly making mention of his Majesty being "under control," and adding that "until a consciousness of "the necessity of temperance shall arise in his mind it is "absolutely necessary to have recourse to artificial prudence" — that is, to a keeper. (Vol. i. p. 375.) On the 25th May another of Willis's notes gives an account of his Majesty having said he had "had a most charming night, having slept from "eleven till half past four," but adds the doctor, "alas! he had "but three hours' sleep, was constantly getting out of bed, "opening the shutters, praying violently, and making such "remarks as betrayed a consciousness of his situation, but "designing to conceal it from the Queen." The doctor therefore begs Lord Eldon to prevent the King from leaving town

" which cannot be safe." Hereupon the Chancellor, in his medical capacity, certainly, and not according to his oath of privy councillor, invents a story about the public business, a pure fabrication to keep his royal master in town. All this while Councils were held and business transacted by the ministers as if their royal master had been in the enjoyment of his faculties undisturbed. On the 6th June we find the Princess Elizabeth, a woman of extraordinary sagacity and good sense, writing to Dr. Willis " respecting the King's " distressing state of mind: —" " His manner is so different " from what it is when *well*, and his ideas concerning the " child (Princess Charlotte) are so extraordinary, that to own " to you the truth, I am not astonished at mamma's uneasi- " ness." His extravagance in expence is then alluded to—he spoke of having a wing built to the palace for the child. " You know full well," adds the excellent princess, " how " speedily everything is now ordered to be done. In short, " what mamma wishes is that you would inform the Lord " Chancellor that his assistance is much wanted in preventing " the King doing anything that shall hurt him. I think him " heated and fatigued, which I am not surprised at, not having " been one minute quiet the whole day. I assure you it is a " very great trial, the anxiety we must go through, but we " trust in God; therefore we hope for the best." (Vol. i. p. 379.) A few days after, we find her Royal Highness writing to the same mad-doctor. " He has been very quiet, very heavy, " and very sleepy all the evening, and has said two or three " times yesterday was too much for him. God grant that " his eyes may soon open, and that he may see his real and " true friends in their true colours. How it grieves one to " see so fine a character clouded by complaint! But he who " inflicted it may dispel it, so I hope all will soon be well."

On the 10th of June we find Dr. Willis writing to Lord Eldon that he has nothing very favourable to say of the King, " that he had rode out for six hours, and his attendants " all thought him much hurried, as did his pages; that he " had a great thirst upon him, that he talked of prudence " but showed none, his body, mind, and tongue being all on " the stretch every minute; and the manner he was now ex- " pending money in various ways, so unlike himself when " well, all evincing he was not so right as he should be."

(Vol. i. p. 381.) "The disorder," says Mr. Twiss, "took so "favourable a turn that in a few days his recovery was pro- "nounced to be complete." Still it was thought desirable to continue the mad-doctors and keepers about him, and the Chancellor tried to make him do this; but he answered that no one who had been in his condition, could ever bear to have his attendants near him when well, and therefore refused "in the strongest manner having Dr. Willis about him."

Now we ask two questions: first, does any one doubt that had Princess Elizabeth and Dr. Willis been examined in a court of justice touching the King's state of mind in case he had executed a deed or made a will at the date of those letters above cited, they would have given a clear evidence that he was deranged? — Secondly, suppose Lord Eldon knew nothing more than what these letters contained, and had not heard what they plainly imply without expressing, which of his clients would he have advised to execute any instrument disposing of an acre of land or a pound of money in the state described? But Lord Eldon, who was employed by the mad-doctors and the patient's family to help their treatment and control of the King as a person of unsound mind, did not hesitate to obtain his assent to all the important executive measures, and all the many acts of parliament which were nominally submitted to the alienated mind of the monarch, for above two whole months, the brunt of the session, and the first two months of a newly-formed administration! What signifies it that the rumours current at the time prove to be false, of a keeper or mad-doctor being in the room while the ministers transacted business with their monarch? They were in the house; they were known by the King to be in the house; they were within call; and we have it in terms stated by themselves to the Chancellor, that their "control" continued over the King; that "artificial prudence" was necessary, because natural prudence, that is reason, was absent; and that his mind laboured under a melancholy visitation, of which he was as conscious as they were aware of it. That he was acting as a free agent then is plainly untrue, during these two months, and the charge against Lord Eldon is thus clearly proved.

During the last two months of Mr. Addington's adminis-

tration the King was again insane. General assurances were given by the Chancellor and his colleagues of his capacity to transact business; but nothing can be more unsatisfactory than the vague and unsupported answers of the physicians given in the work before us; and we have Lord Eldon's own important admission of disease in these words, taken from his Anecdote Book: "When Mr. Pitt succeeded Mr. "Addington, the King was just recovered from mental in- "disposition." (Vol. i. p. 446.) Mr. Pitt, who had great doubts on the subject, was satisfied with an audience upon kissing hands; yet a fortnight after we find the Duke of York writing to Lord Eldon as if his royal father were still very unwell, and actually saying, "He dwells much upon the illegality of "his confinement, and as not being aware of the dreadful "consequences which may attend him if any unfortunate "circumstances can be brought forward in Parliament." (Vol. i. p. 453.) Mr. Pitt too writes to express his extreme "alarm" at the conversations the King had held at one of the late audiences, plainly with Lord Harrowby, now become Secretary for Foreign Affairs. He had been describ- "ing political and military plans about the Netherlands, "which could only be the creatures of a heated and dis- "ordered imagination." (Vol. i. p. 453.) We may add a fact within our certain knowledge, that it having been deemed expedient by Mr. Pitt that the King should take one or two drives round the various parts of the city, in order to show him recovered, his demeanour on the first of these occasions was such that his daughters could not be suffered to accompany him on the second drive. There can be no manner of doubt that his Majesty was insane during the latter end of Mr. Addington's, and the beginning of Mr. Pitt's administration of 1804. Other evidence could easily be accumulated on the same point; but we have seen enough in that which Lord Eldon himself supplies; and it can leave no doubt whatever in any rational mind that Lord Eldon a second time continued to transact public business with a sovereign whose mind was diseased, a patient not a ruler.

The attacks of which Lord Eldon was for so many years made the continual subject no doubt exaggerated his faults, while party spirit misconstrued much, and made a point of

drawing a veil over all his good and great qualities. But it is not party spirit alone that plays havoc with a Chancellor's reputation, at least during his tenure of office, perhaps of life. He is exposed to another more dangerous enemy. He enjoys great power and extensive patronage. At first he is generally well spoken of, perhaps even well thought of, in the profession of which he is the great head. By degrees he finds his well-wishers and his defenders falling away, in pretty exact proportion to the number of places which he has given away. In the Law alone he has, at least had till very lately, much above a hundred, beside conferring the rank of Serjeant and King's Counsel. Whoever should estimate the number of a Chancellor's friends by that of the places thus in his gift, or their zeal in his defence by the value of those places, and by the zeal wherewith they are sought after, would commit a grievous mistake indeed. The calculation should rather be governed by the number of candidates whom he disappoints each time he makes a promotion, and by the fierceness of their anger at being passed over. Against the body of bitter enemies whom he thus raises, he can only oppose the lukewarm zeal of gratitude in the single individual whom he promotes, and who probably will seek to show his independence by taking no part in the controversy respecting his benefactor's conduct, unless indeed he should deem it more prudent by siding against him to show that he owed his advancement solely to his own merit, and also that he is ready to receive still further favours from his enemies.

It thus ever happens that a storm gets up against every Chancellor in the legal profession after he has been for some time in office, to which another natural circumstance contributes not a little; the profession has a direct interest in the elevation of a new Chancellor, because that event must, of necessity, scatter much business and make a general move among the barristers. We recollect, it was at one time said, that a late Chancellor's decisions had been generally reversed on appeal; he moved for a return in the Lords, and it turned out that, of between two and three thousand decrees and orders he had made, only two had been altered, and only eight or nine had ever been appealed from. So it was said, that Lord Manners's decrees were so often wrong,

that of twenty appealed from ten had been reversed, whence, said the lawyers, he is as often right as wrong, — wholly forgetting that ninety-nine in every hundred never had been questioned at all.

In this way Lord Eldon's public and private character suffered unceasing assaults from the time that he had been three or four years in his high office. His vast learning no one could venture to question; his unremitting industry all admitted; his unwearied anxiety to do justice none presumed to deny; his kind and courteous demeanour to all who approached him, and without any distinction of persons, were the subject of universal praise. But then he was of a most refining disposition; he was "the subtlest beast of the field" of Law; he was perpetually doubting and hesitating; he could never make up his mind; he was *judex à non adjudicando;* his decisions were indefinitely delayed; and when given, were so doubtfully pronounced, that opinions which he seemed to have no confidence in could command but little respect from others. In all this there was great exaggeration; there was some positive misstatement of the fact; but there was considerable foundation of truth.

It was quite true, that he had a refining and subtilizing habit, fitter for the advocate than the judge; perfectly true, that he saw difficulties with an inconvenient facility, and not seldom created them by his excessive ingenuity. But it was wholly untrue that he was either slow to form an opinion, or mistrustful of it when formed. On the contrary, he made up his mind rapidly, as soon as he apprehended the point submitted to him; and he very rarely indeed varied his first opinion, in which he had that full confidence which his ample learning and quick apprehension entitled him to feel upon all subjects, whether of law, or of equity, or of fact. A certain dread of going wrong, and of doing mischief which it might be difficult, or at least expensive and tedious to correct, grew upon him to an inconvenient extent, and made him as slow to pronounce his judgment as he was quick to form it. To this, as well as to his extreme desire of stopping nothing, his bad habit of courting prolix discussion, must be ascribed the dilatory habit into which he more and more fell; and among other evils of this was his losing 'the habit of close attention

to the arguments held before him. As he rather solicited than repressed prolixity and repetiton, he not unnaturally attended far less closely to matters which he knew would be again and again urged, than he would have done had only one or two counsel conducted the argument once for all. The bad practice of the Courts of Equity in this respect favoured this failing. The most important and difficult questions are argued in the Courts of Common Law by one counsel of a side; in Equity, there is no limit to the number of the counsel, or the repetitions of the arguments. Lord Eldon, however, with all his conscientious motives and feelings of duty, would sit for an hour at a time without listening to what counsel urged, generally writing letters to his friends, so that he has been known to fall into a trap laid by these gentlemen, who professed to submit a new point. "That," he would say, "is very "material;" but it had been three or four times before pressed upon him the same day. No one can deny that a serious injury was done to suitors by this evil habit; for the argument was often not heard at all, and still oftener was forgotten before his Lordship, "taking home the papers with "him," and laying them aside for months, considered what should be his decision. It would, however, be a great mistake to suppose that he is the only Chancellor who postponed his judgments until the impression of the oral argument had faded from his memory. The same great imperfection has attended the administration of others, and has been justly complained of.

The opposite evils, however, of haste and impatience must not be lost sight of. Sir John Leach seemed to think that what he had to do was chiefly to avoid the dilatory habits of Lord Eldon. Accordingly, he decided with a rapidity so dangerous, that Sir Samuel Romilly said, his hasty injustice was far worse than the slow justice of the Chancellor; and appeals from his judgments being greatly multiplied, both Lord Eldon and Lord Brougham complained, saying that causes were decided at the Rolls and heard before them. Cases have come by appeal from that very able and diligent judge, which had been only heard on one side (against which he decided in a day or two), and which occupied weeks in the Court of Appeal, often with the same result; but then all

parties were satisfied, and none thought of carrying the matter before a higher tribunal. It is doubtless, the first object to decide rightly; but next to that it is highly important to satisfy both the parties, the profession, and the public that due pains have been taken, and that justice has been done. Hence a middle course between the equity pounced upon at the Rolls, and that slumbered over before the Great Seal, was admitted by all to be the safest and most eligible.

It was a very remarkable feature of Lord Eldon's character that the doubt and hesitation which ever beset him in his own Court, and seemed often almost to paralyse his movements over ground which he knew the most thoroughly and could have trodden the most confidently, never embarrassed his action when he had to perform the functions far from natural to him, and even alien to his habits,—those of a minister, a statesman, — what he himself called a politician. The most difficult questions in the Cabinet never gravelled him; the most novel situations could not bewilder his clear judgment; the most perilous adventures never appalled him. In public he might beat his breast, appeal to his conscience, call God to witness, vow all manner of vows, recite all kinds of covenants with himself, paint the agitations of his soul, record the troubles of sleepless nights, seem all but sinking under the weight of his responsibilities and the burthen of the public cares — in the recesses of the council chamber he was the least hesitating, the least scrupulous of men, the most prompt in council, the most quick in action. Only recollect his twice being the Chancellor of an insane sovereign for many weeks at a time and never flinching, — his continuing in his high office during the mock trial of the Queen, his former ally and friend, — nay her whom he had, with Mr. Percival, made a tool of his party-work — and then name, if you can, a politician whose nerves were more nearly akin to the useful and well-wearing fabric which we owe to the labours of Colebrook dale.

Yet would it be wrong to say that cases in Equity or House of Lords appeals were the only matters on which his propensity to doubt broke forth. In the details connected with his office, there was extreme difficulty in getting him to make up his mind. An instance of this is well known in the

Court of Chancery. He had, it appears, entertained some doubts upon the right of the Chancellor to receive for his own use the large fees in bankruptcy which used before the change in 1832 to form part of the emoluments, and which former Chancellors had never hesitated to take as a matter of right and of course. His doubts were great; he could not solve them; he could not get over them; he oftentimes consulted the officers; oftentimes chatted on the matter with Mr. Richards; often did he seek for light from heaven, and assuredly much would he have groaned over it when found had it been unfavourable to the claim. But all in vain; nothing could be found satisfactory. So he would not touch the fees; but desired that they might all be carried to a separate account for a year or two. At length, and long after he had ceased to discuss the subject, apparently to think of it, just before the Court rose for the summer, he called for the Secretary of Bankrupts, and asked to how much the fund then set apart amounted. It had reached an enormous sum; and, as if that which should have added force to his doubts were sufficient to dispel them, or as if the force of temptation applied to his mind were too strong to be resisted, and powerful enough to overcome its doubting propensities, he in one word directed the whole to be transferred to his account—in which, be it observed, he was perfectly right, no mortal but himself having ever been able to descry the shadow of a reason for questioning the claims of the Great Seal to this fund.

The hesitating nature of his mind is exemplified in a singular manner by the composition of the Anecdote Book, from which Mr. Twiss has selected so considerable a portion. The extracts do not bear always directly upon the subject of his biography; for they contain very generally stories of a professional cast, in which all who knew Lord Eldon may remember that he took a great delight. He told them admirably well. They derived additional interest no doubt from his having himself been a witness to the greater part of the scenes he described; but his narrative was excellent, and his diction appropriate and choice, especially for one who in his speaking, whether parliamentary or forensic, was exceedingly careless of composition, and aimed at any thing rather than rhetorical effect. Now, when he told these stories, as he did

with singular glee and an enjoyment that mightily increased that of his hearers, he never hesitated an instant to give the fitting phrase, to point his moral, and to adorn his tale. Nothing, therefore, could be more sure than the effect he produced. But when he came to commit those passages to writing, his disease of doubt and hesitation came upon him; and accordingly, they who recollect the stories as coming from his lips full of life and point now scarcely recognise them in his page; they are the ghosts, or rather the mummies, of their originals. This affords so curious an example illustrating the operation of his proneness to doubt, his hesitation in giving out the decision he had come to, his slowness to deal the blow, that we shall give an instance or two of what we are referring to.

Every one has heard of Serjeant Davy's joke — that the further he went to the West (of England), he was the more convinced the wise men came from the East. The point is thus worn away in the Anecdote Book. "The serjeant used "to express no very high opinion of the talents of the men "of that portion of the kingdom; observing that it was most "true that the wise men came from the East." (Vol. i. p. 352.) Serjeant Hill having a case laid before him with a fee of one guinea, to construe a very cramp devise in a will, answered that he saw more difficulty in the case than under all the circumstances he could well solve, — adding the year and day. The case was returned to him with another guinea, and his answer was, that he saw no reason to change his opinion. The Anecdote Book makes him say, "I don't "answer such a case as this for a guinea," which is both pointless and unprofessional. When a richly-embroidered Jew was objected to by a serjeant as bail for a certain amount, it is known that Lord Mansfield said, "Why, brother, he would "burn for the money." The book thus dilutes an excellent jest, "Don't waste our time by objecting to a gentleman "with such a waistcoat — he would burn for more than the "debt." When he held the office of attorney-general to the northern circuit (a jocular office Mr. Twiss terms it, but incorrectly, for the professional discipline is under his superintendance, and the office, like the grand court, is of the last importance), he in the exercise of the jocular functions which certainly form a part of his duties, indicted Sir Thomas

Davenport for the slaughter of a man who had fallen asleep and lost his balance during Sir Thomas's speech. The Anecdote Book does little justice to the indictment, representing it as "for wilful murder by a long dull instrument, viz. a speech." It was "by a long blunt instrument of no value called 'a speech.'" All indictments mention the value if any on account of the deodand. The main portion of the point is therefore lost, and the substitution of *dull* for *blunt* is wholly senseless. (Vol. i. p. 177.) The last specimen of *lost humour* which we shall give is from vol. i. p. 198., where we find a very celebrated dictum of Lord Thurlow's thus recorded. Speaking of Lord Kenyon, whom he always called Taffy, and Lord Eldon, he is made to say, "There is a difference between you "—you are more obstinate, but you never give any reasons "for your obstinacy. He is very obstinate, but always gives "his reasons, and to say the truth they are very bad ones." The words were these: "You, Taffy, are obstinate and give "no reasons; you, Jack Scott, are obstinate too, but then "you give your reasons, and d——d bad ones they are." It was naturally Lord Thurlow's way to grudge all praise — and to feel it as a kind of personal offence when any one was commended. Having said something against a man in a public station, he stopped short, with this: "Though far be it "from me, my Lords, to say any thing against any man in any "office, for that I know lays me open to hear his panegyric." So if he ever was betrayed into praise himself he would hasten to retract it, as it were to set himself right. Once giving the reason for appointing Lord Kenyon Chief Justice in preference to Mr. Justice Buller, he said, "I hesitated "long between the corruption of Buller and the intemperance "of Kenyon, and decided against Buller. Not, however, that "there was not a d——d deal of corruption in Kenyon's in-"temperance." To this anecdote, so characteristic of the man, must be added the fact, that truth had as little share in it as good-nature; for Buller's appointment was prevented by Mr. Pitt, when pressed on him by Lord Mansfield, who postponed his own resignation several times most improperly in order to favour his friend's succession — Mr. Pitt refusing to continue in office if a Chief Justice were appointed, whom he had himself seen commit the corrupt act of trying a *quo*

warranto on the western circuit concerning a close borough, of which his own family had notoriously the property.

In tracing Lord Eldon's propensity to doubt and hesitate, in finding that it was only operative upon his conduct when he was suffered to indulge it without injury to his own personal views, we certainly make a large deduction from the praise of high and strict integrity which would otherwise be his due when regarded as a Judge at the head of the law, and as a minister at the head of the judicial establishment. If to carry on the ordinary political business of the State, and retain his office with his colleagues, he could easily dismiss all doubts from his mind, and if in extraordinary circumstances he could adopt courses not sanctioned by any precedent in former times, surely the suitors of his court had a right to complain that nothing of the same vigour and determination was applied to the disposal of their causes; and the jurisprudence of the country had a right to complain that all his dread of innovation should be reserved for the remedies occasionally propounded to mitigate or to eradicate the worst abuses of the system. It remains to add, that in the disposal of professional patronage he stands, generally speaking, clear, though there are some exceptions even here; and the difference which he makes in these cases appears not only to fail, but to be an aggravation of the charge. When he refused their rank to Messrs. Brougham and Denman, because George IV. insisted on visiting upon them his own disappointment in having been by their professional exertions prevented from destroying his injured wife, surely the minister who could suffer such a request from his master to stand in the way of discharging his manifest duty was greatly to blame. He knew well that those gentlemen had only done their duty as advocates to their client, and he joined with the defeated party in punishing them — for what? For not having corruptly betrayed and sacrificed a client.[1] Nor is it to be forgotten that Lord

[1] We observe that Lord Eldon ascribes Mr. Brougham's joining in the attacks upon his dilatory habits as a Judge, to his having been thus kept out of his rank at the Bar. But it is perfectly well known that the only virulent attack which that gentleman made on Lord Eldon was in 1818, long before the Queen's case was even heard of, and was owing to the Chancellor's having opposed the Education and Charity Abuse Bills. Mr. B., after 1820, was far less severe in his comments on the Chancellor, and far more complimentary to his general character than before.

Lyndhurst found no difficulty in giving Mr. Brougham his promotion the month after Lord Eldon quitted the Great Seal, though at a time when it was of no service to him, and was most reluctantly accepted by him, while the Duke of Wellington by a single word removed, the year after, all objection to Mr. Denman's rank. Had Lord Eldon shewn any firmness of the like kind, he too would, like them, have been successful in the performance of his duty.

The appointment of a Master in Chancery, which he felt to be an extremely improper one, is vindicated by a story that George IV. came to his house and insisted on seeing him, though ill in bed, and refused to leave the room until his minister yielded. This is really no defence whatever. It was his duty to refuse the sovereign civilly, but firmly. The responsibility rested upon him, not upon the King. Generally speaking, his judicial appointments were unexceptionable; but one was certainly made without regard to merits, and at the request of the King in behalf of a court-physician's relative. This gave rise to a bad joke in Westminster Hall, not recorded in the Anecdote Book, that one baron took his office by operation of law, and one by *prescription.*

We said at the outset of this paper, that some of the sources from which Mr. Twiss draws his information were far less trustworthy than others; and we close it with proving this position. What comes from the female branches of the family must needs be less accurate, for obvious reasons; of which the ignorance of women respecting professional and political matters is the chief. We shall confine ourselves to two instances. In vol. i. p. 131. Mrs. F. is made to recount what happened when an issue was tried on the circuit at York, turning on the question, whether or not a certain person who had ridden a horse was a gentleman, the conditions of the race requiring the riders to be gentlemen. The jury found in the negative; and Lord Eldon is made to add that the party next morning challenged both Mr. Law and himself for denying his gentility; but that they refused to meet one, whom twelve of his countrymen had declared to be no gentleman. This is a great mistake. The person in question blustered and talked big, and threatened to call out Mr. Law who led the cause, and could alone have said the offensive

words. That gallant individual put off his journey to Durham for half a day, and walked about booted and spurred before the coffee-house, the most public place in York, ready to repel force if offered by force — because personal chastisement had also been threatened. No message was sent, and no attempt was made to provoke a breach of the peace. It is very possible Lord Eldon may have said, and Lord Ellenborough too, that they were not bound to treat one in such a predicament as a gentleman, and hence the story has arisen in the lady's mind. The fact was as well known on the Northern Circuit as was the answer of a witness to the question, whether the party had a right by his circumstances to keep a pack of fox-hounds: "No more right than I to "keep a pack of archbishops."

In vol. ii. p. 253. the same respected lady is cited to prove, that on the memorable night in July 1814, when Princess Charlotte took a hackney-coach and left her home to throw herself on her mother's protection, Lord Eldon thus described his own and her proceedings. Being sent by the Regent with the Duke of York and some one else to bring her back, "When we arrived, I informed her a carriage was "at the door, and we would attend her home. But home she "would not go — she kicked and bounced; but would not go. "Well, to do my office as gently as I could, I told her I was "sorry for it, for until she did go she would be obliged to "entertain us, as we would not leave her; at length she "accompanied us."

Now this is a perfect mis-statement, indeed a pure fiction, and there are three persons yet living who know it to be so, and having read the above lines, agree in so declaring it. When the Princess's escape became known at Carlton House (for it is not at all true, as stated by Mr. Twiss, that the Prince and Bishop went to her at Warwick House to inform her of the new constitution of her household, and that she asked leave to return, and escaped by a back staircase), the Regent sent notice to the heads of the Law, and of his own Duchy of Cornwall establishment. Soon after these arrived, each in a separate hackney-coach, at Connaught Terrace, the Princess of Wales's residence. They were the Chancellor, Lord Ellenborough, Mr. Adam, Chancellor of the Duchy,

Mr. Leach, the Bishop of Salisbury, and afterwards the Duke of York. There had already come to join the Princess Charlotte, Miss Mercer, now Lady Keith and Contesse de Flahault, who came by the Regent's express desire as his daughter's most confidential friend; Mr. Brougham, for whom the young Princess had sent, as a person she had already often consulted; the Duke of Sussex, whose attendance he had taken the precaution of asking, knowing that he happened to dine in the immediate neighbourhood; the Princess of Wales too had arrived from her villa at Blackheath, where she was when Mr. Brougham and Miss Mercer arrived; her Royal Highness was accompanied by Lady Charlotte Lindsay then in waiting. Dinner had been ordered by the Princess Charlotte, and the party, except the Duke of Sussex who did not immediately arrive, were at table; when from time to time the arrival of the great personages sent by the Regent was announced, as each of their hackney-coaches in succession came into the street. Some were suffered to remain in these vehicles, better fitted for convenience than for state; but the presumptive heiress to the Crown having chosen that conveyance, it was the humour of the party which she was now delighting with her humour, and interesting by her high spirits, like a bird flown from a cage, that these exalted subjects should become familiar with a residence which had so lately been graced with the occupancy of their future sovereign. Exceptions however were made, and the Duke of York immediately was asked into a room on the ground-floor. It is an undoubted fact, that not one of the persons sent by the Regent, not even the Duke of York, ever was in any of the apartments above stairs for one instant until the young Princess had agreed to leave the house and return home. The Princess of Wales saw the Duke of York for a few minutes below; and this was the only communication between the company above and those below — of whom all but the Duke and the Bishop remained outside the house.

After a great deal of discussion the Princess Charlotte asked Mr. Brougham what he, on the whole, would advise her to do. He said, "Return to Warwick House or to "Carlton House, and on no account pass a night out of it."

She was exceedingly affected — even to tears — and asked if he too refused to stand by her. The day was beginning to break; a Westminster election to reinstate Lord Cochrane (after the sentence on him which abolished the pillory, and secured his re-election), was to be held that day at ten o'clock. Mr. Brougham led the young Princess to the window, and said, "I have but to show you to the multitude which in a "few hours will fill these streets and that Park — and pos- "sibly Carlton House will be pulled down — but in an hour "after the soldiers will be called out, blood will flow, and if "your Royal Highness lives a hundred years, it will never "be forgotten that your running away from your home and "your father was the cause of the mischief; and you may "depend upon it the English people so hate blood that you "will never get over it." She at once perceived the truth of this statement, and without any kind of hesitation agreed to see her uncle below, and accompany him home. But she told him she would not go in any carriage except one of her father's, as her character might suffer — she therefore retired to the drawing-room until a royal coach was sent for, and she then went home with the Duke of York.

The fact is suppressed, through ignorance doubtless on both Lord Eldon's part and Mrs. F.'s, that the real cause of the Princess's elopement was her dread of being compelled to marry the Prince of Orange. That match had been for some time the subject of unremitting negotiation between her and her father. An attempt had even been made through one of his law officers to persuade her that after receiving some presents, and saying things construed into promises, she could be compelled, by a Court of Equity, to perform the contract. This strange doctrine, this new kind of equity, she had met with admirable presence of mind, and indeed skill, declaring her ignorance of the law, but offering to believe the proposition thus (by way of threat) laid down — provided, to prevent all mistakes, they who stated it would put it in writing and sign their names to it, that she might show it to Mr. Brougham, with whom she had been advising. Accordingly, as may well be supposed, nothing more was heard of this equitable novelty, this extension of the doctrine of specific performance. This marriage formed nearly the whole subject of the conferences

in the Princess of Wales's apartments that night; and the Princess Charlotte desired Mr. Brougham to make a minute (which would now-a-days be called a protocol) of her final resolution against the match, giving him and the others present authority, that as soon as they should hear of it being to proceed they should make this protocol public, to show that she gave no free consent, and that any pretended consent was extorted by force. All present signed this instrument — of which as many copies were made as there were persons present — or rather it was executed in sexplicate original, and each of the six was signed by the young Princess and all the other five. Thus ended the extraordinary scene — and thus vanishes the illusion of Mrs. F.'s account, which has its origin in confounding some jocose remarks of her venerable relative, and giving, as facts, some matters which he must have stated as mere speculations. The fact as we have now given it was, though more shortly, given by Lord Brougham in the lifetime of the Duke of Sussex, as well as of two of the ladies above named, and who are still alive. His account was drawn up in Lord Eldon's lifetime also; and was expected to be read by him within a few days after it was written. He died, however, while it was printing.

We here close this article, which has extended to so considerable a length that we cannot now add the commentary which remains to be given upon Lord Eldon's judgments, the portion of the subject which, as we have already observed, Mr. Twiss's work, so valuable in other respects, has inadequately treated. It is sufficient for the present to observe, first, that these decisions, numerous as they are, and involving as they do a great variety of questions both of Equity and Law, bear very rarely any marks of personal or party prejudice having usurped the mind of the Judge; secondly, that with many important faults, arising from the over-anxious and over-subtle complexion of his mind, they contain a most valuable body of judicial learning, and of positive determination, to which the student of jurisprudence will ever resort for instruction, and the tribunals of this country for direction, as long as the system of English law endures.

ART. II. — ON ENFORCING THE ATTENDANCE OF WITNESSES AT COMMON LAW.

As we consider that we cannot render a better service to our readers than occasionally to collect and classify the latest cases on a practical subject, we shall endeavour, in the present article, to show in what manner the attendance of witnesses can be enforced in the common law courts; and we hope that those of our readers, who are daily engaged in the preparation of evidence for trials at Nisi Prius, may find the result of our labours of some practical use.

We do not, however, here purpose to discuss the mode of enforcing the attendance of witnesses by recognizance, which is a form of proceeding exclusively confined to the criminal courts, and to some few appeals at the quarter sessions; neither do we intend to treat of writs of *habeas corpus ad testificandum*, which are granted in those cases alone, where the witness is in custody, or, being in the military or naval service, is not amenable to the ordinary process of the law; but our observations will be confined to the incidents attendant on the service of writs of *subpœna ad testificandum*.

This process, which is often used in criminal cases, and constitutes the usual summons in civil proceedings, is a judicial writ, directed to the witness, commanding him, in the Queen's name, to appear at the Court, and to testify what he knows in the cause therein described, pending in such Court, under a certain penalty mentioned in the writ. If the witness is required to produce any books or papers in his possession, a clause to that effect is inserted in the writ, which is then termed a *subpœna duces tecum*.

This writ, equally with the common subpœna, is compulsory upon the witness, who must attend with the documents demanded therein, if he has them in his possession, and leave the question of their actual production to the judge, who

will decide upon the validity of any excuse that may be offered for withholding them.[1] The fact that the legal custody of the instrument belongs to another person will not authorise a witness to disobey the subpœna, provided the instrument be in his actual possession[2]; but documents filed in a public office are not so in the possession of the clerk as to render it necessary, or even allowable, for him to bring them into Court without the permission of the head of the office.[3] Writs of subpœna suffice for only one sitting or term of the Court; and, therefore, if the cause is made a remanet, or is postponed by adjournment to another term or session, the writ must be resealed, and the witness summoned anew.[4] So if any alteration be made in the writ after it is sued out, though before it is served, it must be resealed; and, therefore, when the day of appearance named in a subpœna was altered by the attorney from one term to another, it was held that the writ thereby became void, and that the witness, on whom it was served subsequently to the alteration having been made, might consequently treat it as waste paper.[5] But a subpœna, requiring the party to attend a trial on the commission-day extends to the whole assizes, which, by a curious fiction of law, are supposed to last but one day.[6]

The service of a subpœna upon a witness ought always to be made in a *reasonable time* before trial, to enable him to put his affairs in such order that his attendance on the Court may be as little detrimental as possible to his interest.[7] On this principle, a summons in the morning to attend in the afternoon of the same day has, more than once, been held insufficient, though the witness lived in the same town, and very near to the place of trial.[8] Where, however, a witness was served at twelve o'clock, while standing on the steps of the

[1] Amey v. Long, 9 East. 473.; 6 Esp. 116.; 1 Camp. 14. S. C.

[2] Id.; 1 Camp. 14., per Lord Ellenborough.

[3] Thornhill v. Thornhill, 2 Jac. & W. 347.; Austin v. Evans, 2 M. & Gr. 430.

[4] Sydenham v. Rand, 3 Doug. 429.; S. C., cited 2 Tidd. 855., 8th edit.

[5] Barber v. Wood, 2 M. & Rob. 172., per Lord Abinger.

[6] Scholes v. Hilton, 10 M. & W. 15.; 2 Dowl. N. S. 229. S. C.

[7] Hammond v. Stewart, 1 Str. 510.

[8] Id.; Barber v. Wood, 2 M. & Rob. 172., per Lord Abinger.

court-house, and being then told that the cause was coming on that day, replied "very well," the Court held that his non-attendance at five o'clock, when the trial was heard, rendered him liable to an action, since his answer was equivalent to an admission that the service was in time.[1] So if a witness is in Court, he cannot, it seems, object to give evidence on the ground that the subpœna has only just been served upon him[2]; neither in criminal prosecutions can he decline to be sworn, though he has not been subpœnaed at all.[3] In civil cases, however, a witness may always refuse to be examined unless he be properly served with a writ.[4] Where a subpœna, requiring the attendance of a witness on the 31st of March, and so on from day to day, until the issue should be tried, was served on the 2d of April, when the witness was distinctly told that the trial had not come on, he was held civilly responsible for disobeying the writ on the 6th of April, when the cause was heard[5]; though, had he received no notice at the time of service that the cause had not then been tried, the result might have been different, and he would, at least, have avoided the penalty of an attachment.[6] As the question whether the writ has been served within a reasonable time is in the discretion of the judge, and must vary according to the circumstances of each case, it is hoped that the decisions cited above will be sufficient to illustrate the general practice; but we may notice, that, in the United States, the reasonableness of the time is generally fixed by statute, one day being usually allowed for every twenty miles, that intervene between the residence of the witness and the

[1] Maunsell v. Ainsworth, 8 Dowl. 869., per Parke & Alderson Bs.; Jackson v. Seager, 13 Law J. N. S. Q. B. 217., per Wightman J.

[2] Doe v. Andrews, 2 Cowp. 845.

[3] R. v. Sadler, 4 C. & P. 218., per Littledale J.

[4] Bowles v. Johnson, 1 W. Bl. 36. See contrà, Blackburn v. Hargreave, 2 Lew. 259., where Hullock B. is reported to have held, that, if a witness be in Court, having come there on other business, he cannot refuse to be sworn, though his expenses be not tendered. Sed. qu. A witness is not bound to obey a subpœna unless his expenses be tendered, although the party who requires his testimony is suing *in formâ pauperis*. 2 Lew. 259., per Hullock B.

[5] Davis v. Lovell, 7 Dowl. 178.

[6] Id. 183.; Alexander v. Dixon, 1 Bing. 366.; 8 Moore, 387., S. C.

place of trial. Perhaps a somewhat similar rule might, with advantage, be adopted in this country.

As to the *manner of service*, it is not usual to part with the original writ, which may, indeed, include the names of four witnesses[1]; but the practice is to make out for each witness a subpœna-ticket, which is a copy of the writ, or at least a statement of its substance duly certified[2], and then to serve the witness *personally* with this ticket, *at the same time showing him the original writ.* It seems that the necessity of personal service will not be dispensed with, even though it be sworn that the witness keeps out of the way to avoid such service[3]; and the provision, which requires the production of the original writ at the time of serving the copy, must be strictly followed, since otherwise the witness cannot be chargeable with a contempt in not appearing upon the summons.[4] If the subpœna-ticket vary in any material degree from the original writ, as where the ticket required the witness to attend on the 24th of May, and the writ itself specified the 27th, an attachment for disobedience cannot be obtained.[5] So the writ must state, with reasonable certainty, the name of the cause, as also the place, in which the attendance of the witness is required. Thus, in a subpœna to attend an action of ejectment, the names of the lessors of the plaintiff must be introduced[6]; and if it be a town cause, the writ must specify whether it will be tried at Westminster or at Guildhall.[7] Where, however, the subpœna required the attendance of the witness at Westminster Hall, the nisi prius sittings being, in fact, held at the adjoining Sessions House, it was held that an attachment might be granted for non-attendance at the Sessions House, notices being affixed to the wall of the Court in Westminster Hall, directing witnesses

[1] See Doe v. Andrews, 2 Cowp. 846.

[2] Maddison v. Shore, 5 Mod. 355.; Cro. Car. 540.

[3] See Re Pyne, 1 Dowl. & L. 703.

[4] Wadsworth v. Marshall, 1 Cr. & M. 87.; R. v. Wood, 1 Dowl. 509., per Littledale J.; Garden v. Cresswell, 2 M. & W. 319.; 5 Dowl. 461. S. C.; Jacob v. Hungate, 3 Dowl. 456.

[5] Doe v. Thomson, 9 Dowl. 948., per Wightman J.

[6] Id.

[7] Milson v. Day, 3 M. & P. 333.

to proceed to that place.[1] So where a subpœna, tested the 9th of May, and served on the 19th, required attendance on the 21st of March instant, the Court considered that this was an error which could not mislead.[2]

In order the more effectually to secure the attendance of witnesses in civil cases, the act of 5 Eliz. c. 9. s. 12. enacts, that if any person, upon whom any process of subpœna out of a court of record shall be served, "and having tendered to him, according to his countenance or calling, such reasonable sum for his costs and charges as, having regard to the distance of the places, is necessary to be allowed," shall, without lawful cause, neglect to appear, he shall forfeit 10*l.*, and yield such further recompense to the party aggrieved as the judge, in his discretion, shall award. Under this statute, the reasonable expenses of the witness for going to, returning from, and staying at, the place of trial, should be tendered to him at the time of serving the subpœna[3], or at least a reasonable time before the trial[4]; and even though he actually appear, he cannot be attached for refusing to give evidence, unless these charges are paid or tendered.[5] Where the witness lives, and is summoned to testify, within the Bills of Mortality, it is usual to leave a shilling with him upon the delivery of the subpœna-ticket, though this would now be considered an unnecessary form.[6] In other cases the sum tendered should be proportioned to the situation and circumstances of the witness[7]; but the party summoning must bear in mind, that, in proceeding against a witness for contempt, the Court will not balance too nicely the expenses of travelling[8]; while the party summoned must remember that, except in the case of a witness called to give his *opinion*, in a matter with which, from his business, he is peculiarly

[1] Chapman v. Davis, 1 Dowl. N. S. 239.; 4 Scott, N. R. 319.; 3 M. & Gr. 609. S. C.

[2] Page v. Carew, 1 Cr. & J. 514.

[3] Fuller v. Prentice, 1 H. Bl. 49.

[4] Horne v. Smith, 6 Taunt. 9.; 1 Marsh. 410. S. C.; 13 East. 16 n. (a)

[5] Bowles v. Johnson, 1 W. Bl. 36.; Newton v. Harland, 1 M. & Gr. 956.; 9 Dowl. 16. S. C.

[6] Jacob v. Hungate, 3 Dowl. 456.

[7] Dixon v. Lee, 1 C. M. & R. 645.; Vice v. Lady Anson, M. & M. 96.

[8] Chapman v. Paynton, 13 East. 16 n. (a), per Wright J.

conversant[1], no compensation for mere loss of time can be legally demanded.[2]

Such compensation was, indeed, formerly allowed to medical men and attornies; but the distinction in their favour, being deemed invidious, has now been overruled.[3] Still, a reasonable compensation paid to a foreign witness, who refused to come without it, and whose attendance is essential in the cause, will in general be allowed, and taxed against the losing party[4]; and where the captain of a ship has been detained for a long time in this country, in order to give evidence on a trial, large sums, calculated at a guinea a day, and amounting, in the whole, to above 100*l.*, have been allowed for his detention.[5] So, an officer of the Court of Chancery, who, either in person or by deputy, attends a trial with original records of the Court, is entitled to a reasonable fee for such attendance; because, in this case, the subpœna is not alone sufficient to compel him to produce the records, and the party, therefore, who seeks their production will be supposed to be willing to pay the usual additional charge.[6] The Act, too, of 3 & 4 Vict. c. 92., which was passed to render certain non-parochial registers and records admissible as evidence of births, baptisms, deaths, burials, and marriages, after enacting, in the sixth section, that the Registrar General, in whose custody they are, shall produce them, or cause them to be produced, on subpœna or order of any competent tribunal, goes on to provide, that this shall be "on payment of a reasonable sum, to be taxed as the Court shall direct, and to be paid to the Registrar General, on account of the *loss of time* of the officer by whom such register or record shall be

[1] Webb v. Page, 1 C. & Kir. 23., per Maule J.

[2] Moor v. Adam, 5 M. & Sel. 156.; Willis v. Peckham, 3 B. & B. 72.; Collins v. Godefroy, 1 B. & Ad. 950.

[3] Collins v. Godefroy, 1 B. & Ad. 950.; Lonergan v. Roy. Ex. Co., 7 Bing. 731, 732.

[4] Lonergan v. Roy. Ex. Co., 7 Bing. 725.; id. 729. S. C.; Tremain v. Barrett, 6 Taunt. 88.; 1 Marsh. 463. S. C.

[5] Stewart v. Steele, 4 M. & Gr. 669.; Mount v. Larkins, 8 Bing. 195.; 1 M. & Sc. 357. S. C.; Temperley v. Scott, 8 Bing. 392.; 1 M. & Sc. 601. S. C.

[6] Bentall v. Sydney, 10 A. & E. 162.: 2 P. & D. 416. S. C; Bastard v. Smith, 10 A. & E., 213.; 2 P. & D. 453. S. C.

produced, and to enable the Registrar General to defray the travelling and other expenses of such officer." If the witness be a married woman, the money should, it seems, be tendered to her, rather than to the husband[1]; and if a person be subpœnaed by both parties, he is entitled, before giving evidence, to be paid by the party actually calling him all the expenses to which he will be liable, after exhausting what he may have received from the opposite side.[2] Of course the witness may waive his right to demand the payment of his expenses; and if he does so, either directly, by agreeing to take a less sum than that to which he is entitled[3], or indirectly, by accompanying the parties to the place of trial without previously making any claim[4], he will be liable to all the consequences of disobedience should he subsequently refuse to appear as a witness.[5] Still the Court will not grant an attachment against him, simply because he has made an unreasonable demand, unless a fair sum has been actually tendered to him.[6] In America, the expenses of witnesses are settled by statute, at a fixed sum for each day's actual attendance, and for each mile's travel from the residence of the witness to the place of trial[7]; but, in this country, the question as to what constitutes reasonable remuneration is left very much in the discretion of the taxing officers, or is decided by reference to the scale of fees, which may chance to have been adopted in the particular Court.

In criminal cases no tender of fees is in general necessary, either on the part of the Crown or of the prisoner, in order to compel the attendance of their respective witnesses[8]; and this

[1] Cro. El. 122.; W. Jon. 430.

[2] Allen v. Yoxall, 1 C. & Kir. 315., per Rolfe B.; Betteley v. M'Leod, 3 Bing. N. C. 405. 407.; 5 Dowl. 481. S. C.

[3] Betteley v. M'Leod, 3 Bing. N. C. 405.

[4] Newton v, Harland, 1 M. & Gr. 956. There the witness, having accompanied the plaintiffs to the place of trial, and lived with them there, was deemed to have waived her right to remuneration up to the time of the trial, though she was held to be still entitled to claim her fair expenses for returning home.

[5] Goodwin v. West, Cro. Car. 522. 540.

[6] Newton v. Harland, 1 M. & Gr. 956.

[7] See Conklin's Pr. 265, 266.; LL., U. S. 1799., ch. 125. § 6. vol. i. p. 571., Story's ed.; 1 Paine & Duer's Pr. 497.

[8] Per Bayley J., cited 2 Russ. C. & M. 948. n. (a.); R. v. Cousens, id., per Wightman J.; R. v. Cooke, 1 C. & P. 322., per Park J. & Garrow B.

rule will prevail, though the indictment has been removed by *certiorari*, and is consequently tried in the Nisi Prius Court.[1] An exception, however, has been recognised by the legislature in favour of those witnesses who, living in one distinct part of the United Kingdom, are required to obey subpœnas directing their attendance in another, and who are not liable to punishment for disobedience of the process unless at the time of service a reasonable and sufficient sum of money to defray their expenses in coming, attending, and returning, had been tendered to them.[2] Although witnesses in crown cases cannot, except under the circumstances just stated, claim, as a matter of right, the payment of their expenses, it being considered by the law to be the public duty of every citizen to obey a call of this description, yet, in order to encourage the due prosecution of offenders, the legislature has authorised courts to grant to prosecutors and witnesses such costs, as will reimburse them for the expenses they have incurred, in all cases of felony[3], and in most serious charges of misdemeanor[4]; and moreover, in some grave cases of felony, to order additional remuneration to be paid to any persons, who have been especially active in apprehending the offenders.[5] The amount of the costs allowed varies according to the place where the trial is heard, each quarter sessions being authorised, with the assent of one of the inferior judges, to fix the scale of remuneration.[6] It is to be lamented that one uniform scale of costs has not, as in America, been adopted for the whole country.

In all criminal cases the prisoner is entitled, both in this country and in America, to have compulsory process for obtaining witnesses in his favour[7]; but, to the disgrace of our penal laws, it must be stated, that no provision has yet

[1] R. v. Cooke, 1 C. & P. 322.

[2] 45 G. 3. c. 92. s. 4.

[3] 7 G. 4. c. 64. s. 22.; 6 & 7 W. 4. c. 116. s. 105. Ir.; 7 & 8 Vic. c. 106. s. 40. Ir.

[4] 7 G. 4. c. 64. s. 23.; 7 W. 4. & 1 Vic. c. 44.; 7 & 8 Vic. c. 106. s. 4. Ir.

[5] 7 G. 4. c. 64. s. 28.; 5 G. 4. c. 84. s. 22.; 6 & 7 W. 4. c. 116. ss. 106, 107. Ir.; 7 & 8 Vic. c. 106. ss. 41, 42. Ir.

[6] 7 G. 4. c. 64. s. 26.; Corner's Crown Pr. App. 164.; 8 Jurist, 80.

[7] 2 Hawk. P. C. c. 46. ss. 170. 172.; 2 Ph. Ev. 378.; 2 Russ. C. & M. 947.; Const. U. S. Amendm. Art. 6.

been made for reimbursing such witnesses their reasonable expenses, however necessary their attendance may be at the trial, in order to establish the innocence of the accused. The nearest approach to justice, that is at present vouchsafed to prisoners, only extends thus far, that, if the constable, as is generally the case, has taken possession of the property found on their persons, the Court, on application, will, for the purposes of their defence, order that portion of it to be restored to them, which is not required as a means of proof at the trial, or which does not fairly appear to be the produce of the crime with which they stand charged.[1]

Writs of subpœna may be issued by any Court of Record; but as, at common law, they are plainly of no force beyond the jurisdictional limits of the Court from which they issue, those granted by the clerk of assize, or clerk of the peace, are compulsory only within a single county or other more limited district; and therefore, if the witness lives beyond those limits, application must be made to the Crown Office, whence subpœnas may issue to any part of England.[2] In the United States, courts, sitting in any district, are empowered by statute to send subpœnas for witnesses into any other district, provided that, in civil causes, the witness do not live at a greater distance than one hundred miles from the place of trial[3]; and in this country the legislature has provided, that the service of a subpœna or other process upon any person in any one of the parts of the United Kingdom, requiring the appearance of such person to give evidence in any *criminal prosecution* in any other of the parts of the same, shall be as effectual, as if the process had been moved in that part, where the witness is required to appear. If the person served does not appear, the Court out of which the process issued may, upon proof of service, transmit a *certificate* of the default, under the seal of the Court, or under the hand of one of the judges, to the Court of Queen's Bench

[1] R. v. Barnett, 3 C. & P. 600.; R. v. Jones, 6 id. 343.; R. v. O'Donnell, 7 id. 138.; R. v. Kinsey, id. 447.; R. v. Burgiss, id. 488.; R. v. Rooney, id. 515.; R. v. Frost, 9 id. 131.

[2] Cro. C. C. 9. 21.; Corner's Cr. Pr. 256, 257.

[3] Stat. 1793. c. 66. [22] s. 6.; 1 LL. U. S., p. 312., Story's ed.

in England or Ireland, or to the Court of Justiciary in Scotland, according as the writ may have been served in one or other of those parts of the kingdom; and such Courts respectively may punish the person for his default, as if he had refused to appear in obedience to process issuing out of those respective courts.[1]

If a witness, having been duly served with a subpœna, wilfully neglects to appear, he is guilty of *contempt* of court, and may be proceeded against by *attachment.*

In order to render a witness liable to this summary proceeding, it is requisite to show distinctly, though by any species of proof, that, on the cause being called on for trial, he was wilfully absent under such circumstances, that, had the trial proceeded, he could not have been forthcoming when required to give evidence. The jury need not be sworn; and it is no longer necessary even that the witness should be called upon his subpœna before withdrawing the record. This last form is, indeed, usually followed, and the practice is convenient, as furnishing satisfactory and cheap evidence of the absence of the witness. Still it is not essential, and in some cases, as if the witness had gone to France two days before the trial, would be merely an idle ceremony.[2]

As an attachment for contempt does not proceed upon the ground of any damage sustained by an individual, but is instituted to vindicate the dignity of the Court[3], the case must be perfectly clear to justify the exercise of this extraordinary jurisdiction.[4] The motion for an attachment should, therefore, be brought forward as soon as possible[5], and the party applying must show by affidavit, that a copy of the

[1] 45 G. 3. c. 92. s. 3.

[2] Lamont v. Crook, 6 M. & Wels. 615.; Barrow v. Humphreys, 3 B. & Al. 598.; Dixon v. Lee, 1 C. M. & R. 645.; Mullett v. Hunt, 1 C. & M. 752.; Goff v. Mills, 13 Law J. N. S., Q. B., 227., per Wightman J. These cases overrule Malcolm v. Ray, 3 Moore, 222.; and Bland v. Swafford, Pea. R. 60., and resolve the doubt expressed in R. v. Stretch, 4 Dowl. 30.; 3 A. & E. 503., S. C.

[3] Barrow v. Humphreys, 3 B. & Al. 600., per Best J.

[4] Horne v. Smith, 6 Taunt. 10, 11.; Garden v. Cresswell, 2 M. & W. 319.; Scholes v. Hilton, 10 M. & W. 15.; 2 Dowl. N. S. 229. S. C.; R. v. Lord J. Russell, 7 Dowl. 693.

[5] R. v. Stretch, 4 Dowl. 30.; 3 A. & E. 503. S. C.

subpœna was seasonably and personally served on the witness [1], that at the time of such service the original writ was shown to him [2], that his fees, if he were entitled to them, were paid or tendered [3], or the tender expressly waived [4], and, in short, that every thing has been done which was necessary to secure his attendance. [5] It must also appear, from the affidavits, that the absence of the witness was an intentional defiance of the process of the Court [6]; but if this be clearly shown, the witness, as it seems, cannot justify his conduct by proving that his evidence was immaterial. [7] The fact, however, of immateriality is sometimes important, as tending to negative the existence of wilful misconduct. Thus, the Court refused to grant an attachment against Lord Brougham, when it was evident, from the notes of the judge who tried the cause, that his presence at the trial would not have served the complainant [8]; and they properly observed, that they would not allow the process of the Court to be used for purposes of needless vexation. So, in the case of Lord John Russell and Mr. Fox Maule, who had disobeyed writs of subpœna duces tecum, the Court, in discharging the rule for an attachment, relied on the fact that the documents, if produced, would not have been admissible. [9] In the case of Rex v. Sloman, the rule for an attachment was refused, the witness having had reasonable ground for believing that he would not be wanted at the trial. [10] On the other hand, it must be remembered that the duty of attending a court of justice in pursuance of a subpœna, is paramount to the duty

[1] Antè, p. 287.

[2] Garden v. Cresswell, 2 M. & W. 319.; 5 Dowl. 461. S. C.; Jacob v. Hungate, 3 Dowl. 456.; R. v. Sloman, 1 Dowl. 618.; Smith v. Truscott, 1 Dowl. & L. 530.

[3] Antè p. 288.; Connor v. ———, Ir. Cir. R. 610., per Pennefather B.

[4] Goff v. Mills, 13 Law J. N. S. Q. B. 227., per Wightman J.

[5] 2 Ph. Ev. 377.; Garden v. Cresswell, 2 M. & W. 319.; 5 Dowl. 461. S. C.

[6] Scholes v. Hilton, 10 M. & W. 15.; 2 Dowl. N. S. 229. S. C.

[7] Chapman v. Davis, 3 M. & Gr. 609. 611, 612.; 4 Scott, N. R. 319.; 1 Dowl. N. S. 239. S. C.; Scholes v. Hilton, 10 M. & W. 16.; 2 Dowl. N. S. 230. S. C. These cases appear to overrule Tinley v. Porter, 5 Dowl. 744., and Taylor v. Williams, 4 M. & P. 59.

[8] Dicas v. Lawson, 1 C. M. & R. 934.

[9] 7 Dowl. 693.

[10] 1 Dowl. 618.

of obedience to the commands of any master, however stringent and express those commands may have been [1]; and, on this ground, an attachment has issued against an attorney, who, being served with a subpœna to attend a trial on the following day, went in the morning to a board of guardians to discharge his duty as clerk, and found on his return that the cause had been unexpectedly called on in his absence. The court held that he had no right to speculate on the chance of being in time. [2] Of course if the witness be too ill to attend [3], or if leave of absence has been given him by the attorney of the party requiring his attendance [4], no attachment will lie; and, on ordinary principles of justice, it would seem that if, in a criminal case, where no fees were tendered, a witness, from real poverty, should be unable to obey the summons, he would not be guilty of a contempt. [5]

We may here observe, that although the Court of Queen's Bench will grant an attachment against a witness for disobeying a subpœna to give evidence in an inferior court, where the writ has issued from the Crown Office [6], they have no power, either at common law or by virtue of the Act of 45 G. 3. c. 92. [7], to interfere, unless the writ has so issued [8]; and consequently, in all those cases where the process is granted by the clerk of assize, or clerk of the peace, and the witness disobeys the summons, the inferior court is driven to proceed against him, either by the doubtful and arbitrary course of fining him, in his absence, for the contempt [9], or by the tedious, and therefore useless process of indictment. It may be said that those, who wish to have the attendance of witnesses enforced by the authority of the Court of Queen's Bench, may always effect this purpose by obtaining a subpœna from the Crown Office; but in remote counties this

[1] Goff v. Mills, 13 Law J., N. S. Q. B. 227. 229., per Wightman J.
[2] Jackson v. Seager, 13 Law J., N. S. Q. B. 217., per Wightman J.
[3] Re Jacobs, 1 Har. & W. 123. See Scholes v. Hilton, 10 M. & W. 15.
[4] Farrah v. Keat, 6 Dowl. 470.
[5] 2 Ph. Ev. 383.
[6] R. v. Ring, 8 T. R. 585.
[7] As to which act, see antè, p. 292, 293.
[8] R. v. Brownell, 1 A. & E. 598.
[9] See R. v. Clement, 4 B. & Al. 218. In that case the fine was imposed by one of the superior judges. Quære, whether the justices at sessions could safely exercise the like power.

course is highly inconvenient, as it occasions a considerable loss of time, and, if a town agent be employed, a needless additional expense. A much more simple and effectual method might be adopted, if the legislature would enact that every inferior court should, like the Crown Office, have the power of issuing subpœnas for witnesses, in whatever part of the country they might reside, and that the Court of Queen's Bench should enforce obedience to such subpœnas by the ordinary process of attachment. The wholesome dread of this proceeding would, on the one hand, render it seldom necessary to have recourse to it; and the necessity for paying the expenses of the witnesses would, on the other, render parties unwilling to summon persons whose presence was not materially requisite. It is only reasonable and just that every court having power definitively to hear and determine any suit should be enabled, without being driven to a circuitous mode of proceeding, to call for all adequate proofs of the facts in controversy, and, to that end, to summon and compel the attendance of witnesses before it.

If a very flagrant case of palpable contempt is shown, such as an express and positive refusal to attend, the Court will, it seems, grant an attachment in the first instance; otherwise the usual course is to grant a rule to show cause.[1] It is hardly necessary to add, that if a witness duly served, and having his expenses paid, refuses in court to be sworn or to testify, he is guilty of contempt, and may, as in all cases of contempt, be punished by fine and imprisonment, at the discretion of the court.[2]

Besides the mode of proceeding by attachment, the party injured in a civil suit by the non-attendance of a witness has his remedy, either by action of debt, under the statute 5 Eliz. c. 9.[3], or by action on the case for damages at common law. Recourse is seldom had to the action of debt, because, though the party aggrieved may recover in this form of action the penalty of 10*l.* in addition to what the court might assess as a satisfaction in damages, yet this as-

[1] Anon. Salk, 84.; R. v. Jones, Stra. 185.; 4 Bl. Com. 287.; Jackson v. Mann, 2 Caines, 92.; Andrews v. Andrews, 2 Johns. Cas. 109.; Thomas v. Cummins, 1 Yeates, 1.

[2] 4 Bl. Com. 284—288.

[3] As to which act, see antè, p. 288.

sessment must be made, not by the jury or judge at Nisi Prius, but by the court out of which the process issued; and this being an inconvenient course, it is more advisable to rely on the remedy by attachment, when, if the witness redeems his offence by making satisfaction to the party, the Court will in general remit the punishment.[1] The action on the case for damages is more frequent; and to support this action it is not necessary, any more than in proceeding by attachment, to show that the jury were sworn, or that the witness was called upon his subpœna[2]; neither is it required that the declaration should contain a direct averment that the party had a good cause of action or a good defence, but it will be sufficient to state and prove that the witness was material, and that the party could not safely proceed to trial in his absence.[3] It seems that the same strictness of proof with respect to the form and service of the writ as is necessary to render the witness guilty of contempt will not be requisite in order to sustain the action[4]; and it has been held that, though for the purpose of bringing the witness into contempt, the original writ must be shown at the time when the copy is served, this course is not necessary as the foundation of an action, unless, perhaps, when a sight of the writ has been expressly demanded by the witness.[5]

[1] Pearson v. Isles, 2 Doug. *556, 560. 561.*, per Lord Mansfield.

[2] Lamont v. Crook, 6 M. & W. 615. See antè, p. 293., and cases there cited.

[3] Mullett v. Hunt, 1 C. & M. 752.; Davis v. Lovell, 4 M. & W. 678.

[4] Davis v. Lovell, 4 M. & W. 684. 686., per Parke B.

[5] Mullett v. Hunt, 1 C. & M. 758., per Bayley B.

ART. III.—THE LAW OF FEES AND COSTS. (No. 2.)

In a former article we considered the law of fees and costs, in its most comprehensive sense, as embracing the whole burthen of the administration of justice, whether borne by the state or by private individuals. And we traced it historically, in the practice of the continental nations, from the dawn of Roman and German civilisation to modern times. We have now to turn our attention to our own country and its dependencies.

Our colonial empire is of such unparalleled magnitude, and has been subjected to the crown in so many different ways, by settlement, by conquest, by treaty, and by voluntary submission, that we cannot expect to find in its judicial arrangements any uniformity of system. The basis of those arrangements is, in some of our possessions, the law of England, in others the French, Spanish, Dutch, Italian, or even the Mahometan or Hindoo law; the foreign legislations having generally been modified by our own, and these again by local usages and customs. To survey the whole sphere of these dependencies of the empire is a labour beyond our powers. We may, however, in a future article, endeavour to make such a selection as will serve to illustrate the general subject.

Let us pass at present to the third branch of our proposed investigation, which comprises the practice of our own country at different periods of its history. To our Saxon ancestors such a thing as a judicial establishment can hardly be said to have been known; for we hear of neither judge, registrar, nor summoner. In the Hallmote the thane's reeve or steward served both for registrar and judge. The hundred courts, borough courts, and shire courts, seem to have been popular assemblies, advised, rather than controlled, in administering justice, by certain individuals of superior rank and knowledge. "Let the shiremote (says Canute, A. D. circ. 1020) be held at least twice in the year; and let the bishop

and the alderman be there, the one to explain to the people the law of God, the other the law of the world." The alderman, as his name implies, was probably at first an *elder* thane, or person of consideration, chosen by the assembly, or named by the king, to preside. Afterwards his office became hereditary, in the person of an earl or superior thane, who took, as his assessor or deputy, a man more skilled than himself in the law, under the title of *Shire-Reeve*, or Sheriff; and hence the County Court came to be called the Sheriff's Court, or Tourn.

There were certainly no advocates in these courts; attornies there probably were, but merely private individuals, who neither constituted a legal profession, nor could they have any right to fees, otherwise than by mere private agreement.

In short, the burthen of administering justice in the Saxon courts was almost wholly personal; for we know of no fund from which either judicial or ministerial officers could have been compensated, except the *fines*, which were largely inflicted, as we have seen they used to be among the ancient Romans and Germans. The most remarkable of these fines was the *Wergild*. Every man was estimated at a certain *were*, or value, which varied at different times and places. We have a curious law of King Æthelstan, about the year 930, which estimates a husbandman in Mercia at 200 shillings, a thane as equal to six husbandmen, and a king as equal to six thanes. Sometimes the whole *were* was imposed, and sometimes a part, as a composition for bodily punishment. Thus a law of Canute, A. D. 1016, punishes perjury with the amputation of the hand, but allows the hand to be redeemed by paying half the individual's *were*. Again, by a law of Edmund, about A. D. 940, a man who had killed another might redeem his own life by paying first the *healsfang* or redemption of his own neck; then, after a certain period, the *manbote*, or compensation for the person slain; and lastly, at the end of another period, the *were*, or estimated value of himself. Fines are directed, in these laws, to be paid sometimes to the king, sometimes to the bishop, the earl, or the hundred. By the above-mentioned law of Æthelstan, which he declares to be the folkright or common law of England, a king's wergyld is fixed at 30,000 thryms (a coin of uncertain

value), of which 15,000 were to go to the royal family, and 15,000 to "the people of the land," meaning, probably, those who attended the *mote*, at which the penalty was imposed.

But the Norman conquest was the dawn of a regular system of judicature. William himself adopted two measures pregnant with the most important consequences to the forms of the subsequent procedure. He separated the spiritual from the temporal jurisdiction, and he made the sheriff a king's officer. The first of these institutions soon led to a regular judicial establishment in the ecclesiastical courts, and the latter to the institution of the *Curia Regis*, the first great step towards centralising and rendering uniform the administration of the temporal law. The canons, although they had not yet been digested into one body, contained many provisions for the guidance of judges, advocates, and witnesses, taken chiefly from the Roman civil law. The Courts Christian therefore (as they were called) were soon organised, and in the great outlines of their constitution may be presumed to have served as models for the king's court. The laws now extant, under the names of William I. and Henry I. are indeed of doubtful authority, and slight importance; and we willingly pass over, as irrelevant to our purpose, the Saxon ordeal, the Norman duel, and the compurgation common to both. But when we come down to the reign of Henry II. we find a new light spread over our whole jurisprudence. *Glanvil*, our first law writer, then appeared, to whom (or at least to the chief justice of that name) we are probably indebted for the many and great improvements of the law which took place in his time. The *Tractatus de Legibus Angliæ* was written about the year 1187, between thirty and forty years after the publication of the *Decretum*, and when the study both of the civil and canon law was already in high repute throughout Europe, and particularly in England. It opens with a direct quotation from Justinian; and its contents, together with those of Bracton in the following century, fully justify the assertion of Reeves, "that the civil and canon laws were not confined (at that time) to the ecclesiastical courts, where they were professedly the only rules of decision, but interwove themselves into the municipal law, and furnished it with helps towards improving its native

stock;" and we concur with that estimable writer in the wish, "that the early connection of our law with the civil and canon law were more fully investigated, than it has yet been."

Judicial establishments were now completely organised. The *Curia Regis*, with its dependency the *Exchequer*, and the *Bench* (or Common Pleas), were established, and the *Chancery*, for the formation of writs, had acquired a separate existence, at least as an *office*, if not as a *Court:* the admirable institution of *justices itinerant* was devised, to bring justice home to the doors of the suitors, and the *Commune Concilium* was avowedly maintained as a check on any inordinate power of the Crown. "In populo regendo," says Fleta, "superiores habet (Rex), ut *Legem*, per quam factus est Rex, et *Curiam* suam, videlicet Comites et Barones."[1] The judges were paid by salaries, and sworn to take no gratuities from private individuals, "exceptis esculentis et poculentis pro uno die, et non ultra."[2] They held their offices, however, only at the Sovereign's will.

In the King's Courts were various officers, exercising *commemorative* functions, as in the Common Pleas, *Clerici Prænotarii* et *Cursarii*, et *Cyrographarii*. Some of these held their offices "de *feodo*," and in virtue thereof received fixed sums for certain acts. The word *feodum*, therefore, was applied first to the office, and secondly to the sum claimed by virtue of the office; and in this latter sense it is the origin of our modern word *fee*, which has received so much more extensive a signification.

The officers exercising *coercive* functions, under the various titles of *summonitores*, *marescalli*, *ballivi*, *virgatores*, *servientes*, *clamatores*, &c., were also paid fixed sums for certain acts. Thus the marshal might arrest a debtor, and keep him one night before he delivered him over to the Fleet Prison; and for this his due was half a mark.[3] Some of these officers also held their offices "de *feodo*," others not.[4]

A legal profession was now formed, in all its branches. "In Curiâ Regis sunt *servientes*, *narratores*, *attornati*, et *apprenticii*."[5] The word "*serviens*" was manifestly applied to two very different classes of persons. The "serjeauntes

[1] Fleta, i. 17. [2] Id. ibid. [3] Id. ii. 30.
[4] Id. ii. 38. [5] Id. ii. 37.

des justices en eyre[1]," were executive officers, like the "sergeantz d'armes[2]," or the "serjans de l'espée," of the old Norman coustumier (A. D. 1315). The "serviens ad legem," (Chaucer's "sergiant at law, ware and wise,") is mentioned by Bracton (about A. D. 1250) as being sometimes commissioned as a judge, and is noticed, A. D. 1340, as "serjant le roi jurrée," assigned, in default of a justice of the bench, to take assizes.[3] It has been doubted whether the *narratores* formed a different class from the servientes. Probably they were pleaders who *counted* (as it was called) orally in Court, without having been sworn to serve the King, answering nearly to the barristers of the present day. These latter, indeed, are generally supposed to be meant by the word *apprentitii;* but as Fleta places the apprentitii after the *attornati,* he would seem to allude to a class of persons more like the present articled clerks to attornies. The *attornati* seem to have been so named from attending at the sheriff's *tourn,* and are noticed by Glanvil, under the name of *responsales,* as put in the place of other men, to *answer* for them, "ad lucrandum vel perdendum." A freeman was allowed to do suit to the County Court, &c., by attorney, A. D. 1236.[4] Afterwards other acts were so allowed; and hence the vicarious performance of them became gradually an occupation; and by the statute of Carlisle, limiting the admission of attornies to the chancellor and chief justices, it was raised to the rank of a profession. Still the remuneration of their services, as well as those of the other legal advisers and assistants, was left entirely to private arrangement.

The administration of justice was, in those times, so far from being a burthen to the government, that a large part of the royal revenue was made up of forfeitures and sums paid under the various names of *Fine, Redemption, Occasion,* and above all *Amercement.* The original meaning of the word "Fine" was the *end* of a controversy by means of a concord of the parties. Thence it came to signify, secondly, the concord itself; thirdly, the sum paid for the king's permission to effect it; and lastly, any sum paid to a superior authority in

[1] Stat. 3 Ed. I. c. 30.
[2] Stat. 13 Rich. II. s. 1. c. 16.
[3] Stat. 14 Ed. III. s. 1. c. 16.
[4] Stat. 21 Hen. III. c. 10.

the way of penalty. When parties had agreed to settle their differences, if one of them afterwards refused, a writ lay "quòd teneat *Finem* factum in curiâ," "that he should keep the *concord* made in court.[1] As to the sum paid to the king for such a concord, Ruffhead says, "the foundation of this claim is, that by reason of the concord between the parties, the king loseth the amercements upon the judgment or nonsuit."[2] And the author of Fleta argues, that though Magna Charta forbids the selling or delaying of justice, "non inhibetur quin *Fines* capiantur pro brevibus possessionum, et actionum personalium civilium, et *pro celeri justitiâ habendâ.*"[3] The word "*Redemption*" (whence comes the modern Ransom,) signified a sum paid for exemption from personal punishment; *ex. gr.*, "Malefactores in parcis adjudicentur prisonæ trium annorum, de quâ graviter *redimantur*, pro regiâ voluntate."[4] "*Occasion*" seems to have been any penalty suited to the occasion; as "non occasionentur," "shall not be fined."[5] "Sine occasione."[6] So in a capitular of Louis the Pious, "de injustis occasionibus." (A. D. 819.) But the most productive of all these imposts was the "*Amercement;*" so called because the party, for some offence or neglect, was supposed to be *at the mercy* of the king, or inferior authority. This was applied to all sorts of persons, and for all sorts of defaults. If a *county* outlawed an individual prematurely, or could not discover a secret murderer, it was amerced. If a *vill* received a fugitive not in frank pledge, or buried a corpse without inquest, it was amerced. If a *tything* did not give up a fugitive, it was amerced. If a *lord's* servant did not appear to a complaint, or if a lord's gaoler caused the death of a prisoner, the lord was amerced. If a *sheriff* did not execute a writ of summons, or executed it improperly, he was amerced. If a *summoner* disobeyed or defaulted in his duty, he was amerced. If a *bailiff* made default in the exchequer, he was amerced. If a *plaintiff* falsely complained of redisseisin, he was amerced. If a *demandant* or *tenant* did not appear at the day, he was amerced. If *pledges* did not present their parties at the day, they were amerced. If *vouchees to warranty* did not appear at the day, they were

[1] Glanvil. 8. c. 3. [2] Pref. Stat. [3] Fleta, ii. 13.
[4] Id. i. 38. [5] Chart. Forest. c. 9. [6] Ib. c. 12.

amerced. So deforcers of dower, disseisors of pasture, owners of pits uncovered, bakers or brewers not observing the assize of bread or ale, and numberless other offenders and defaulters, were amerced.[1] It would seem that these amercements were at first merely arbitrary; but afterwards they were assessed, in some cases, by the justices in Eyre[2]; in others, by the treasurer and barons of the exchequer[3]; and in others, by the vicinage, or peerage.[4] The numerous statutes made to restrain them, show that they had been a source of most grievous abuse. "The power of fining (says Barrington) was perverted from the purposes of justice, to the filling of the king's coffers." Money was paid for delaying law, for expediting law, to obtain right, to obtain favour, to procure pardon! It did not even always reach the king's coffers; for the sheriffs, who in fact imposed the fines, farmed the revenue which they produced, and hence had both motive and facility to oppress the suitors, jurors, and others under their control.[5]

To these causes of *expence*, in the early periods of our law, must be added a fertile source of *delay*, not only in the complexity of the Norman tenures, but in the dilatoriness of the procedure, especially in the number of *essoins* allowed. Excuses for non-appearance are denominated in many laws of the middle ages by the word "essoin," or some other of cognate origin: as "quòd ipse non venisset ad placitum, nec ulla *sunnia* nunciasset."[6] "Si eum *sunnis* non detinuit."[7] "Nisi competens *soinus* eum detineat."[8] The origin of such a practice is indeed to be found in the Roman law, from which the essoins *de infirmitate veniendi aut reseantisæ, de subitâ aquarum inundatione, et de servitio Regis*, were manifestly taken. "Si quis judicio se sisti promiserit, et *valetudine*, vel *tempestate*, vel *vi fluminis* prohibitus se sistere non possit, exceptione adjuvatur."[9] "Si ideò non steterit, quia *Reipublicæ causâ* abfuit."[10] And they were evidently just in principle; the evil consisted in the facility with which they were allowed, and the number of days given to all parties, and in every

[1] Vid. Fleta, i. 25, 26, 27. 30.; Glanvil. i. 29.; Reeves, i. 122.; Stat. Scacc.; Stat. Marlb.; Stat. Mort.; Jud. Pillor. &c.
[2] Fleta, i. 30. 48.
[3] Stat. Scacc.
[4] Mag. Chart. c. 14.
[5] Barr. Stat. 25. 50. 62.
[6] Marculf. Form.
[7] Leg. Salic.
[8] Leg. Hen. I.
[9] Ulpian. D. 2. 11. 2.
[10] Gaius. D. 2. 11. 6.

stage of a cause. Fortescue, however, who wrote in the time of Henry VI., considered them to be a great excellence of the English law; for, says he, "Nunquam in judiciis tantum imminet periculum, quantum parit processus festinatus." "Quare leges Angliæ *essonia* admittunt, qualia non faciunt leges aliæ mundi universi."[1]

The constitution and procedure of the Ecclesiastical Courts, from their first separate establishment, were the same in England, as we have already described them to have been on the Continent: it will therefore be unnecessary to notice them here more particularly. Enough has been said to afford a general idea of the administration of the law in early times; and taking into account the very limited population and wealth of the country then, compared with what it can now boast, the general burthen of the administration of justice was probably much heavier, was thrown much more oppressively on the subject, and was certainly far less pure and equitable, than it is at the present day.

No doubt, in the lapse of ages, the procedure did not always adapt itself readily to the change of interests, habits, and customs; the judicial establishments were in some cases overloaded with officers, and in others inadequate to their functions, and the legal assistance was in some particulars overpaid, and in others inadequately remunerated. Our limits will not allow us to follow out these topics in detail, nor is it needful that we should do so; but we proceed at once to contrast some features in the present administration of the law, so far as regards expence, with the hasty outlines, which we have sketched, of similar particulars in other ages and countries.

To begin with the judicial establishment:—Every one must rejoice, that the mode of remunerating high judicial officers, wholly or in part, by fees from suitors, by the sale of offices, &c., has been superseded, in all recent reforms, by the payment of fixed *salaries* from the state. Such has been the change effected as to the emoluments of the Lord Chancellor, of the Judge of the Admiralty, and of the Masters in Chancery; and adequate salaries, with competent provision for

[1] Laud. L. Ang. c. 53.

retirement have wisely been allotted to the courts and officers newly created, including the Magistracies of Police. This is as it should be; but the Judge of the *Prerogative Court* presents a singular contrast to his brethren of the Bench. This eminent person exercises a contentious and a voluntary jurisdiction; for neither of which he receives any salary, but is paid wholly by fees. The contentious jurisdiction is exceedingly laborious; it requires great learning and experience, and often operates on property of a very large amount. In *Helps* v. *Wood*, the stake was above a million; in *Jones* v. *Fawcett*, above 600,000*l.*; in *Colvin* v. *Fraser*, above 500,000*l.*, &c. The annual sum, which the Judge of this Court earned by his *contentious* jurisdiction, on the average of six years ending 1833, did not exceed 96*l.* On the other hand, the *voluntary* jurisdiction scarcely requires the judge's personal attention twice in a year: the emoluments consist of fees on the seal of the Court to probates, administrations, &c.; and their average annual amount for the six years last mentioned was 3236*l.* This sum was paid on about ten thousand grants of probates and administrations annually; and the property, which passed under the grants of the year 1829, was near forty-five millions and a half, on which the judge's remuneration was about *one-fifteenth of a farthing in the pound!* Inconceivably trifling as this tax is, it is still very unequally levied; for the judge's fee on a probate is only 3*s.* 6*d.*, whether the sum bequeathed be 100*l.* or 1,000,000*l.* It follows from all these statements, that the laborious exertions of a learned judge, securing a rich man in the possession of property worth a million sterling, is almost entirely paid by the contributions of a number of poor persons, for unopposed grants, which cost nobody any trouble at all. The minor Ecclesiastical Courts, which on an average of three years, ending December, 1829, issued annually 14,323 grants of probate or administration, are paid in the same manner as the Prerogative Judge; and the mode of payment by fees alone is applied to the Vice Admiralty Judges, all of whom hold office during pleasure, without a provision for retirement after any length of service. It has long been proved, that the immaculate purity, profound learning, and indefatigable exertions of the Bench, in its highest branches, are best secured

by its independent position, liberal remuneration, and certainty of income. The country feels that this is the best economy; and surely British subjects, under every jurisdiction, and in all parts of the empire, are entitled to expect that their judicature should be regulated on principles so salutary, so equitable, and so plain.

The *ministerial* officers, in all our courts, continued, till a very recent period, to be paid by fees. These often amounted, in the aggregate, to immense sums; and, in such cases, the duties were generally discharged by deputy; so that a heavy burthen was laid on the public, not for the administration of justice, but to provide for Government dependents. The value of a Prothonotary's place, in Queen Elizabeth's time, is said to have been not less than 10,000*l.*, equal to 40,000*l.* or 50,000*l.* of our present money. The fluctuations, too, in some of these emoluments were excessive. The office of Registrar of the High Court of Admiralty netted, in the peace of 1783–93 not more than 15*l.* per annum; in the war that followed, it produced, in some years, nearly thrice as many thousands; of which by far the larger part went to pay the noble holder's sinecure. Better principles have since prevailed. No doubt, as the wealth of the country increases, its interests become more complex, its procedures are necessarily diversified, and the ministerial officers who aid in their execution must be multiplied; whilst, perhaps, some old places are improperly retained, which have become superfluous. Thus, in Chancery, the report of 1816 enumerates the officers subordinate to the judges under no less than sixty different heads, several of which ramify into different branches, as the Accountant General's Office, the Register Office, the Report Office, the Examiners, the Six Clerks, the Sworn Clerks, &c. &c. Certainly, in the words of Lord Chancellor Erskine and Sir W. Grant, "it is for the benefit of the suitors, that skilful and proper persons should be encouraged in the due and faithful discharge of the duties of those offices, by a reasonable recompence and reward of their services;" and when, by change of circumstances, the sums allowed, under orders of the Court, become inadequate to the duties to be performed, and to the support of practitioners in

a liberal profession, they should be augmented; but whether that ought to be done by means of fees charged to the suitors, or of salaries received from the State, is quite another question; and, upon the whole, we are inclined to think that the rules proposed in 1833, for the Ecclesiastical and Admiralty Courts, might safely be extended to all others, viz.: —

1. That all sinecures be abolished.
2. That compensation be made to the persons whose offices are discontinued.
3. That the efficient officers be remunerated by *salaries*, in proportion to the trust (skill) and labour of their respective situations; and,
4. That they be required, in all cases, to discharge their duties in person, and not by deputy.

In the spirit of these rules, we should add, that offices of small utility, though not absolutely sinecures, might often be consolidated, so that, according to the homely proverb, "no more cats should be kept than would catch mice;" and, on the other hand, that the allowances made to those who suffer by public reforms, should be bonâ fide *compensations*, and neither inadequate nor extravagant sums deceptively coloured with that fair and equitable designation.[1]

Our readers are well aware, that much has been done in this way, of late years, by the Legislature, and much by the judges, under powers delegated to them by parliament. By stat. 50 G. 3. c. 118., the office of Registrar of the High Court of Admiralty, heretofore so lucrative, was pared down to one third of its former dimensions; and was required to be

[1] We cannot refrain from here alluding to the *compensation* lately awarded to the Sworn Clerks and other Officers of the Court of Chancery, under the stat. 6 & 7 Vict. c. 103. No measure shews more completely the necessity of some officer or officers for the revision of public bills than this. Had such an officer existed, it is impossible that the clauses under which it has been found absolutely necessary to award that compensation, differing as they do from all previous compensation clauses, could have passed. One of the first things which a revising officer would do would be to prepare *common forms* of all the usual clauses used in acts of parliament, which would thus save a world of trouble and irregularity. We need not go into the general question; but it is clear that the present compensations were obtained by *surprise*; and we are quite satisfied that Sir Robert Peel and the Lord Chancellor were as vexed and amazed as any one. — EDITOR.

performed by the principal, with one assistant if necessary. By stat. 2 & 3 W. 4. cc. 111. and 122., and stat. 3 & 4 W. 4. c. 84. (Lord Brougham's great Chancery reform), not only a large amount of fees, heretofore paid to the Chancellor, was given up to the public, but many offices previously supported by fees, were replaced by a few paid (at a much lower rate) by salaries. By stat. 6 G. 4., a reform of a different kind, but not less important in principle, was effected, in putting an end to the *sale of offices* by the Chief Justice of the Common Pleas, a custom surely much more "honoured in the breach, than the observance." Of the diminutions of expense by judicial authority, the latest is not one of the least remarkable. We allude to the Lord Chancellor's orders, in the course of the bygone year, for the reduction of fees on office copies. These have been reduced from 10*d.*, 8*d.*, and 6*d.* per folio, to 4*d.*, and the estimated saving to the suitors by these and other arrangements is stated at 18,000*l.* a year.

The *modes*, in which ministerial officers of courts are recompensed for their labours at present, are various. Some of them depend entirely on salaries; but a great number are paid, in part or wholly, by fees, which are regulated sometimes by the nature of the act done, sometimes by the length of the document transcribed, sometimes by the distance travelled, the time consumed, or the value of the object in litigation. The principles, which ought to govern the amount of recompence, are stated, with his usual felicity of style, and accuracy of conception, by Lord Stowell, in the case of the Rendsberg.[1] He particularly dwells on the charge of a per centage claimed by the marshal on the value of a ship and cargo, for bringing them within the jurisdiction of the court; and he shows that neither *pro opere et labore*, nor on the ground of responsibility, could such a charge be maintained for such a service. Yet in various courts this mode of paying officers has been too often resorted to; especially where deposits are made, formally in the hands of the officer, but really in some perfectly safe place of public custody. Thus it appears by a report in 1826, that there were above 39,000,000*l.* of stock standing in the name of the

[1] 6 Robinson, 143.

Accountant General of the Court of Chancery, at the Bank of England, of which probably 6,000,000*l.* or more were annually transferred. The broker's commission consequently amounted to several thousand pounds in the course of the year; and of that commission the Accountant General, in addition to his salary, received a share. So, in the Admiralty Court, according to the Report of 1824, we find the Registrar charged per centages on bills and money paid into the Registry, and converted into Exchequer bills, and also 2*d.* in the pound for all monies paid out of the Registry.

Very many tables have been framed, fixing the fees due to officers in their respective courts; but on comparing these together, it will be found, that they agree in scarcely any one principle of charge; the same effort of labour, the same degree of skill, or the same amount of responsibility, being rewarded very differently in one court from what it is in another. The Exchequer Report of 1822 says, "the charge of purchasing, transferring, and paying out of the Court of Exchequer cash, stock, or effects, is, according to the present allowances, considerably heavier upon the suitors of that Court, than the charge of the corresponding operations in the Court of Chancery." The Chancery Report of 1816, states a fee of 2*s.* to the Usher of the Court, for attending a cause heard at Westminster or the Rolls: the Prerogative Report of 1823 gives the Apparitor only 1*s.* for a like attendance.

It is the duty of the State to provide legal assistance for the suitors: and in no country, ancient or modern, has that duty been more effectually discharged than in England. It was well said by Lord Brougham, when a member of the House of Commons, "You should not make inferior in rank, in feelings, and in accomplishments, that profession, out of which the Judges of the land must be appointed." And first, as to the bar,—the serjeants and barristers of Westminster Hall, and the advocates at Doctors Commons, — it is true, that they have a monopoly, in the exercise of functions of the greatest importance to the whole community; but without that monopoly the talents, the integrity, the learning, the independence essential to those functions could not exist. "By how much more," said the orator last quoted, "you render the profession eligible only to persons of in-

ferior education and habits, who otherwise could but find their way to employment in merchants' counting houses, or in shops; by so much the more you close it upon men of talent and respectability, and prevent it from being other than a source of prejudice and disadvantage." The monopoly, however, is not a close one: it is not a privilege of caste, or of wealth. Any man in England may rise, and many have risen, from the most obscure origin, to the peerage itself, through the profession of the law; but no man can do so otherwise than by means, which tend to illustrate his country, and to secure his countrymen in the enjoyment of their rights. Of the education necessary to fit a gentleman and a scholar for the bar, we have spoken in a former number. Those who have gone through such a course of preparation, will not be overpaid by the pecuniary emoluments, to which it is likely to lead. Nor indeed does the public seem to think that the bar, as a body, are overpaid. The Chancery Report of 1826 contains the analysis of several bills relating to suits of different lengths. In one of sixteen years, where the costs of all the parties together amounted to 3720*l.*, the fees of counsel were 329*l.*; in one of five years, on an amount of 421*l.*, they were 109*l.*; in one of four years, on an amount of 80*l.*, they were 10*l.*; and in one of five terms, on an amount of 290*l.*, they were 22*l.*, the proportions necessarily varying, according as the exigencies of the cases required more or fewer settlings of pleadings, more or fewer motions, consultations, hearings, &c.

It is manifest, that for exertions of this kind there can be no reasonable table of fees. To use the words of the poet, with some variation, you cannot

> ——— "gauge and span,
> And buy the intellect and mind of man."

A rich and generous client may present a noble gratuity to his successful defender; as the first Lord Clive is said to have given a splendid mansion at Mitcham to Mr. Wedderburn; or as Lord Trimlestown is reported to have drawn a cheque of 10,000*l.* in favour of Mr. Farrell; but for the common intercourses of a profession, a certain general usage of remuneration is sufficient; and as that usage is best known to the

other branch of the profession, the English system, by which the advocate receives his fees from the solicitor, and has no intercourse in the way of bargain with the client, is doubtless best devised, for maintaining at once the dignity and the integrity of the bar.

The only objections to the present system, which we regard as important, apply to matters of detail. It is said (and said truly) by Mr. Stewart, in his "Suggestions as to Reform in some Branches of the Law," that the mode of remunerating the payment of any professional document merely by its length, does not insure the proper requisites for the work (for it is often more easy to compose a long instrument than a short one), whilst, on the other hand, it places human nature in a constant state of temptation, and gives cause for the most odious accusations and suspicions. It is moreover obvious, that such a practice may tend to overload a cause with a vast mass of papers, to confuse the practitioner, and to increase indefinitely the expense.

The general spirit of the observations, which we have made on one branch of the profession, applies, *mutatis mutandis*, to the other. The solicitors and proctors, like the counsel, possess a monopoly, for the public good. They also must justify the state, for granting them such a privilege, by a course of study adapted to their peculiar duties [1], and by intelligence, faithfulness, and integrity in their discharge. Attempts have been sometimes made to confine their charges, by positive law, within certain limits; but, whilst it would be easy for an unscrupulous man to overleap such fences, an honourable practitioner will always be sufficiently restrained by the common usage of his brethren. The objection, indeed, as to charging by the length, instead of the importance of the documents, which pass under their hands, applies still more forcibly to the solicitors than to the bar; and it leads, as Mr. Field has well observed, in his pamphlet on the Court of Chancery, to a "false and mischievous principle of paying for what is not done, by way of compensation for not paying for what is done."

Having thus shown that the first of the three rules stated

[1] Stat. 6 & 7 Vict. c. 73.

in the outset of our inquiry is well satisfied in England, inasmuch as the State has provided its subjects with ample means of obtaining justice; we come to the second rule, which regards the distribution of the burthen between the individuals concerned and the State. And here we must first distinguish between the voluntary and the contentious jurisdictions. Since a voluntary jurisdiction is chiefly intended for the protection of inexperience, it is highly proper that it should be joined with a contentious jurisdiction. For instance, the experience of the judge and registrars of the Prerogative Court, in contested suits, render them safe guides to follow in acts where no contest is apprehended. The task of superintendence, indeed, is for the most part easy: a registrar, ninety-nine times in a hundred, can perform the whole; but it may be of the utmost importance that the thousandth case should be submitted to the judge, who perhaps, after mature deliberation, will refer it to a contentious tribunal. Still the individual has in all cases received a special benefit: he has obtained the probate, which forms his title to the property, or he has had the benefit of judicious advice as to the course which he ought to pursue. The judge and registrar, we will suppose, for the sake of argument, are paid by public salaries, to which, as a member of the community, the individual in question contributes through the medium of taxation; but they have benefited him more than others, and for that benefit it is but just that he should pay: the mode and quantum of payment we will consider presently.

In the contentious jurisdiction, we must distinguish the criminal from the civil. In barbarous times they are confounded; but as civilisation advances, a clear line is drawn between proceedings which are instituted to protect the community against the depravity of one of its members, and those which serve to determine between two private persons (both possibly honest and honourable) which has the better right to a thing, or whether the one has fulfilled his obligations to the other. Proceedings of the first class are carried on for the behoof of all the citizens, and therefore the whole expence of them should be defrayed from the public purse. It is a great hardship and injustice that, because the public peace has been broken, in my person I should have to pay

for bringing the offender to justice. It may indeed happen that, in consequence of a criminal prosecution, a man, who has been robbed, may recover his property, or one who has been defamed may re-establish his reputation: but these are merely accidental circumstances; they are not the proper objects of criminal law. We submit, therefore, on principle, that in all criminal prosecutions the State should pay not only the whole judicial establishment, and the legal assistants, but the witnesses and other incidental charges of prosecution, except in so far as they might be recoverable from a wrong-doer.

Nor in civil proceedings is the case always different. Legislation, on this point, is at present in a vacillating and uncertain state.[1] The apparent views of the legislature are, that the litigants should bear the whole burthen of the administration of civil justice, by paying fees, either to the judges and other officers, or to a fee fund, from which those persons are to be in part, or wholly remunerated, in the shape of salaries. Now it sometimes happens, as in the case of Malta, that this fund is not adequate to the charge; and then the remaining burthen falls on the public. Sometimes, on the contrary, it exceeds the charge, and then the suitors have paid more, for the administration of justice than it costs the community.[2] In other words, the State has taxed them for going to law! It appears by a return in the Lords' papers for 1843, that whereas the Acts[3] direct that the salaries and compensation allowances of certain officers shall be paid out of the fees of the Queen's Bench, Common Pleas, and Exchequer, if sufficient, and if not, the surplus shall be charged on the Consolidated Fund; the receipts for five and a half years, amounted to 355,510*l.*, and the payments to 193,673*l.*,

[1] A great and apparently unreasonable difference exists in this respect in the funds from which the Judges of the Courts of Common law and those of Equity are paid. The whole expence of administering justice in this country forms an interesting subject of inquiry, to which we have elsewhere to some extent adverted. See post, art. X. See also a return on this subject, moved for in session 1844, by Mr. W. Williams, M. P. for Coventry.

[2] Thus the financial returns of Malta for 1839 show in the preceding years an expenditure, on account of the Courts of Justice, amounting to 6162*l.*, whilst the receipts from the same source are only 3121*l.*

[3] Stat. 7 W. 4. c. 4., and stat. 1. Vict. 30.

leaving a balance in favour of the public of 161,837*l.*, which must be always increasing, because the compensations (which are included in the payments), are gradually diminishing, and must eventually cease.

Fee funds have been established in almost all the recent judicial reforms, and generally with a like result. We say nothing here of the profit to the State from *fines* and *forfeitures;* for these properly belong to criminal law. But we cannot pass over the large sums paid directly by the two branches of the legal profession, for liberty to exercise their talents in the service of the public. The members of the bar, conveyancers, &c. are said to be 2345, the solicitors and proctors 9336; and it has been estimated that the admission stamps and certificates of the former class average annually about 6000*l.*, and the annual licences of the latter near 86,000*l.*; to which are to be added their stamps on articles and admission, about 54,000*l.*; so that the annual revenue from this source is little short of 146,000*l.*, which sum, on ordinary commercial principles, must be taken to be ultimately borne by the suitors.

The *stamps* on law proceedings (repealed, in most matters of contentious jurisdiction, by stat. 5 Geo. IV. c. 41.,) were a very fertile source of profit to the State from litigation; but they were still more objectionable from the unequal rates of their assessment than from their amount. In a very few instances, the *ad valorem* principle was, to a certain degree, adopted, but in general it was wholly disregarded: and what is very remarkable, the same acts done in different courts were charged with very different duties. For instance, it appears by the schedules to the repealing Act, that the filing of an affidavit in an Ecclesiastical Court had previously been charged with a stamp of five shillings, but in a Court of Common Law only half a crown! The stamps were first brought into use in 1694, but they were then light; for in 1695, they produced, together with all other stamps, only 48,000*l.*; whereas, in 1839, the stamps on probates and administrations alone (which are acts of voluntary jurisdiction), produced 843,998*l.*

This mode of meeting judicial burthens, has long been practised in India. By the Bengal legislation of 1814,

No. 1. s. 13, &c., former fees on law proceedings were abolished, and a graduated table of stamps was adopted, from half a rupee to 2000 rupees, the latter being on a plaint, where the sum claimed should exceed 100,000 rupees. It seems, however, more advisable, that in a scheme of this nature, the principal stamp should be on the judgment. It would surely be easy to adapt that principle to civil procedure in all the courts at home. Suppose the judicial and ministerial officers to be paid by salaries, with adequate compensations on retirement. Let the whole annual expence of these salaries, and compensations, be brought into one mass, deducting from it the proportion which properly belongs to the administration of criminal justice. For instance, deduct from the salaries of the fifteen judges one third for the exercise of their criminal jurisdiction. It would be for the legislature to determine whether the whole, or any given part of the remaining sum, should be charged on the suitors; and whatever that amount might be, it would be easy to form a scale of graduated stamp duties, corresponding to the respective sums in litigation, so that the suitor would pay nearly in proportion to the benefit he would receive; as in fact he now does on probates and administrations. This is not the place for estimating such a scale; but we may suggest that it would be desirable to have a small stamp on the entering, or appearing to an action, and a much larger on the judgment, with a proportion of the latter in cases of compromise. The intermediate steps should, in our opinion, have little or no financial impost, because the thing intended (on this view) to be paid for, is justice, and not labour; and because the suitor would still have to bear the whole burthen of his legal assistance, his evidence, and extra-judicial expences.

It only remains for us to notice our third rule, namely, that whatever addition to the expence or trouble of administering justice is occasioned by the crime, the fault, or the misfortune of an individual, should, if possible, be borne by that individual. In criminal justice, this would lead to a more frequent use of *Fines* as a punishment. The great objection to this is its assumed inequality, as between rich and poor men; but that is only true, where the fine is determined by a fixed money-scale. In the nature of things, how-

ever, there is no necessity for such a scale. We have only to remember the old rule of Magna Charta, "amercietur secundum modum delicti, salvo contenemento suo;" that is, as Fitzherbert says, "saving to a gentleman his *countenance* and his household, to a merchant his merchandise, and to a husbandman his tenury." Let the fine be discretionary, and if a gentleman is fined 50*l.* for an assault, let him show, if he can, "by the oath of honest and lawful men of the vicinage," that it is beyond his means of payment; and as to all persons, gentle or simple, let the rule be rigidly enforced (at least by imprisonment), "qui non solvit in crumenâ, luat in corpore." In regard to civil costs, they should be in the discretion of the court, proper taxing officers being always appointed, who, at the conclusion of a cause, might determine whether the party, who was right on the merits, had not been wrong in some part of the procedure; and if so, he should be charged with a correspondent amount of the stamp duties eventually payable to the State, as well as of the legal assistance to which his adversary was in consequence necessarily obliged to resort; remembering the rule, that "in æstimando, ratio haberi debet ejus impensæ, quæ *modum probabilem non excedat:*" and the taxer's certificate, if not appealed from within a limited period, should have the force of a warrant to confess judgment for the sum which it might allot. In short, our aim would be so to distribute the burthen of justice, that whilst the honest and regular suitor paid *in exact proportion to the benefit he received,* the burthen of all unnecessary expence or delay should fall on the individual by whom it had been caused.

ART. IV.—MR. BARON GARROW.[1]

"Neminem ex iis quidem qui in aliquo numero (jurisconsultorum) fuerunt cognovi, in omni genere honestarum artium tam indoctum, tam rudem. Nullum ille poetam noverat; nullum legerat oratorem; nullam memoriam antiquitatis collegerat; non publicum jus, non privatum et civile cognoverat."—CICERO, *Brut.* 59.

MR. GARROW was, in a certain line of the legal profession, without an equal, certainly—in a portion of that line, without a rival. He had early in life devoted himself to the practice of the criminal law, and he arrived in a short time at considerable eminence. By attending almost exclusively to this branch of business, and exercising upon it his great powers of steady attention, extraordinary quickness in apprehension, and a singular circumspection, he soon reached the lead of the Old Bailey practice, and domineered without a competitor at the bar, and with little control from the bench. He had the good fortune to acquire the friendship of the late learned Mr. Shelton, then clerk of the arraigns in that court, and perhaps the most accomplished criminal lawyer of his day. This gentleman, it was well known, freely unfolded to him his vast stores of knowledge, and where any complicated case arose, filled his mind both with principles and authorities. Such was the great experience of Mr. Shelton, and such the confidence reposed in him by the judges, that his opinion was solicited even by the most learned of their body in cases of much difficulty.

In consequence of some opening upon the Home Circuit, which Mr. Garrow travelled, and which is easily combined with the Old Bailey, (then only held eight times a

[1] A well-written, and we believe authentic memoir of Mr. Baron Garrow was printed in 1832, in the third volume of the "Legal Observer," p. 253, to which we refer for some further particulars as to his life.

year, but now twelve times, ever since the establishment of the great Central Court,) he gradually became a candidate for civil business, and attended regularly in Westminster Hall. His success here was far more rapid than any one expected the "*Old Bailey Solicitor*" could attain. His talents were found to be perfectly well suited to the Nisi Prius business in general, and he before long had so large a share of it, that, having given up the Old Bailey some time before, he was soon raised to the rank of King's Counsel.

There have probably been few more ignorant men in the profession than this celebrated leader. To law, or anything like law, he made no pretence. What little he could have known was rather mechanical than scientific. He began as Assessor at the great Bedford County election in 1784, under the patronage of the Whigs, to whose party he appertained, without probably knowing very distinctly the meaning of the term, and with certainly no notion of the division in principle which distinguished the Whig from the Tory. The knowledge of a few statutory provisions being all that an assessor has to regard, he could go through the routine of that election safely enough, if not very respectably. Then the little criminal law required at the Old Bailey he could pick up by a few months attendance there, and for any out-of-the-way point, he must trust to the suggestion, or rather the prompting of the moment from his junior or his client.

The practice of evidence, that is, of examination of witnesses, he soon acquired, without rule or the notion of principle, by use and observation, till he knew by sure and unerring instinct what questions might and what might not be put; and when a rare matter presented itself, he must here again be primed or prompted for the nonce. Then with so slender a provision of law, his ignorance of all beside, of all that constitutes science, or learning, or indeed general information, nay even ordinary information, was perfect; and yet one important branch of knowledge had become familiar to him—his intercourse with prisoners, with juries, above all with witnesses, had given him extensive knowledge of human nature—though not certainly in its higher, more refined, or even more respectable forms.

With all these great deficiencies, with this confessedly

slender stock in trade, Mr. Garrow was a great, a very great advocate. To describe him as merely quick, clear-seeing, wary, prompt, nimble, bold, in every sense of the large word, skilful, would be too general, though it would be quite correct if each of these phrases were extended to the superlative degree. But more is wanting to pourtray distinctly his extraordinary merits. The giddy and superficial vulgar — meaning by this the vulgar of the legal order — would admire without stint his cross-examination. It was, no doubt of the matter, very brilliant; in every sense, striking. He seemed every now and then to destroy, almost to anihilate, an adverse witness; and often he would, without effort and unperceived, be winding about him, throwing a net round, gradually contracting it into a noose, or drawing after him or towards him the witness, his appointed but unconscious prey, all else already seeing the fate that awaited him, and then would on a sudden pounce forth upon him, and tear him in pieces. But, generally speaking, his cross-examination had this great defect, that he trusted to attacking the witness hostilely, and made war upon him far too soon. Now, be a counsel ever so expert, there is one limit necessarily appointed to the success of such a hostile operation. If the witness is calm, or confident, or well trained, above all, if, without being honest, he is cool and self-possessed, he may bid defiance to any cross-examination. But in most cases a great deal may be obtained by gentle treatment — by calmly throwing him off his guard — by kindly treating him — by presenting things to his mind without the warning which a hostile attack always gives an acute witness; and of this Mr. Garrow far too seldom availed himself. Men said his Old Bailey practice, by making him familiar with the lower and more tutored kind of witnesses, had spoilt him in other particulars. It is more likely that he could not resist the temptation of making a great impression on the jury and on the bystanders. Those bystanders — and the profession, we again must observe, are not to be excepted from the number — never failed to commit the mistake of supposing a loud and angry examination to be a successful one; and they constantly supposed that the credit of a witness had been demolished when his person had only been scolded.

And here as to the uses of cross-examination, we may make an extract from Mr. Butler's "Reminiscences."[1] "Cross-examination," says that gentleman, "is sometimes abused, but it is certainly the surest method of eliciting truth that has been devised. When the affair of the necklace of the late Queen of France was in agitation, a person observed to Lord Thurlow that the repeated examinations of the parties in France had cleared up nothing. 'True,' said his Lordship, 'but Buller, Garrow, and a Middlesex jury would, if such a matter had been brought before them, have made it all in half an hour as clear as day-light.'"

But Mr. Garrow's real forte was in truth his examination in chief, which was unrivalled, and which is, indeed, a far more important and not a less difficult attribute than the cross-examination which so captivates the ignorant. It requires the most perfect knowledge of the facts, and the most skilful leading of the witness through them, so as to make him tell the story clearly, connectedly, and strikingly, and to avoid the parts of the case, which, being tender, it would be perilous to let him come too near. But it also demands the most vigilant attention to every word, tone, look, gesture of the witness, because from this close and wakeful survey it will frequently appear how far the instructions may be relied on, how far the same things are likely to be told upon oath and in public, which were before related by the witness privately and unsworn to the client. No description can give the reader an adequate idea of this eminent practitioner's powers in thus dealing with his witnesses. They who had lying before them the instructions on which his examination proceeded, saw a case brought out which they scarcely seemed to have read before. How different the mechanical examinations of ordinary barristers, yawning over their briefs, pursuing the order of the written statement line by line, and only turning into a question, not seldom a leading or irregular question, the short sentences which the attorney has given as what "*this witness will say!*" Then, when the fire of cross-examination had shaken the credit of the evidence, how ad-

[1] Vol. i. p. 50.

mirably did the great tactician, in re-examination, restore, comfort, set it up! These were things which the *connoisseur's* understanding could relish; they were to the vulgar audience as "a stumbling block, or perhaps foolishness."

It may easily be supposed that his statement, his narrative, was of a high order. No man more clearly, more continuously presented a picture of his case to those he was addressing. His language was plain, but it was well strung together. He reasoned little, he jested less; he not rarely declaimed, and he had sufficient force to produce his effect. He was worst when he tried to tell some long story of his feelings for his learned friend on the other side, or when he ventured to indulge in the pathetic. But his voice was powerful, and it was pleasing when raised; his action was good and moderate; his countenance, though not very refined, was expressive enough when he was roused; his whole manner was successful. His discretion, his perfect judgment and entire self-command, exceeded that of most men. Among the other singular anecdotes of his professional life we used to be told, that going on a special retainer to defend a gentleman charged with a capital offence (it was murder indeed), he sat in court during the whole trial, and of course watched each word, look, and gesture of each witness, as well as of the prosecuting counsel, and the judge, and the jury, with the eyes of an eagle, and never once uttered a word from the beginning to the end of the proceeding.

Mr. Garrow's ignorance of law, except the most ordinary matters which are of hourly occurrence at Nisi Prius, has been often mentioned with astonishment. But the real wonder was this, that he could suddenly take up a point from his learned coadjutors, and state his objection or answer his antagonists, as clearly, tersely, and accurately as the best special pleader or mercantile lawyer of the day. You generally found him quite to seek, if the same point arose a few weeks, possibly days, after. It seemed as if he had no niches in which to store, no pegs on which to hang the shreds and scraps of law which he was constantly obtaining, as the pressure of the moment made him turn round to his junior, and stoop down to pick them up. Indeed, it was perhaps better that he should not keep them at all: had he retained them,

having no means of understanding and arranging them, a kind of patchwork would have been formed of no use for any future emergency, and the poor *chiffonnier*[1] must have again exercised his humble trade as before.

He was sufficiently aware of his own deficiencies to shun the occasions which might display them. Accordingly, he avoided, when in high office, appearing to argue legal questions before the House of Lords; and on one occasion Lord Eldon, then presiding there, had the cruelty to insist upon his attendance, when some peerage question was in the House. Being told that Mr. Attorney was engaged in the Court of King's Bench, he asked "if it was in a horse cause," and if he could not leave it to attend his duty in that House. The case was postponed to let him come another day.[2] He had gotten an argument prepared for him, which he read word for word at the bar; and, unable to give the citations which were made by Mr. Nolan (the writer of the paper) in the most abbreviated form, he read them as written, to the great amusement of the malicious Chancellor, who did not soon forget the legal authorities he had that day been introduced to, such as *one Lev.* and *Cro. Jac.* Nor did Lord Eldon confine his jocularity on this subject to the House of Lords. "Two days afterwards, (says Sir Samuel Romilly, in his Diary,) in the Court of Chancery, on a question whether a manager of a theatre could discharge the duties of his office without personal attendance, I, who had to argue that he could not, said that it would be as difficult as for a counsel to do his duty in that court by writing arguments and sending them to some person to read for him. The Lord Chancellor interrupted me by saying, 'In this court, or in any other?' and, after the court rose, he said to me, 'You know, I suppose, what I alluded to? It was Garrow's written argument in the House of Lords.' So little respect has his Lordship for an

[1] The rag-gatherer in Paris, who rakes among the dust for his small fragments of cloth, or silk, or trinkets.

[2] The question arose on a claim to the earldom of Airlie; and the point to be decided was, whether a Scotch entailed title of honour was forfeited by its devolving on an attainted person, subsequent to his attainder; or whether it was merely suspended during his life, and, on his death, came to the next heir of entail. The same question was again raised and argued before the House of Lords in 1831 on the Lovat Peerage, and has never yet been decided.

Attorney-General whom he himself appointed because he was agreeable to the Prince." It must, indeed, be confessed that all others had better right to laugh on this occasion than Lord Eldon. He it was who had promoted to the head of the profession a person plainly ignorant of its most common and best-known learning, and he had placed him in a position which gave him an irresistible claim to a seat on the Bench though wholly incompetent to fill it. It was Lord Eldon's duty, however, to resist that claim, and prefer offending Sir William Garrow to outraging justice by so unfit an appointment. We were accordingly fated to hear the unlearned Baron, in an Equity suit, commend Lord Eldon as the parent of the doctrine of Trusts in Equity. When told of this numerous progeny so unexpectedly put upon him, as it were dropt at his door, his Lordship thought it quite sufficient to join heartily in the laugh, as he had formerly done upon the presentation to him of *Cro. Jac.*

His ignorance was, as we have already said, not confined to his own profession; he seemed as a man without education, probably because he had not been educated; he seemed as a man who never read, probably because books formed no portion of his reading. He now and then saw a play, or went to church; and he heard the Erskines, the Laws, the Dallas's, the Gibbs's expatiate on various points of learning. From thence he might pick up a few phrases and fewer ideas; but he was most cautious in their application, for fear of awkward mishaps; he was far from adventurous out of his own line, within which his boldness was as remarkable as his prudence was consummate; he hardly ever soared from the ground he loved, dreading a quick fall. Instances are recorded, no doubt, of his yielding to the temptation of visiting higher regions; as when he would discourse of the connection between the mind and the body, on some will-cause which raised the question of sanity. The topic was not judiciously chosen, for it was among the more obscure and indeed inscrutable points of metaphysical science. Nor will future inquirers derive much aid from his effort, in promoting these pyschological researches. "You see, Gentlemen, the mind and the body have a close, an intimate, I may say, an inseparable connection. Gentlemen, they chum together." Probably he speedily perceived some hint in the

judge's face — as when he asked Mr. Gaselee, indulging in a similar barn-door flight—if "we weren't getting into the high sentimental latitudes?" — for the metaphysician came quickly down to the matter before him, and went on with his luminous and plain statement of the case he should prove by witnesses — there being none, we should imagine, to the point of the commorancy and joint occupancy of the two tenants above mentioned.

On the Bench, and especially in the Criminal Court, where he found himself at home, he occasionally ventured on these very perilous oratorical experiments. A flight of his on the Oxford circuit, when passing sentence of death on an unhappy sheep-stealer, will not be soon forgotten. At Stafford, after expatiating at great length and with much solemnity on the heinousness of the offence, he assured the offender that all hope of mitigation was illusory. "I have, however (added he), one precious consolation — this is not the final trial which awaits you — you will ere long appear before another and all-merciful Judge, who will hear with patience all you have to say, and *should he feel a doubt, will give it in your favour.*" It is, perhaps, right to add, that he afterwards recommended a mitigation of the sentence, as indeed was his custom where he felt at liberty to indulge the natural humanity of his disposition. It was, however, by no means unusual with him, perhaps by way of admonition to the by-standers, to excite apprehensions which he never intended to realise.

The success of so consummate an advocate, when he had once made up his mind to quit the Old Bailey and dwell in Westminster Hall, was rapid, and though he never was popular with his contemporaries, like Erskine, the darling as the pride of the gown, yet did they not at all grudge his progress, so plainly was his extraordinary merits perceived, and so willingly admitted. It may be questioned if either Erskine or Gibbs ever had such hold as Garrow of the common business of the Court. It is certain that he retained it far longer than either of them; for he must have been nearly thirty years in the lead both at Westminster and Guildhall, and his business, like Mr. Scarlett's, abode by him to the last. Those who have witnessed it cannot easily forget the struggles between

him and Gibbs, after he had fairly driven out of the field, Mingay, an artist of a very inferior description. He was often, indeed, on ordinary cases, an overmatch for Erskine himself; but Erskine could afford to sustain this defeat, or this overreaching, and his temper was sweet as his nature was noble. Not such the temper of Sir Vicary. When Garrow would "run round him," get verdicts from him, beat down his damages by coarse clamour, or horse-laughing, even make points against him, or take them from him (*filch* them, as he was wont to phrase it); the bystander saw such bitterness manifested in the defeated face, that he could not have wondered at seeing him cry from mere vexation. The business, however, especially at Guildhall, was admirably managed by these three great leaders, to whom Mr. Park and Mr. Topping may be added. They conducted it, too, so as to greatly save the public time. They would confer previously, or as the cause was trying. Abandoning on either side, and at once, the untenable points, they would bring the others at once forward, so as to obtain the opinion of the judge on the law, or of the jury on the fact, and a new cause was called. It was thus, and it was in such times as these, when leaders were strong and briefs were concentrated in a few hands, that Lord Ellenborough was enabled to meet a cause list of six hundred at one sitting, Lord Mansfield having complained of his entry once reaching sixty. But of this dispatch much also depended on the presiding and animating vigour of the judge. After being away, towards the end of his life, for a few weeks, and having his place supplied by a puisne judge, Lord Ellenborough came back and disposed of eighteen defended causes in a day. We are, however, very far from holding up such examples as worthy of all imitation. Causes were more fully if not so brilliantly tried before Lord Tenterden, especially during his last seven or eight years. In his great predecessor's time the saying was, in describing the two sides of the Hall, or rather the passage which then led into it, and on one side of which Lord Ellenborough judged, while on the other Lord Eldon sat—that the one was the Court of *oyer sans terminer*, and the other of *terminer sans oyer*.

The placing of Sir W. Garrow upon the Bench has been

adverted to. He was far, indeed, from a brilliant judge, except at Nisi Prius, and there not clearly a very good one. Perhaps he was seen to most advantage when presiding in the Criminal Court, with the routine of which he had been so long familiar. Even at Nisi Prius there was a perpetual *fidgettiness* observable, arising, no doubt, from a consciousness that some legal point might at any moment occur, calling for a decision to which he felt himself inadequate. But no such apprehension disturbed his self-complacency when he had the dock before him. After the counsel on both sides had exhausted their questions, it was his custom to luxuriate in an examination of his own, and here he often evinced his perfection in the art of which he was an admitted master. Nor did he shrink at times from, as it seemed, lowering his dignity, by the most lavish display of that peculiar knowledge which can only be acquired at the school in which he had studied. There was no mystery in the profession of the "*appropriators*," in which he was not an adept. There was no term of art in the vocabulary of crime with which he was not familiar. At times the effect produced by him was most amusing. None who were present will forget the impression thus made upon an unhappy coiner, tried before him on the Oxford circuit. This man conducted his own defence, and did so with much skill and more effrontery. The judge seemed quite absorbed in admiration of the prisoner's ingenuity, and contrived to fill him with the delusion that he was so — a delusion from which there was soon to be a fearful waking. "My Lord," he vociferated, "there were only two bad half-crowns found upon me. If I was making a trade of it, it stands to reason I'd have had more;" and he looked up to the bench quite confident of its sympathy. Garrow's white eyes glared upon the culprit, and in a tone which assured him all their secrets were in common, playfully replied, "Perhaps, sir, the WALLOP was exhausted." The word, and the tone of its enunciation, at once unnerved the prisoner — he felt he had before him a professor of his craft, whom it was quite useless to attempt to mystify, and he resigned himself to his fate. "Gentlemen, (said Garrow blandly to the jury, who shared in the ignorance of all around them,) a WALLOP is a term of free-masonry amongst coiners. It means the hidden heap of counterfeits to

which they resort for a supply when the exigencies of the profession may require one." The Court of Exchequer, then composed of Chief Baron Richards, and Barons Graham, Wood and Garrow, used to be thus rather more wittily than correctly described, as consisting of one who was a lawyer and no gentleman; another a gentleman and no lawyer; a third, both the one and the other; and a fourth neither. The truth of the description is here sacrificed, as usual, to the point of the epigram.

In Parliament, it needs scarce be observed, this very celebrated advocate had little or no success. Indeed he cordially hated the place, and was with difficulty induced to enter it, or having entered, to address it. Speak, however, he did; and he began to say that he had made, on entering Parliament, a covenant with himself not to speak, against which he was now compelled to act. His speech was a very bad one, and Mr. Windham, inheriting from Mr. Burke his dislike of lawyers, began his comment on this expression, as in a declaration; he "complained of covenants broken." "Many parties," he observed, "had a right to complain of the breach which had been committed — the House — the subject — himself — but the party most entitled to complain," he added, "was the *covenantee*, he with whom the covenant had been made." Unlike the epigrammatic description which had been quoted above, the truth of this remark was fully as manifest as the wit.

In private life Mr. Garrow was not only blameless, but every way to be commended. In all its relations he was unimpeachable; and beside the kindly nature of his social intercourse, he was to be admired for extraordinary generosity to all that wanted his aid. He gave and he lent large sums of his hard-earned gains to assist those who were in embarrassment or in distress. It is singular, that, probably from never having frequented good society, or, indeed, almost any society at all, he was in private one of the most shy and bashful of men, though very, very far otherwise in public.

ART. V.—THE RECENT STATE TRIAL IN IRELAND.

THE House of Lords, in reversing the judgment of the Irish Court of Queen's Bench in the great cause of O'Connell and Others against the Queen, has conferred upon this country an inestimable benefit. Reader, be not alarmed; we are not repealers; we are not O'Connellites; it is not in its political point of view that we wish to consider this remarkable judgment, though we think that the government has little reason to be dissatisfied with the result; still less do we intend to discuss the relative value of the opinions entertained or expressed by the nine[1] judges, who ineffectually supported, or the five[2], who successfully reversed, the judgment below; but we desire, while the circumstances of this case are yet fresh in the minds of our countrymen, to draw their attention, gravely and respectfully, to one or two defects in the administration of the law; and we hail the decision of their Lordships with satisfaction, because, by strikingly exemplifying these defects, on an occasion of such universal interest, it has afforded us the most favourable opportunity of explaining and enforcing our views.

It were needless here to recapitulate the notorious facts connected with the trial, or to advert to the numerous objections that were urged by the traversers before the court of last resort; but it will suffice to remind our readers, that the broad legal proposition established by the case is this[3],

[1] In the House of Lords, the Lord Chancellor and Lord Brougham, and among the judges, Tindal C. J., Patteson, Maule, Williams, Coleridge, Js. and Gurney and Alderson, Bs.

[2] Of the Lords, the Lord Chief Justice, Lords Campbell and Cottenham; and of the judges, Parke B. and Coltman J.

[3] Another question of real constitutional importance, which related to the right of challenging the array of the jury panel, on account of the omission of many duly qualified persons from the general jury list, was much mooted in the House of Lords, though no ultimate decision was pronounced upon that point. The Lord Chancellor and Lord Brougham, backed by the opinion of eight judges, namely, Tindal C. J., Patteson, Maule, Williams, Coltman, Js. and Parke, Alderson, and Gurney, Bs., held that the omission was no valid

namely, that no general judgment on an indictment containing several counts can be sustained in a court of error, if any one count be bad in law; except, perhaps, where all the different counts render the accused liable to the same fixed punishment, which can only be once inflicted, such, for instance, as death or transportation for life.[1] The *ex post facto* effect of this decision, on what Mr. Baron Alderson most justly calls "the cloud of cases, in which a general judgment has been pronounced on an indictment with one or more defective counts[2]," would form an amusing subject of speculation. A writ of error, unlike an appeal, may be brought at any time within twenty years after the judgment is signed[3]; and though it appears, from some old obscure decisions in the arbitrary days of the Stuarts, that, in cases of treason and felony, this writ is allowed only *ex gratiâ*[4], it has never been doubted since Paty's case[5], that persons convicted of mere misdemeanors may demand it as a matter of right. What, then, is to prevent all the ragamuffins who, since the year 1825, have been severally convicted of sedition, blasphemy, libel, slander, and a whole beadroll of degrading offences, from bringing writs of error to reverse the judgments on which they have been respectively fined? Not one record in twenty would, we are convinced, stand the

ground of challenge; while Lord Denman took a contrary view of the law, and was partially supported by the doubtfully expressed opinions of Lord Campbell and Coleridge J., the former of whom, "though unconvinced by the reasoning of the learned judges, would hardly have ventured to advise their Lordships to reverse the judgment, merely on the ground that the challenge to the array was overruled." See Print. Op. of Lord Campbell, p. 4. Lord Cottenham declined giving any opinion on the subject. See his Lordship's Pr. Op. p. 2. All their Lordships, as well as the judges, agreed that there must be some legal remedy for so great an error, but they declined to state what the remedy was; and Lord Denman, not without reason, complains of this unsatisfactory mode of dealing with the subject. See his Lordship's Pr. Op. p. 5. Surely, on a matter of so great importance, the legislature would do well to interfere with a declaratory enactment.

[1] See the observations of Lord Denman in his Pr. Op., p. 13., and of Parke B., in the Pr. Op. of the Judges, 28. *Semble, contrà*, per Coltman J. id. 19.

[2] Print. Op. of the Judges, 24. See also Pr. Op. of Lord Brougham, 4.

[3] 10 & 11 W. 3. c. 14.

[4] Gargrave's case, Roll. R. 175.; R. v. Paty, 2 Salk, 504.; 1 Vern. 170., and cases there cited.

[5] 2 Salk. 504.

test of such an inquiry; and though the reversal of the sentence would not of itself benefit the offender, since, having once paid the amount of the penalty, he could only recover it by the doubtful process of a petition of right, yet surely, in so palpable a case of manifest injustice, the government could scarcely fail to refund at once its ill-gotten gains. The defendants having shewn, by the reversal of their judgments, that the sentences pronounced upon them were illegal, would, like Mr. O'Connell, be entitled in common justice to urge that they were innocent and ill-used individuals; nay, we are not sure that they might not claim five per cent. interest on the amount of their fines, together with compensation, varying of course according to their rank in society, for any imprisonment they may have already endured. Even the traitors and felons of the last twenty years might, with equal justice, complain, if they were not permitted to bring writs of error to reverse their sentences of transportation, which now turn out to have been illegal and void; for we must bear in mind that the rule of law laid down in O'Connell's case, though a matter of surprise to Mr. Baron Parke and Lord Denman[1], was not promulgated to meet the special circumstances of a special political trial, but has been undoubtedly the law of the land from time immemorial, though, from some unexplained cause, no one, not even the most astute and learned lawyer in the profession, was previously aware of the fact.

Passing, however, from fanciful speculation to sober reality, we do not hesitate to assert as our opinion, that, unless some relaxation be introduced by the legislature in the strictness at present required in drawing and construing indictments, the practical result of the decision in O'Connell's case will be, that no man, guilty of an offence of more complexity than petty larceny, can, with anything like certainty, be rendered amenable to punishment, provided that he or his friends can only raise a thousand pounds to carry the record to a court of error. In the last volume of Mr. Moody's "Crown Cases," which, be it remembered, contains points of criminal law reserved for the opinion of all the learned judges, we find

[1] See Pr. Op. of the Judges, 27.; and Pr. Op. of Ld. Denman, 7.

that a woman named Stroud, who had been convicted of murdering her bastard daughter, was permitted to escape her merited punishment, because the child was described in the first count of the indictment as Harriet Stroud, and in the second count as a female infant whose name was to the jurors unknown, while, according to the evidence adduced at the trial, the child on the day that it was drowned by its mother had been christened Harriet alone[1];—in another case, a bankrupt, found guilty of feloniously embezzling his property, with intent to defraud his creditors, was discharged from custody, because the technical statement that the offence had been committed against the form of the statute had been accidentally omitted in the indictment[2];—while in a third case, where a felon had been convicted on an indictment charging him with "feloniously, wilfully, and maliciously" cutting and wounding the prosecutor, the judgment was arrested, because the record did not also contain the word "unlawfully," which was used in the act defining the offence.[3]

Such being the precision required in the language of indictments,—a precision so absurd as fully to warrant unprofessional men in lending a very academic faith to the statements of the reporter,—it is obvious that the only mode by which the escape of the worst criminals could be avoided was to introduce into the indictment many counts, varying the description of the offence in such a manner as to meet with accuracy any state of facts, that might be ultimately established by the evidence. So long as it was considered a settled rule that a judgment warranted by any one valid count would be good, this course of proceeding prevented on many occasions a criminal trial from becoming, what it otherwise would have been, "a mockery, a delusion, and a snare[4]" to the public; but now that this "law taken for granted[5]" has been held erroneous, what is the position of the prosecutor? If he confines the charge to a single count, some trifling variance between the allegations and the proof will almost certainly

[1] R. v. Stroud, 2 Moo. C. C. 270.

[2] R. v. Radcliffe, 2 Moo. C. C. 68.; 2 Lewin, C. C. 57. S. C.

[3] R. v. Ryan, 2 Moo. C. C. 15.; 7 C. & P. 854. S. C.

[4] See Pr. Op. of Ld. Denman, 1. His Lordship applies these expressions to a trial by jury, where the jurors have not been duly chosen.

[5] See Id. 9.

occasion the acquittal of the prisoner; if he introduces several counts into the indictment, the judgment is liable to be reversed by a court of error, should one of these counts turn out to be bad. But it is said, the judge must form an opinion on the validity of the counts before he proceeds to pass sentence[1], or the counsel for the prosecutor must examine the record, and take care that the judgment is not entered on a bad count.[2] We have no great faith in either of these expedients. A large majority of offences are tried at the sessions, the respected chairmen of which are certainly not very competent to exercise this delicate discretion; and even among the fifteen superior judges some might *hereafter* be found, whose off-hand opinion respecting the validity of a complicated indictment would not be treated with very great respect in a court of error; and as to the counsel, they are unfortunately not all Peacocks or Chittys; and many an upright and industrious man, who has hitherto conducted prosecutions with credit and advantage, would be sorely vexed in spirit, and puzzled in brain, if out of some ten or twenty counts he should, at the termination of the trial, have to select the one on which he could safely rely.

The practice of introducing numerous counts into an indictment is certainly open to very serious objection, and few persons can be found, whether lawyers or laymen, who will not readily adopt the manly language of the Lord Chief Justice, when he observes, "that there cannot be a much greater grievance or oppression than these endless, voluminous, unintelligible, and unwieldy indictments. An indictment which fills fifty-seven close folio pages is an abuse to be put down, not a practice deserving encouragement. Most of the persons who are accused of offences are in a line of life which does not enable them even to get a copy of such a charge from the clerk of assize, who will not part with it without his fees; and when the party accused has obtained a copy, the greatest stretch of mind of the most learned persons can hardly, even for days, as we know from the arguments at your Lordship's bar, find out what it is that is really the matter of criminal

[1] See Pr. Op. of Ld. Denman, 10.
See per Parke B., in Pr. Op. of the Judges, 32.

charge."[1] His Lordship was, in this passage, alluding to a remarkable instance of needless prolixity, but his observations admit of general application, and the only answer that can be given to them is this: — no doubt it is a grievance; no doubt it is an oppression; but so long as indictments are interpreted with the present ridiculous strictness, it is absolutely necessary to insert numerous counts, in order to meet any difficulty that would otherwise arise at the trial, from the misdescription of the offence in a single count. The decision in O'Connell's case has, indeed, stripped the practice of much of the advantage, which has hitherto more than counterbalanced the evils attendant upon it; but that decision has not, and cannot, compel a return to the old practice of drawing indictments consisting of a single count; because, if this course were adopted, not one criminal in fifty would be convicted, except in cases of the most simple nature.

The real remedy for the evil is sufficiently plain. Enable the presiding judge of a criminal court to amend all those matters in the record which are not material to the real merits of the case, and by the misstatement of which the defendant cannot have been prejudiced in the substantial conduct of his defence; let this be followed up by an enactment that several counts in an indictment shall not be allowed, unless a distinct subject matter of complaint is intended to be established in respect of each[2]; and the legislature will then have gone far towards effecting that simplicity in criminal charges, which Lord Denman has justly pronounced to be "one of the objects most worthy of attention in framing the code of every civilised country."[3] There is a certain class of cases where the confining a prosecutor to a single count might, at first sight, appear to be attended with some risk: we allude to those crimes which vary in their intensity, and partly in their punishment, according to the intent of the criminal; as, for instance, if a prisoner be charged with cutting or stabbing, under the act of 7 W. 4. & 1 Vic. c. 85. ss. 2. 4. Here it is usual at present to introduce several counts, one stating the intent to have been to murder, another to disable, a third to

[1] Pr. Op. of Ld. Denman, 10.
[2] See Reg. Gen. H. T. 4 W. 4., 5 B. & Ad. ii.
[3] Pr. Op. of Ld. Denman, 10.

maim, and a fourth to do grievous bodily harm. Still we see no objection to stating all these intents in one count, leaving the jury to ascertain and decide on which, if any, the prisoner is guilty. A similar course is adopted at common law in the ordinary indictment for murder, on which the culprit may be convicted of manslaughter; that is, the jury are at liberty to negative the malice aforethought, and the consequent allegation of murder, and to find the party guilty of the remainder of the indictment.

The alterations here proposed are not without precedent. The very abuses, which now call so loudly for remedy in criminal proceedings, formerly existed to the same extent in civil causes. The most trifling variances between the record and the proof being fatal to the plaintiff's claim, the ingenuity of the pleader was taxed to the nth, to introduce as many counts into the declaration, as might effectually meet every supposable state of facts. The result was, that the Court, the jury, and the counsel on both sides, were too often so bewildered in the maze of special pleadings, as to be incapable of ascertaining what were the specific points at issue; while it not infrequently happened that the plaintiff was nonsuited, either from the pleader having overlooked some view of the case which the evidence unexpectedly established, or from some accidental error of the clerk, who was employed to copy the voluminous declaration. Active measures were at length taken to put a stop to these abuses. In 1833 an Act was passed [1], giving to the Judges at Nisi Prius those powers of amendment, which we now wish to extend to criminal tribunals; while, in the following year, the Judges, acting under the authority of this statute, promulgated the wholesome rule, that "counts founded on one and the same principal matter of complaint, but varied in statement, description, or circumstances only, are not to be allowed." [2] Thus was effected an alteration, which, though at first productive of some inconvenience and embarrassment, has, now that its operation is better understood, caused incalculable benefit to suitors, — an alteration, which may well

[1] 3 & 4 W. 4. c. 42. ss. 23, 24.

[2] Reg. Gen. H. T. 4 W. 4., 5 B. & Ad. ii.

claim to be considered one of the greatest amendments of the law, that this country has witnessed during the present century.

Now, we contend that it is impossible to urge any sensible argument against the adoption of a similar mode of proceeding in criminal trials. It may be perfectly true, as Mr. Justice Coltman observes, that when a judgment is reversed on the ground of the record containing one bad count, the defendant still remains liable to be prosecuted on an indictment properly framed[1]: but to this it may be answered, first, that the same argument would equally support the old form of pleading in civil actions[2], which is now universally condemned; and next, that in practice this course is scarcely ever pursued, and indeed savours so much of oppression, that if the Government, relying upon strict law, were now to recommence proceedings against O'Connell and his associates, their conduct would be regarded with one universal feeling of disgust throughout the entire realm. Besides, if this were not so, why, in the name of common sense, is the time of the judges and jurors to be wasted, why are witnesses to be harassed, why are county rates to be increased, why is the public mind to be poisoned and disgusted, by compelling prosecutors to have recourse to a second trial, when the real guilt of the prisoner has been fully established on the first? Be as cautious as you will in trying a man who may possibly be innocent, and let him have the full benefit of every rational doubt that ingenuity can raise in his favour; but when once he is found to have transgressed the law, do not, because the pleader or the copying clerk has made some verbal error totally beside the real merits of the case, permit him to demand a second inquiry, when, by the corruption or withdrawal of witnesses, or perchance by their death, he may be enabled to escape the due punishment of crimes, which beyond all doubt he has perpetrated. Without adopting to its full extent the sporting illustration of Mr. St. John, — "It is true we give law to hares and deer, because they be beasts of chase; it was never accounted either cruelty or foul play to knock foxes and wolves on the head, as they can be found, because those be beasts of prey[3]," — we are surely justified in contending, that transgressors of the

[1] Pr. Op. of the Judges, 19.
[2] Grant v. Astle, 2 Doug. 722.
[3] Lord Strafford's Trial, 3 Howell, St. Tr. 1509.

law should not be entitled to claim from the law any special protection, but should be subjected to the same course of justice, which has been found to operate beneficially in civil trials between man and man. In the days of the Tudors, indeed, when a merry Recorder of London could, in writing to the minister of state, betray evident mortification at the dullness of a sessions, where only eighteen malefactors were hanged, and one *pressed;* and could in another letter state that some dozen wretches had been convicted the day before, but "through God's goodness and your Lordship's good help, they have all been executed this morning;" — or even in far later times, when a Lord Chancellor could adjure the House of Lords by that All-wise Being, before whose tribunal he felt that he should shortly have to appear, to reject a bill, which proposed to release prisoners, convicted of stealing five shillings in a dwelling-house, from the awful punishment of death;—Humanity might rejoice at any quibble that would defeat the sanguinary purposes of what was miscalled Justice; but now that the amount of punishment is more duly proportioned to the guilt of the criminal, the sole excuse for permitting technical subtleties to prevail has ceased with the evil that gave them birth.

It is idle to suppose that the power of amendment would be abused by the Judges, who, if we may form an opinion from the construction put by their Lordships on the Act of 9 Geo. 4. c. 15.[1], would be far more likely to cripple the intentions of the legislature, by a too timid exercise of the powers given them, than to authorise amendments of the record, which could operate to the prejudice of the prisoner; but, in order to avoid the possibility of injustice, an appeal should be allowed to the Court of Queen's Bench, whenever the Judge at the trial has authorised an amendment to be made.

If the alterations here proposed were effected, the decision in O'Connell's case would be confined in its operation to those few indictments for misdemeanor, and still fewer indictments for felony[2], in which counts containing charges for separate offences had been introduced. So far no lawyer would quarrel with the decision, since, whether distinct crimes be charged

[1] See R. v. Cooke, 7 C. & P. 559.; R. v. Hewins, 9 C. & P. 786.

[2] See R. v. Folkes, 1 Moo. C. C. 354.; R. v. Gray, 7 C. & P. 164.; R. v. Parry, id. 836.; R. v. Trueman, 8 C. & P. 727.

in several counts or in several indictments, it is clear that separate sentences should be passed on the offender, respecting each offence of which he is found guilty; and if the Judge improperly determines to pronounce a general judgment, when a prisoner has been convicted of several different transgressions, it is equally clear that, in the event of there being a single bad count, or a single bad indictment, such a judgment must be arrested, for in this case it is impossible to ascertain how much of the punishment relates to the bad count or the bad indictment. But when the several counts, as in the large majority of instances is the case, do not describe several offences, but are only different modes of stating the same crime, the above reasoning does not apply; and it is curious to observe the illogical arguments to which the Judges who voted for the reversal of the judgment on O'Connell were driven to have recourse. They felt an unconquerable repugnance to presuming that the Court below pronounced their judgment on the good counts only, because, *looking beyond the record*, they were aware that the presumption was in direct contradiction to the fact [1]; and then, in the same breath, they conclusively presumed, or, to adopt their own language, "supposed" [2] that the bad counts related to distinct offences from those included in the good ones, when it was at least equally notorious that this was not the case. The undoubted principle of law, as propounded by Mr. Baron Alderson, — "that a Court of Error cannot reverse a judgment upon a mere conjecture that it may be wrong, but must see clearly that the judgment below is erroneous," can scarcely be said to have been recognised by those Judges, who thus rejected one presumption which told against them, and then, in order to reverse the judgment below, adopted another, which was equally contrary to the fact.

If the decision in O'Connell's case was remarkable, the mode in which that decision was obtained was certainly not less so. The Common Law Judges, as is usual in cases of importance, were summoned to attend the House of Lords;

[1] See Pr. Op. of Lord Denman, 7.; Pr. Op. of Lord Cottenham, 3.; Pr. Op. of Lord Campbell, 5.

[2] See Pr. Op. of Lord Cottenham, 3, 4.; do. of Lord Campbell, 5.; do. of Parke B. 28.

nine of them attended, and after a patient hearing of the arguments at the bar, seven out of the number concurred in opinion, that the point, on which the case finally turned, should be decided in favour of the Crown. Mr. Baron Parke and Mr. Justice Coltman arrived at an opposite conclusion. The House of Lords, after a short adjournment, next proceeded to pronounce judgment. The lay lords, though several of them were present, declined to interfere, and the question was finally decided by five peers, who either were holding, or had held, high judicial situations. Two of these voted with the large majority of the judges, but the remaining three, being content that the judgment should be reversed, a decision to that effect was carried by a majority of one. A more unsatisfactory judgment could not have been pronounced. We do not speak now of the merits of the arguments on which it rested, which, for aught we know, may be sound, — indeed we have some ground for believing that the majority of those who frequent Westminster Hall concur in the correctness of the decision, — but we allude to the effect of this judgment upon the public mind. Men, unconnected with the profession of the law, have little means, and less inclination, to weigh the respective merits of the legal arguments adduced on either side of this vexed question, but they are both able and willing to appreciate these facts; that while nine learned judges agreed that the judgment below should be affirmed, five only concurred in the opinion which ultimately prevailed, — that the two peers who voted in the minority generally support the present government, and that the three who took a contrary view, as uniformly muster in the ranks of opposition. Can we then, taking these facts into consideration, be surprised that the public at large should refuse to "hearken to the voice of" legal "charmers, charm they never so wisely;" and that this decision should, in the language of Lord Brougham, have gone forth without authority, and come back without respect?[1] Indeed, if this were not so, we should be compelled to give the public credit for far less common sense, though it may be, for some more knowledge of the law, than we think they possess.

It is in vain to urge that the House of Lords is not bound

[1] See *Times*, Sept. 5. 1844.

to subscribe to the opinions of the Judges, but that, after weighing those opinions maturely, it is the duty of the peers to decide according to the conscientious dictates of their own judgments; it is in vain to cite the Presbyterian marriage case as an authority for this practice to its fullest extent: the public do not dispute the legality of the practice, but they deny its expediency; they think, and we decidedly agree with them, that the court of last resort should be so constituted, that judgments pronounced by that tribunal might embody the sentiments of the majority of the great lawyers of the land; and they feel that any Court which thinks fit to set at nought the opinions of the superior judges, can neither retain, nor deserve, the confidence of the country.

The fact is, that the House of Lords, as at present constituted, is greatly disqualified to act as an efficient court of ultimate appeal. First, it is beyond all comparison the most expensive tribunal in the kingdom. Counsel, who will readily argue a point of law in the Exchequer Chamber for ordinary legal fees, will require, if the case be taken to the Lords, at least twice the amount of those fees on their briefs, besides ten guineas a day during their attendance on the House, and five guineas for every consultation. Attornies increase their charges in a similar ratio; while, unlike the practice that obtains in every other Court in the kingdom, except the Privy Council, the proceedings must be all printed, and several hundred copies struck off, for the nominal use of the multitudinous judges. Thus, for all substantial purposes of justice, the House of Lords is practically a closed court to nine tenths of the suitors. Perhaps, however, in one point of view, this last result may be regarded as an advantage, since if the Court were open alike to all litigants, poor as well as wealthy, few men, the average of whose lives, be it remembered, is but three score years and ten, could hope in that brief period to obtain redress for their wrongs. Even with the present limited number of appeals, the arrears have at times been very great, and are still considerable, and the anxiety occasioned by the delay of justice has proved most oppressive to the suitor; nor can this be a matter of surprise, when we reflect, that the Court only exists during the session of Parliament, and that the average number of its judicial

sittings do not exceed sixty days in the year.[1] Neither does it unfrequently happen that, when the counsel are prepared with their arguments, and the client fondly hopes that his case will at length be determined, an adjournment takes place, because some noble and learned lord has been summoned away upon urgent public business; while another case, after full hearing, is postponed *sine die* to some future sessions, in order that the Common Law Judges may attend a second argument, and after expressing an unanimous opinion in favour of the one party, may have the satisfaction of finding that the House of Lords decides in favour of the other. Moreover, it should be borne in mind, that, although there are at present, besides the Lord Chancellor, three Ex-Chancellors, a Lord Chief Justice, and a Master of the Rolls, in the Upper Chamber of Parliament, yet this is an accidental circumstance, upon the permanent continuance of which we cannot in reason rely; and our children, if not ourselves, may live to see the day when the sole law peer in the House of Lords is the Lord Chancellor: nay, the Great Seal itself may be in commission; and the court of ultimate appeal may be composed of lay peers alone.

Such are some of the evils attendant upon the House of Lords as a court of last resort, — evils so striking as to have led to a very general conviction in the country that some alteration must be effected, and to have induced several of the ablest lawyers, of either political party, to advocate the adoption of various specific amendments.[2] But here, as in other

[1] See Parl. Ret. 21st March, 1844.

[2] For instance, Lord Cottenham, while Chancellor, in 1836, brought in a Bill for allowing the House of Lords to hear appeals and writs of error, during the prorogation or dissolution of Parliament, and for summoning the Equity Judges in the same manner as the Common Law Judges. Lord Langdale M. R., in 1836, and subsequently in 1839, proposed the appointment of "a Lord President" and certain "Lords Assistant," for the disposal of appeals and writs of error, and that the House of Lords should sit in case o any business undisposed of for such purpose; and that when this machinery was added to the House of Lords, the appellate jurisdiction of the Privy Council might be transferred to it. Sir Edward Sugden, in 1840, proposed in the House of Commons a plan nearly similar to that of Lord Langdale, except that the Lord Chancellor should preside, and that, instead of Lords Assistant, the new Judges should be named Lords Presidents; that they should deliver their opinions openly, *but should not vote* unless peers. Sir E. Sugden also proposed that "the appeals in the House of Lords should be heard with as many of the forms and regulations of the Superior Courts of Justice as are consistent with

cases, it is far easier to destroy than to reconstruct, — to point out defects than to discover the fitting remedies; and it is consequently with diffidence approaching to timidity, that we offer to the reflecting public the following suggestions.

We propose that practically a new court of ultimate appeal shall be established, consisting of two chambers, the one taking cognisance of writs of error, the other of appeals; that the law lords shall be *ex officio* members of this court, and shall be assisted in the one chamber by the Common Law Judges, and in the other by the Equity Judges; that the law lords alone shall be entitled to sit as presidents in these chambers, but that each judge shall be authorised to vote *in judicio;* that no member of the court, from whose judgment a writ of error is brought, and no Equity Judge whose decree is the subject of appeal, shall attend this tribunal, unless such member or judge be a Lord of Parliament; that at least seven of the Common Law Judges, and three of the Equity Judges, must attend each sitting of the respective chambers; that writs of error and appeals from Ireland, and appeals from Scotland, shall be determined in one or other of these chambers, according to the subject-matter of the dispute; that the Court shall be permanent, and shall be empowered to sit during each term a sufficient number of days to keep down effectually the arrears of business; that all unnecessary costs shall be abolished; that *printed* cases shall no longer be required; and that the taxing officers shall be directed to allow only such fees to counsel and attornies, as are at present considered reasonable for attending the Court of Exchequer Chamber. Of course appeals and writs of error will still be nominally brought in the High Court of Parliament, but would be virtually decided by the new tribunals.

We are aware, that, in proposing these alterations, we shall startle some few of our readers, who have been wont to regard

the jurisdiction and authority of the House." And in 1842 Lord Campbell brought in a Bill for allowing the House of Lords to sit and hear appeals and writs of error during the prorogation (but not during the dissolution) of Parliament, and summoning the Equity Judges, and the Judges of the Prerogative Court and High Court of Admiralty, in the same manner as the Common Law Judges; the intention being to make the House of Lords as efficient in numbers as the Judicial Committee of the Privy Council. It is only fair to observe that Mr. Lynch, now one of the Masters in Chancery, in a pamphlet published by him in 1836, was the first to propose most of these reforms.—Editor.

with undefined reverence the judicial supremacy of the House of Lords; but we would humbly remind such persons that, in reality, we are not seeking to deprive the collective members of that House of any substantial power. It is indeed perfectly true that the constitution recognises no distinction between lay and law peers, but that every Lord of Parliament has an inherent *right* to vote on every legal question that is brought before the court of last resort: but it is equally true, as was solemnly admitted by Lord Wharncliffe and the other lay peers in O'Connell's case, that, in practice, the judicial duties of the House of Lords are exclusively discharged by those peers, who have risen to eminence in the profession of the law. If this were not the case, the High Court of Parliament would not only, in the language of Lord Brougham, "be one of the most absurdly framed judicatures in the world[1]," but, in our opinion, its very existence, as a court of justice, would not be tolerated by the people of this country for a single session. We cannot, then, imagine that the lay lords would entertain any serious objection to the relinquishment of a power, which they do not in substance possess, or that they would regard the change as calculated to diminish their collective or individual dignity in the slightest degree. The law lords, no doubt, would be called upon to make a trifling sacrifice of authority, but ambition must be made of selfish stuff indeed, if they would not cheerfully acquiesce in a measure, the practical advantages of which they are best capable of appreciating. In proposing that the superior judges of the land should have co-ordinate power with the law lords in the court of last resort, we are probably only advocating a return to the practice of former ages; for although, during some centuries, these learned persons have attended the House of Lords simply as assistants, or, at best, as advisers, it would seem that, in the early periods of our history, they enjoyed the privilege of voting on the judgments to be pronounced. Such at least was the opinion of Lord Hale[2], who is no mean authority; and without giving to the circumstance undue weight, it will certainly go far towards satisfying those persons, who, being attached to old forms simply because they are old, will perhaps urge, that, since the House of Lords has

[1] Speeches, iii. 449.

[2] Hale's Jurisd., 59.

been acknowledged for a thousand years as the last resort of litigants, its judicial powers cannot now be entrusted to another tribunal without manifest danger to the constitution.

It is obvious that, if this change were once effected, justice in the last resort would be administered with far greater expedition and far less cost than at present; and it is almost equally certain, that, as the Court would be more readily accessible to suitors, and as the judgments would be founded on the aggregate opinions of the soundest lawyers of the day, the decisions would be more numerous, more likely to be sound, and much more satisfactory to the public, than those that could be pronounced by any other Court. It must always be remembered that the splendid talents of which the public has now the benefit in the House of Lords cannot be depended on, and their combination is in fact accidental. Our recommendations of course point to the establishment of a Permanent Tribunal. If then these results may be reasonably anticipated from the proposed alteration, we shall be justified in suggesting another amendment of vast importance. Writs of error, at present, lie from the Common Law Courts to the Exchequer Chamber, and appeals are brought from the decrees of the inferior Equity Judges before the Lord Chancellor. Thus, it is only after a second hearing of the respective causes, that recourse can be had to the court of last resort. Now we question the expediency of this mode of proceeding, and we humbly submit that these intervening courts of error and appeal should be abolished. If after two solemn hearings before Judges of competent experience and knowledge, substantial justice cannot be effected, it is in vain to hope that any further investigation will be productive of any practical advantage to the suitors. Wealthy and dishonest litigants, indeed, who are conscious of the weakness of their cause, may rejoice in any plan, that will legally enable them to ruin their opponents, or force them to accept an unjust compromise; but the public entertain very different views on this subject, and we are persuaded that no change in the law would be hailed by them with such universal satisfaction as that, which, by confining suitors to a single appeal, should carry out the old legal maxim, "Interest reipublicæ ut sit finis litium."

ART. VI. — LEGAL EDUCATION. — LAW UNIVERSITY.

IN our last Number[1] we dwelt at length upon this highly important subject, and we complained, or rather we echoed the

[1] We should here observe that the account which we gave in this article of the course pursued in Edinburgh on obtaining the degree of Advocate related rather to a bygone time than to that which obtains at present. In the present day the party claiming to be admitted as an Advocate is not obliged to bring any certificates of his having attended any lectures, either on Roman or Scotch law, either in "*the* University of Edinburgh" or in any university whatever. There is now no such thing known in the University of Edinburgh as distinct courses of lectures on the Institutes of Justinian and on the Pandects, although the present excellent and most zealous Professor of Civil Law in that university endeavours, as far as the limits of the session permit him, to introduce his pupils to a knowledge of the Pandects along with the more particular and severe study of the Institutes; and no lecture on any branch of Roman law is now delivered in Latin.

Formerly, also, the examinations might with some justice have been described to be NOT real examinations, precisely in consequence of the "very bad practice" alluded to of informing the candidate beforehand of the particular title in which he was to be examined. But of late years the examinations have ceased to be "ceremony and from," partly because the examiners are strictly prohibited from informing the candidate on what titles he is to be examined, and partly because *all* examinations are now conducted in English. Nor is there now any limitation of the prescribed preparation to any number of titles of the Civil or of the Scotch law. On the contrary, the candidate must stand an examination on the whole of Justinian's Institutes, and on the whole of Erskine's Institutes of the law of Scotland; and the English reader must remember that there is an interval of a year between the Civil and Scotch law examinations. As to the Thesis, a correspondent, who evidently speaks from personal experience, writes to us, "As these productions are never looked at by the profession except to ascertain to whom the Thesis is dedicated, the young lawyer VERY SELDOM INDEED is the real author of his Thesis. If you had the opportunity only once of witnessing the distribution of the Thesis, which, fresh from the hands of the stitcher, and radiant with gilt-edged leaves, is presented by the candidate *propriis manibus* to every member of the bar as he enters the court at nine o'clock, and of observing, how, ten minutes afterwards, the suppositious first-fruits of legal erudition, crumpled, soiled, and tattered, are feeding the stoves and littering the floor of the Outer House, it might pleasantly produce a conviction that this very Thesis teaches betimes "the young lawyer" with us the value of the maxim "*Qui facit per alium, facit per se.*" — ED.

We may also take this opportunity of making some further observations on those mystical letters LL.D., which are explained in the same article, p. 146., to signify *Doctor in the Civil Law*. We have thought it due to our readers to examine more particularly into the grounds of that explanation.

We first find the term *Legis Doctor*, or *Legis Magister*, used in the eighth and three following centuries to signify a judge, or other person learned in the *admi-*

universal complaint, that there is in England, and in England alone of all European states, no provision whatever made for

nistration of the law; as in the following, among many other documents, by Pepin, A. D. 751; by Hilderadus of Milan, A. D. 853; by Otto the Great, A. D. 964; and by Pope Leo IX., A. D. 1049. (*Savigny*, i. 470, 471, 472.) IRNERIUS, who first gave celebrity to the school of civil law at Bologna, about A. D. 1115, appears to have been only termed *Magister*, as was VACARIUS, who first taught the Roman law at Oxford, A. D. 1144. Shortly after this time, however, "Legis Doctor" was the designation applied to a *teacher* of that law, as in the case of WALFRIDUS, about A. D. 1146. (*Savigny*, iv. 61, 62.)

Long prior to this period "Professores Utriusque Juris" are mentioned, in a document of the year 689, among the counsellors of King Alan of Bretagne, which terms are supposed to have meant persons skilled in the Roman civil law and in the canon law. It was not, however, until after the latter law had been systematized by GRATIAN, A. D. 1151, that we find it taught in the schools, and brought into competition with the study of the civil law. The laws of the Church had been first termed *Canones*, to distinguish them from the temporal laws, which, in the middle ages, had generally obtained the appellation of "*Leges*." The *Canones*, on the other hand, were digested into three books, called *Decreta*, now better known by the singular *Decretum*. About the end of the twelfth century the teachers of this systematized canon law began to be called *Decretorum Doctores*, in contradistinction to *Legum Doctores*. (*Savigny*, iii. 207.) At first the schools of the Legum Doctores and those of the Decretorum Doctores were entirely separate; but at length one BASIANUS, a canon of Bologna A. D. 1197, taught both systems. His example was afterwards followed by others; and though some learned persons were distinguished as civilians only, and some as canonists only, yet there were others equally celebrated in both laws, and called "Doctores Utriusque Juris."

The dignity of Doctor was perhaps assumed at first by the teacher himself, or given to him by his scholars; but eventually the universities in Europe generally assumed to themselves, or received from the pope, the exclusive privilege of conferring this among other degrees. So early as A. D. 1150 we find Thomas à Becket mentioned at Oxford as "Legum Doctor" (*Reddie*, 40.), which, if abbreviated, would be LL.D., the two L's implying plurality: and it is certain that this could only have meant Doctor of the Civil Laws, because at that time the *Decretum* was hardly published, and Doctorates in the canon law were unknown till long afterwards. In 1417, however, Archbishop Chicheley thus enumerates the doctorates of the Universities of Oxford and Cambridge: —

1. Sacra Theologiæ.
2. Decretorum.
3. *Legum.*
4. In Medicinis. —(*Lyndwood*, Const. Prov. p. 71.)

. It is clear, therefore, that at that time LL.D. was the appropriate designation of a Doctor of the Civil Law, and D.D. of a Doctor of the Canon Law; and thus matters stood till the time of the Reformation. But as great part of the canon law had been framed purposely to support doctrines and pretensions of the Church of Rome to which the government and reformed Church of England were opposed, King Henry the Eighth, in the year 1535, issued a precept to the Universities of Oxford and Cambridge, prohibiting them from granting degrees in the canon law. That precept, however, in no manner

teaching the law, and qualifying its professors well and duly to practise it. We must now recur to the same topic; but instead of reiterating our censures of this discreditable peculiarity which characterises our system, we shall lend our feeble aid to the good work of removing it, by suggesting in what way it appears most advisable to undertake at length this necessary improvement.

The place where all legal education must centre is evidently the capital, both because the courts are there situated, because the heads of the law both on the bench and at the bar there reside, and because there is accommodation provided for students as well as for practitioners in the chambers of the four Inns. In London, therefore, it is manifest, the establishment or establishments for teaching law must be placed.

The first question which arises is that just suggested, whether there should be one or more institutions for legal instruction; whether there should be four colleges, — one

affected the degree of *Doctor of Laws*, the ancient and accurate translation of the appropriate term *Legum Doctor* importing a doctor or teacher of the Roman civil law; and accordingly the letters LL.D. have been used, at least from the time of Archbishop Chicheley to the present day, to express a person invested with that degree by either of the above universities.

It is true, that in later times some misapprehension has arisen, in quarters where, perhaps, it might not have been expected, as to the purport of the letters in question. Oughton, the able author of the "*Ordo Judiciorum in Foro Ecclesiastico Civili*," written about 1733, dedicates his work to the ecclesiastical judges of his day, whom he styles "*Canonici et Cæsarei Juris Doctores.*" This proves two things: first, that in his time the letters LL.D. were usually attached to the names of those learned persons; and, secondly, that Oughton, properly understanding that LL. meant "Laws" in the plural, but being ignorant of, or at least not adverting to, the authorities above cited, concluded that the English universities intended by those letters the same as many foreign universities mean by J.U.D. "*Juris Utriusque Doctor*," i. e. Doctor both in the civil and canon law, but which the English Universities could not mean without violating the precept of Henry VIII. (vide 1 Blackst. Com. Ed. Christ. 392. n. 36.) Possibly some Doctors of Law in more recent times, observing that the plural "Legum" was liable to the misinterpretation put on it by Oughton, may have, for that reason, preferred subjoining to their names (as is now often done,) the letters D.C.L.; but these are at least equally equivocal, since they may as easily be supposed to signify Doctor of the *Canon* Law, as Doctor of the *Civil* Law; so that, upon the whole, those gentlemen who still adhere to the use of the old letters LL.D. are not only equally correct with those who use D.C.L., but have, in their favour, a practice of at least four centuries.

for each of the Inns of Court, or a University, common to the members of all four. In favour of the former plan may fairly be urged the advantages of competition among the different teachers, as well as among the different forms of collegiate government, and the different modes of administration. The various resources of the Inns, whose property is exceedingly unequal, may also be mentioned, although we rather incline to think that this consideration tells the other way — surely the wealthier body would be disposed to lend its help towards the education of students belonging to its less fortunate sister. In favour of the second plan, the University, reasons at once suggest themselves which are not easily to be overcome by any objections that can be urged. The difficulty of finding perfectly well qualified professors is not inconsiderable. In order well to teach the law even upon principle, the instructor must have a knowledge of jurisprudence generally, as well as of the municipal system more immediately the subject of his lessons. But in order to teach that municipal system effectually, so as to carry out not merely a theoretical or speculative knowledge of its principles, but such a knowledge as shall qualify the students for practice at the bar or in chambers, he must not merely be well grounded in the doctrines of the English law, but have a thorough familiarity with its application to particular cases; he must be acquainted with its practice; nay he can never well perform his task unless he be still engaged himself in that practice. Neither a young barrister who has never been engaged in court, nor an elderly one who has been for some years retired from the forum, can bring to the task of forming lawyers for Westminster Hall the readiness, the expertness, the practical knowledge which this task requires. Then how few men are in this position of combining both the science, the practice, and the leisure, or the active industry which can make leisure for itself, which these conditions presuppose! There may be some difficulty in finding one or two for the different branches of legal study; four or eight cannot reasonably be hoped.

But there is another reason which tells strongly in favour of the University. It is of great importance that a uniform system should be observed. Now we all know that where

there are four several bodies each in competition with the others, the rivalry is very apt to take a wrong direction; and to make men undersell each other in price rather than outstrip each other in the excellent quality of their productions. A contest would instantly arise, of one Inn making the access to the honours agreed for, a call to the bar more easy than others. But another evil would arise from the separate institution. The best methods of teaching should be adopted by all alike. Now there are not more than one in each way that can be called the best. But jealousy would arise between the different bodies, and far from following the example of one, because it was the best, we should see the others avoid it merely because it was not their own. When a question arose of giving the London University, now called University College, the power of granting degrees as part of its charter, the reasons here urged prevailed against such a provision, and induced the government to establish a university for the mere purpose of conferring degrees. The directors of the University College knew that they could confer degrees without any such grant in their charter, but they were averse to exercise such a power, because it appeared upon the whole much less liable to abuse in the hands of a central, impartial body.

It appears, then, to be an essential part of the plan, that one body, a Legal University, should be established; and we are now shortly to inquire what principles should govern its construction. These range themselves under two heads, the principles which should regulate its policy or administration, and those which should regulate its operations; in other words, the *structure* of the body, and its *functions*. The following suggestions towards forming a plan of this kind are humbly offered, by no means in any overweening confidence that they approach perfection, or even possess any great claims to attention, but because they seem grounded on right and rational principles, and because until something is embodied in a shape for discussion, no discussion will ever take place. They must be considered as in the nature of a proposition, and, inviting to them the early attention of our readers, we present them as calculated to bring men's minds into a useful contact, from which light may arise.

1. We have already a great facility prepared for us in regard to the constitution of this University by the ancient establishment of the Inns of Court. The harmonious and cordial co-operation of these venerable societies must be an indispensable condition of this new work. Upon a perfect equality these four societies must be admitted to concur in regulating the whole affairs of the University; and for this purpose no arrangement appears more desirable than to make the standing council, the executive body, consist in part of the four Treasurers of these societies, who are the heads of these bodies, yearly succeeding to office by rotation. But there ought also to be a more permanent portion of the executive body; and for this purpose it seems fit that the four Inns should choose two, irremovable except by the majority of the Inns, and that the judges should name a President, to hold his office for a year but to be indefinitely re-eligible. The whole executive council would thus consist of seven members, and its rules and regulations should have the force of laws, and bind the University in all respects.

The delivery of lectures would be a part of the scheme, and for providing funds recourse must be had to the revenues of the different societies, and as these are administered by the benchers of each, the council would demand, and the benchers grant, such supplies as the services to be performed might require. For building, at least at first, no expense need be incurred. Lincoln's Inn Hall would suffice as soon as the Chancery sittings were removed to the new Building; and if any inconvenience should be found from the conflict of hours, the other Inns could easily furnish accommodation. But it is extremely desirable that the whole course should be conducted in the same place; and this may well be arranged by the different classes meeting one before the sitting of the courts, one after their rising and before dinner, and two in the evening. We shall presently see that four classes a day would be sufficient, and for each an hour and a half should be allowed, to admit of examinations and exercises.

For the salaries of the Professors, a yearly sum should be allotted, to be distributed among the four societies, and to be granted permanently by the benchers of each. But a due

regard must be had to the necessity of making the professors depend upon the fees of their students for a considerable proportion of their emoluments. This is necessary in order to encourage active exertion. A salary of three or four hundred a year to each professor would not be too great; and the funds of the societies could well afford it.

2. The choice of the professors should be vested in the council, and each should hold his office subject to removal, provided that five out of seven, including the three more permanent members of the council, agreed to displace. The professors should have one of their number in rotation to exercise the functions of their chief, or dean, and who should in that capacity be bound to attend all meetings of the council as an assessor, whensoever he should be required, either at his own desire, or at the desire of the council.

It would be necessary to have three chairs or classes, and advisable to have four. There must be one of common law, one of equity, one of conveyancing, by means of which last, the common-law professor would be enabled to pass more lightly over the law respecting real property. But it would be most desirable to add a fourth, of general and comparative jurisprudence, and of civil law and the law of nations. A course of legal education cannot be regarded as perfect which leaves out these subjects. We have great doubts if equity can alone furnish out a class; while common law would be too heavy, including as it does criminal law and actions, were it not relieved by the conveyancing class. But perhaps the equity professor might teach the matters required for practising in the House of Commons' committees, and even the *practice* in courts of appeal; or he might undertake bankruptcy and insolvency.

It is well worth considering, whether subsidiary instructions might not also be given in special pleading and in practice, separately from common law. These subjects lie within a narrow compass, and could be treated of either by the common-law professor, or by a pleader under his superintendence.

There is no doubt that the University must be thrown open to all practitioners, to barristers as well as students, to attornies and their clerks as well as to barristers, to civilians

and proctors as well as common-law lawyers or common-law students. Any exclusion indeed would be not only invidious but impossible.

The only question is, whether any share in the government of the University should be given to attornies and solicitors. As a good understanding between the different branches of the profession is in an eminent degree desirable, being greatly for the benefit of each, there seems no harm in allowing an eighth member to be added to the council, the head of one of the Inns in Chancery, taken in rotation, or one yearly elected by the three heads of these Inns. This would be agreeable to that branch of the profession, and would be also of great use in the conduct of the University's affairs.

A question may arise if this University ought to grant degrees of bachelor of laws. It is not very material. But one thing seems clear: a certificate of two years' attendance at different classes being given by the professors respectively, and also a testimonial of good conduct, ought to have the effect of saving the party from two of the five years required by three of the societies[1] previous to admission as a barrister. At present the degree of master of arts at Oxford, Cambridge, or Dublin, wholly unattended with a certificate of ability, and without any regard to legal education at all, saves these two years at all the Inns of Court. Yet the being a Scottish barrister has no such effect. There is in this a great inconsistency, which the benchers might in each Inn easily remove, and the certificate above proposed appears to be the proper course.

How far certificates of study should be made necessary to being admitted barristers is scarcely a question. Either such certificates or actual examination seems to be indispensable, else the establishment of a University would be a mere form. Perhaps the best course would be, considering the intimate connection between the proposed institution and the four societies, to leave the regulation of this important and delicate matter to the deliberations of the council. Such are our opinions upon this subject; all which is respectfully submitted to the bench, the bar, and the public.

[1] In the Middle Temple, we believe that three years are now sufficient, provided the person to be admitted is twenty-three years of age.

ART. VII. — DIVORCE.

1. *Minutes of Evidence taken before the Select Committee of the House of Lords appointed to consider of the Bill for the better Administration of Justice in the Judicial Committee of the Privy Council, and to extend its Jurisdiction and Powers.* Session 1844.

2. *Thoughts on the Law of Divorce in England.* By ROBERT PHILLIMORE, Advocate in Doctors' Commons, and Barrister of the Middle Temple. 1844.

FROM an early period in the history of the Catholic Church marriage was considered a sacrament. Consequently no human authority could rescind it; unless perhaps the Pope, as God's Vice-gerent upon earth, had the power of dissolution, — a power which he but rarely, if ever, exercised. The law of divorce therefore in this island, as in the rest of Europe, acknowledged throughout the cardinal principle of indissolubility.

To set aside a marriage in the Catholic times it was necessary to show that the marriage itself was invalid. Conjugal infidelity furnished a ground for separation. But nothing short of death itself could release the nuptial bond. The course therefore was to assert some obstructing antecedent impediment, — as a previous betrothment, undue consanguinity or affinity, physical incompetency or mental incapacity. Any one of these points established, the marriage thereupon was declared null *ab initio*. But if originally valid, it was under all circumstances positively and absolutely indissoluble. The hardship of such a state of things would have been great, or rather would have been intolerable, were not the Catholic tribunals, we are well assured, in general very liberal and indulgent in their construction of legal impediments to matrimony. Every one knows how much it was the policy of the Roman Church to multiply these

impediments;—the power of dispensation having been for many centuries a fruitful source of ecclesiastical revenue. To this end the spiritual lawyers, the Canonists, invented many ingenious fictions, distinctions, and refinements, which made it in most instances no very difficult matter to annul a marriage. The most remarkable of all their contrivances in this kind was that by means of which the legitimate impediments of consanguinity and affinity were extended to a preposterous extreme. For not only did they forbid marriage with a seventh cousin, but they held that the relation of affinity might be contracted by mere commerce between the sexes. And having once established this position, they deduced from it many startling conclusions. Thus if a man had carnally known one sister, it would have been incest in him to marry or to have sexual intercourse with the other sister or even with any of her relatives to the seventh degree; because, said the Canonists, an affinity resulted from the commerce with the first sister which affected all her relatives standing within the scope of the seven proscribed degrees. Fornication therefore according to these authorities was as much the parent of affinity as matrimony itself. In proof of which assertion we may refer to the notable case of Margaret widow of James IV. of Scotland[1]; who after the King's death having intermarried with Lord Methven, attempted to get rid of that nobleman by a sentence of the Ecclesiastical Court on the ground that before the marriage she had been, (as the record expresses it), *carnaliter cognita* by her husband's fourth cousin the Earl of Angus. And to the same effect is the case of Henry VIII. and Anne Boleyn. For when the cruel parent of the English Reformation invoked the aid of the spiritual court to divorce his second wife, he did so, not on the ground of her alleged adulteries, but on the ground of two distinct canonical impediments,—namely her pre-contract with Northumberland, and his own pre-intercourse with her sister Mary, whom we are told by Catholic writers the first Defender of the Faith had maintained for years as his concubine. Attempts have been made to vindicate Henry from this stain upon his

[1] Riddell's Scots' Peerage Law, p. 187.

memory. The story of his connexion with Mary Boleyn is denied by all good Protestants. But whether true or false, it serves to throw light upon the point now under consideration; and shows that the institutions of the canon lawyers ministered well to the passions of any husband who might happen to combine the character of a libertine and a tyrant. In fact parties who sighed for their liberty did not often in those days sigh in vain; for wherever a marriage became hateful to one or other, or both, of the spouses, the Canonists rarely failed to demonstrate that it was invalid; the only proof required by the court being the mere confession of the parties.[1] Yet these impediments, with the long train of sublimated subtleties which attended them, were not always oppressive to the laity. They were occasionally found to be a real accommodation and convenience. Thus in cases of adultery the injured party had no more stringent remedy than divorce *à mensâ et thoro* — a sort of insult rather than a satisfaction to any man of ordinary feelings and understanding. But if by the fertile exercise of canonical ingenuity some antenuptial disability could be suggested, complete redress would be given; for the contract would be pronounced invalid, and both parties would then have their freedom. The labours of the Canonists therefore in this department ought not to be the subject of indiscriminating censure; since by means of them the community was in a great degree protected from the harsh and unbearable consequences which would otherwise have followed an undeviating adherence to the iron doctrine of indissolubility.

Such was, and perhaps still continues to be, the Roman Catholic system of divorce *à vinculo matrimonii;* a system objectionable and mischievous in many ways, but chiefly so in this, that it almost invariably did something essentially different from that which it professed to do. For while the true object in most cases was to *rescind,* the avowed object in all was to *annul* the matrimonial contract; thus effecting covertly

[1] The statute 32 Hen. 8. c. 38., speaking of the canonistic devices, states in its recital, "that no marriage could be so surely knit and bounden, but it should lie in either of the parties' power to prove a pre-contract, a kindred and alliance, or a carnal knowledge, to defeat the same."

and indirectly a purpose which, when sought on proper grounds, required no disguise, being at once reasonable in itself and unequivocally permitted by Divine authority.

At the Reformation marriage ceased to be regarded as a sacrament; and the doctrine of indissolubility fell speedily to the ground. It had, in fact, no support either in the Old Testament or in the New. "Be thou expelled from me, and free for any one else," were the words of divorce under the Jewish theocracy.[1] By the modern dispensation the same liberty was continued; for when the Scribes and Pharisees came to tempt our Saviour with the question whether it were lawful for a man to put away his wife for any cause, (as they said Moses had permitted them to do,) the Divine Teacher answered that it was not lawful, "except for adultery;" evidently intimating that for *that* offence it was lawful. No one, indeed, can read the 5th and 19th Chapters of St. Matthew's Gospel without being convinced that adultery is a scriptural ground of divorce. In the same way it soon became apparent that the restrictions of consanguinity and affinity, when pushed to the absurd extreme which has just been pointed out, were unwarranted by any thing to be found in the Sacred Writings. And it was agreed that there ought to be no prohibition of matrimony beyond the limits of God's law, as unfolded in the 18th chapter of Leviticus; while, on the other hand, all marriages *within* those sacred boundaries were adjudged incestuous and illegal, and utterly above the reach of ecclesiastical dispensation.[2]

In this state of public opinion, it became necessary to institute a general revision of our ecclesiastical jurisprudence; with which view an Act was passed in 1533[3], authorising

[1] See Bishop Cozens' argument in Lord Roos's case, 13 State Trials, 1333. It is also given in Macqueen's Parliamentary Divorce, p. 554.

[2] 32 Hen. 8. c. 38.

[3] 25 Hen. 8. c. 19. s. 2. That the King's Highness shall have power and authority to nominate two-and-thirty persons, whereof sixteen to be of the clergy and sixteen to be of the temporalty of the Upper and Nether House of Parliament, and that the same two-and-thirty shall have power and authority to view, search, and examine the canons, constitutions, and ordinances, provincial and synodal, heretofore made, and such of them as the King and the said two-and-thirty, or the more part of them, may deem worthy to be continued,

Henry VIII. to appoint commissioners with very extensive powers, who, in conjunction with the royal theologian himself, were to revise and to rectify the entire body of the canon law, in so far as operative within the realm. The same Act was apparently renewed about two years afterwards[1]; and in 1543 a further statute[2] was passed for the purpose of giving commissioners still larger powers of reform and amendment. Similar endeavours were likewise made in the following reign[3], Edward VI. being full of zeal and ardour in the cause; but his premature death occasioned its suspension: for although the consideration of the subject was resumed in 1 Eliz., when a Bill was introduced to renew the appointment of commissioners, the measure was dropped on the second reading in the House of Commons, and, as we learn from Burnet, was not again revived.[4] The commissioners, however, prepared an elaborate report, embodying therein a new code of ecclesiastical laws; and the work was subsequently published under the title of "Reformatio Legum Ecclesiasticarum,"—a document rendered venerable by the learning and piety of its framers, who drew it up not in the hasty spirit of experimental innovation, but after a calm and deliberate scrutiny of more than twenty years. An important chapter of the new code was devoted to the subject of Divorce; as to which it contained a variety of minute regulations. Suffice it for the purposes of our present argument to say that the "Reform-

shall be from thenceforth kept, obeyed, and executed within this realm, so that the King's most royal assent, under his Great Seal, be first had to the same; and the residue of the said canons, constitutions, and ordinances which they may not approve or may deem worthy to be abolished shall from thenceforth be void and of none effect.

[1] 27 Hen. 8. c. 15. Giving authority to the King to name thirty-two persons, viz. sixteen spiritual and sixteen temporal to examine the canons and constitutions heretofore made according to the 25 Hen. 8. c. 19.

[2] 35 Hen. 8. c. 16. Authorising the King to name thirty-two persons, viz. sixteen spiritual and sixteen temporal to examine all canons, constitutions, and ordinances, principal and synodal, and to establish all such laws ecclesiastical as shall be thought by the King and them convenient to be used in all spiritual courts.

[3] 3 & 4 Edw. 6. c. 11. An Act that the King's Majesty may nominate and appoint two-and-thirty persons to peruse and make ecclesiastical laws.

[4] Hist. of Reformation, vol. ii. p. 791.

atio Legum" authorised divorce *à vinculo* in cases of adultery, malicious desertion, and mortal enmities; and it wholly abrogated the inferior remedy of divorce *à mensâ et thoro.* The regal sanction was alone wanted to make this code the law of the land. But although not of actual binding obligation, it must have had great weight as expressing the opinion of the Reformed Church upon a question then regarded as purely ecclesiastical. Accordingly Sir John Stoddart, in his evidence before the Lords' Select Committee, throws out the following judicious remark[1]: —

"The *Reformatio Legum* would have been in all probability, if King Edward VI. had lived, the law of England. But although it was not the law of the land, it was the *recognised opinion and sentiment of the English Church,* at that time. It was drawn up by a sub-committee of eight persons out of the thirty-two nominated according to the directions of the Act of Parliament; and at the head of those was Archbishop Cranmer; and therefore I apprehend that the *Reformatio Legum* having been published as a work of authority, although not of absolute legislative authority, it must have been, and in all probability was, followed; and for that reason *in the Spiritual Courts there were dissolutions of marriage. Because I believe that from about the year* 1550 *to the year* 1602 *marriage was not held by the Church, and therefore was not held by the Law, to be indissoluble.*"

The abandonment of the doctrine of indissolubility must, we think, have been somewhat earlier than the date assigned by Sir John Stoddart, because in the year 1548 we have the famous case of Parr Marquis of Northampton[2], where it was held by a commission of delegates, that the act of adultery dissolved the nuptial tie; and that a sentence of divorce by the Ecclesiastical Court following thereon (even although purporting to be only *à mensâ et thoro*) enabled the injured husband to marry again, living his guilty wife. It is unnecessary to state here the particulars of that celebrated and well-considered precedent. But we apprehend the principle to

[1] Minutes of Evidence, p. 27.

[2] Burnet's Reformation, vol. ii. p. 115. Macqueen's Parliamentary Divorce, p. 468.

be derived from it is this, that where you have, by sentence of divorce issuing from a court of competent jurisdiction, a judicial ascertainment of adultery, not only is the nuptial tie rescinded, but the injured party is immediately at liberty to contract a second marriage. This we take to have been the opinion of the Church at all events: and that opinion was probably acted upon by the laity. We do not, however, agree with Sir John Stoddart in thinking that the Ecclesiastical Courts gave sentences of express dissolution. We believe they adhered to their ancient form of judgment — they only divorced *à mensâ et thoro.* But in whatever shape their decrees were pronounced, the community, in cases of adultery, relied upon them as justifying a second act of matrimony. This being the case, we find that towards the close of the reign of Elizabeth, certain important ordinances regarding matrimony were enacted by the Chamber of Convocation. These, though now more or less forgotten, or lost sight of, were passed with great solemnity, and confirmed by the Queen. They were subsequently known as the Ecclesiastical Constitutions of 1597. One of these ordinances, the 105th canon, was in the following terms: —

"Forasmuch as matrimonial causes have been always reputed among the weightiest, and therefore require the greatest caution when they come to be handled and debated in judgment, especially in causes wherein matrimony is required to be *dissolved* or *annulled*; we strictly charge and enjoin, that in all proceedings in *divorce*, and *nullities of marriage*, good circumspection and advice be used, and that the truth may, as far as possible, be sifted out by the depositions of witnesses and other lawful proofs; and that credit be not given to the sole confessions of the parties themselves, howsoever taken upon oath either within or without the Court."

Here, then, the process of *dissolving*, and the process of *annulling* matrimony, are plainly discriminated as separate remedies then existing in the Spiritual Courts. The words seem to admit of no other construction. They refer to the *dissolving* divorce, and to the *nullifying* divorce, as proceedings in themselves altogether distinct, substantive, and independent.

Another canon, the 107th, passed on the same occasion,

having nothing to do with dissolving or nullifying divorces, lays down the following regulations as to divorce *à mensâ et thoro.*

"In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the said sentence that the parties so separated shall live chastely, and neither shall they, during each other's life, contract matrimony with other person. And for the better observance of this last clause the said sentence of divorce shall not be pronounced until the party or parties requiring the same, shall have given good and sufficient caution and security unto the Court, that they will not any way break or transgress the said restraint or prohibition."

In the year 1597, therefore, it still continued to be the opinion of the Church of England, that, upon a divorce for adultery, even though only *à mensâ et thoro*, the parties might marry again. The very fact of enjoining a prohibitory bond, implies that the marriage, which the bond was intended to prevent, would have been valid. The learned and judicious Dr. Hammond lays it down with great clearness, that "requiring a bond does infer that this marriage, after a Christian divorce, is not looked on by the Church as an adulterous commission, but rather as a matter of dangerous consequence." And this certainly was the prevailing sentiment of our ablest divines of the seventeenth century. Besides, the authors of the canon would not have designated such a connection by the sacred name of matrimony, unless they had held it really entitled to that appellation.

The 107th canon, however, seems to have gone an unwarrantable length in prohibiting such engagements. Bishop Cozens contends that this part of the canon is illegal; and Dr. Hammond is of the same opinion, though he does not express himself so decidedly. Restraints upon matrimony are no favourites with lawyers; and we very much doubt whether any of our temporal courts would have put in suit the bond or recognizance, which we understand is to this day exacted from the suitors, as a condition precedent of sentence in the Ecclesiastical Courts; a species of duresse for which it will not be easy to find a parallel in any other department of our jurisprudence.

At the same time it must be observed, that had the Ecclesiastical Courts entertained suits for the *dissolution* of marriages, as they clearly ought to have done in cases of adultery, but little inconvenience would have resulted from the restraint imposed by the 107th canon; for that canon applied solely to divorce *à mensâ et thoro.*

But while the Church of England, as a body, thus disclaimed the doctrine of indissolubility, we doubt not that sundry individual ecclesiastics adhered to the old opinion. Thus Whitgift, who was primate from 1583 to 1603, having called before him certain *sage divines and civilians,* put to them this question, — "whether, after divorce, it were lawful for a man to marry again, his first wife being still alive?" to which they responded in the *negative;* whereupon, the archbishop being a member of the Court of Star Chamber, it was contrived soon afterwards, in 1602, to bring before that tribunal the famous case of Rye v. Foljambe. There it appears that Foljambe, having been divorced for adultery, married a second time, living his first wife; and it was held that the second marriage was void, "because," according to the report of Moore[1], "the first divorce was but *à mensâ et thoro,* and not *à vinculo matrimonii;* and John Whitgift, then Archbishop of Canterbury, said that he had called to him at Lambeth the most wise divines and civilians, who all agreed in this." Now of this determination some may think it enough to say that it was a "Star Chamber matter." It was a direct contradiction of the "Reformatio Legum," of the Marquis of Northampton's case, and of the Ecclesiastical Constitutions of 1597. It was also opposed to the practice of the laity for at least half a century. Accordingly Mr. Serjeant Salkeld, in his note upon the case[2], says that "in the beginning of the reign of Queen Elizabeth, the opinion of the Church of England was, that after a divorce for adultery, the parties might marry again. But in Foljambe's case, anno 44 Elizabeth, in the Star Chamber, *that opinion was changed.*" So that the decision appears to have had all the characteristics of an arbitrary exercise of power by a tribunal which, in fact, had no legal

[1] P. 683.

[2] 3 Salk. 138.

jurisdiction over the subject matter; — a tribunal too which for its tyrannical excesses was, in a few years afterwards, swept away by an indignant parliament.

The decision in Foljambe's case was not assented to by the Church of England, for the Chamber of Convocation, its popular parliament, in the succeeding year, re-enacted, word for word, the Ecclesiastical Constitutions of 1597; and these, as subsequently confirmed by James I., are now a substantive part of the ecclesiastical law of this kingdom, being, in fact, the well-known canons of 1603, which have never been repealed or disturbed. In the following year, 1604, the Statute of Bigamy (1 Ja. 1. c. 11.) was passed by the legislature, making the offence felony; but containing an express proviso that the Act should "not extend to any person divorced by sentence of the Ecclesiastical Court." For the legislature, we may well believe, did not intend to make that a felony which had so often received the sanction of competent authorities, — which had been approved as legal by the delegates in 1548, and which had been twice confirmed as valid by the Chamber of Convocation; once in 1597, and again in 1603.

How far the conduct of the laity may have been affected by these proceedings it is difficult to conjecture. What practical rule respecting second marriages was followed in the reign of James I., or in that of his son, or during the time of the Commonwealth, we know not. But we are fortunately enabled to lay our finger upon a case in the reign of Charles II., which shows that, so far down as the year 1669, the only obstacle to a second marriage after a divorce *à mensâ et thoro* for adultery, was the bond in the Ecclesiastical Court; which, however, could have been binding upon one only of the parties. We are now referring to the case of Lord Roos, which has been usually considered as furnishing the first example of a parliamentary divorce; whereas it was a Bill brought merely to be relieved from the restraint and prohibition of the Ecclesiastical Court. The facts were shortly these. In the year 1666, an Act was passed bastardising the children of Lady Anne Roos, by reason of her adultery: whereupon her husband, Lord Roos, followed up this proceeding by obtaining from the Spiritual Court a

sentence of divorce *à mensâ et thoro*, upon the usual condition of not marrying again, for which he gave security as required by the canon. In this situation, being the next heir of the Rutland peerage, he was advised, that, although his marriage was rescinded, he had still to get rid of his bond or recognisance. No other way seemed so proper for this purpose as an Act of Parliament. Accordingly a Bill was brought in, entituled "An Act for Lord Roos to marry again." This, therefore, was not a divorce bill. It did no more than simply enable Lord Roos to contract a second marriage, the canon and the bond notwithstanding.[1]

[1] Lord Roos's Bill, being a private one, was never printed. It consequently is not to be found in any public collection. We are indebted for the following copy of it to the courtesy and kindness of Mr. Birch, the clerk of the parliaments. It is taken from the House copy in the parliament office, and is in the following terms: — "An Act for John Manners, called Lord Roos, to marry again. For as much as John Manners, commonly called Lord Roos, only son and heir apparent of John Earl of Rutland, being *formerly married* to the Lady Ann Pierpoint is, by sentence of the Ecclesiastical Court, justly divorced from her for adultery on her part; and her children, by Act of this present Parliament, have been declared illegitimate, and no probable expectation of posterity to support the family in the male line but by the said John Manners Lord Roos: the King's most Excellent Majesty therefore, upon the humble petitions of the said John Earl of Rutland and the said John Manners called Lord Roos, and others their relations, and for other weighty considerations, is pleased that it be enacted, and be it enacted, by the King's most Excellent Majesty, with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That it shall and may be lawful to and for the said John Manners called Lord Roos at any time or times hereafter to contract matrimony, and to marry as well in the lifetime of the said Lady Ann as if she were naturally dead, with any other woman or women with whom he might lawfully marry in case the said Lady Ann was not living; and that such matrimony, when had and celebrated, shall be good, just, and lawful, and so shall be adjudged, deemed, and taken to all intents, constructions, and purposes, and that all and every children and child born in such matrimony shall be deemed, adjudged, and taken to be born in lawful wedlock, and to be legitimate and inheritable, and shall inherit the said earldom of Rutland and all other dignities, baronies, honours, and titles of houses, lands, tenements, and other hereditaments from and by their fathers, mothers, and other ancestors, in like manner and form as any other child or children born in lawful matrimony shall or may inherit, or be inheritable according to the course of inheritances used in this realm; and be it further enacted, that the said John Manners called Lord Roos shall be entitled to be tenant by courtesy of the lands and *inheritance* of such wife whom he shall hereafter marry; and such wife as he shall so marry shall be intituled to dower of the lands and tenements whereof the said John Manners called Lord Roos shall be seised of such estate whereof she shall be dow-

The case is principally interesting and important as constituting a distinct legislative negation of the doctrine of indissolubility. The difference between it and the case of the Marquis of Northampton was this. The Marquis was barred by no restraint from marrying another wife immediately after sentence; whereas Lord Roos was prevented from doing so by the canon and the bond, from the binding cogency of which it was the sole object of the Act to relieve him.

The first genuine example of a dissolution by Parliament of the nuptial tie was in the case of the notorious mother of Savage, — the Countess of Macclesfield.[1] There the aid of the legislature was sought, because, in consequence of the skilful opposition set up by the Countess in the Spiritual Courts, and the narrow antiquated maxims which there prevailed, she contrived to baffle all her husband's efforts to obtain a sentence of divorce *à mensâ et thoro*. The circumstances of the case, however, were so scandalous and flagrant, that it would have been an outrage upon every principle of justice to withhold relief. Accordingly the Bill of Lord Macclesfield made its way through Parliament in 1697, unembarrassed by any other opposition than some feeble expressions of dissent on the part of the Roman Catholic members.

The next instance of a legislative dissolution of marriage was in the Duke of Norfolk's case.[2] There also a sentence of divorce was refused by the Ecclesiastical Court, although the Duke tried the experiment more than once. He, however, recovered damages at law from the adulterer, Sir John Jermayne. And after his Bill had been repeatedly rejected by the Lords, it became at last, in a new state of circumstances, successful in 1700. And this brings us to the case of Mr. Box, in 1701, which we must now rescue from its obscurity, by pronouncing it the earliest specimen of a dissolving statute passed by the Legislature, *after* sentence of

able as any other husband or wife may or might clayme, have, or enjoy; and the child or children born in such marriage shall and may derive and make title by descent or otherwise to and from any of their ancestors, as any other child or children may do, any law, statute, restraint, prohibition, ordinance, canon, constitution, prescription, or customs had, made, exercised, or used to the contrary of the premises, or any of them, in anywise notwithstanding."

[1] Macqueen's Parl. Div. p. 574. [2] Ib.

divorce in the Ecclesiastical Court. To this era, therefore, is to be referred the commencement of the system of parliamentary divorce; which, though not so old as generally fancied, has still a respectable antiquity.

The petition of Mr. Box, as entered on the Lords' Journal of Feb. 19. 1700, prays that he may have "leave to bring in a Bill to dissolve his marriage with Elizabeth Eyre, she having lived in adultery, as he hath fully proved in the Court of King's Bench, and obtained a definitive sentence in the Arches' Court of Canterbury." The Bill was entituled "An Act to dissolve the marriage of Ralph Box with Elizabeth Eyre, and to enable him to marry again;" a title followed from that time to this. It passed in 1701. We do not think that the change of system thus introduced is to be regarded as indicating any real change of sentiment in the mind of the nation on the subject of divorce. The course taken in Mr. Box's case was probably resorted to *ob majorem cautelam.* But it produced a consequence foreign to the purpose of its authors; for in process of time it gave rise to an opinion that nothing short of an Act of Parliament could dissolve an English marriage — an opinion which, though owing its birth to an accident, is now as firmly settled as if it had been determined upon solemn deliberation by the highest court of justice in the realm.

Upon the whole matter we confidently deduce this conclusion; that since the Reformation the Ecclesiastical Courts have neither faithfully represented the sentiments, nor honestly obeyed the dictates of the Church on the subject of divorce. For while the Church evidently meant to repress conjugal delinquency, by an appropriate application of two distinct remedies, divorce *à vinculo* and divorce *à mensâ et thoro,* the Ecclesiastical Courts have thwarted that intention by refusing to award divorce *à vinculo* in any case whatever; and by granting even divorce *à mensâ et thoro,* in those cases only where it could be allowed consistently with the occult maxims of the canon law, how repugnant soever to the law of the land. And the consequence is, that the doctrine of indissolubility operates in this country now with a rigour unknown in Catholic times; the various devices, which then

afforded so many loopholes of escape from its severity, having been each and all put an end to at the Reformation.[1]

In a moral point of view we have the high authority of Dr. Lushington for holding that, where the Ecclesiastical Courts refuse divorce, the worst possible effects generally result. In his opinion it is a "necessary consequence that both parties lead an *immoral life afterwards.*"[2] He knew cases in which the husband's conduct had been unimpeachable, "till at a late period, when, owing to the delay in getting the divorce, he *fell* — and the remedy was refused;

[1] We have said nothing of the opinions of the Temporal Courts; because, having no direct jurisdiction over the subject matter themselves, they took their law of divorce from the Ecclesiastical Courts without examination, (1 Bla. 441.); assuming, erroneously as it now appears, that the decisions of the Ecclesiastical Courts accurately represented the opinions of the Church respecting the marriage contract. It was not we think till 1812 that the Temporal Courts had occasion to consider the doctrine of indissolubility, which came before them incidentally in Lolley's case, (Rus. & Ry. 237.), where a decision was pronounced by the twelve judges of England on the strict principles of the canon law, applied, however, under circumstances of the greatest difficulty. The parties were married in England; but having afterwards repaired to Scotland, where they acquired a domicile, a suit for adultery was instituted before the Court of Commissioners at Edinburgh, who in due time pronounced a sentence of divorce *à vinculo matrimonii*; and the question afterwards came to be, whether upon Lolley marrying again in England, he was thereby guilty of bigamy. It was held in the affirmative. This undoubtedly was a very harsh decision, and was so considered by the profession and the public; and indeed by the government of the day: for the sentence was commuted upon a representation to the Home Department, but not until the man had been for some time under sentence in the hulks on his way to the plantations. The Statute of Bigamy, as we have seen, protected from penalties all parties divorced by the Ecclesiastical Courts; and this had repeatedly been construed to include even divorce *à mensâ et thero.* Now Lolley had been divorced *à vinculo*, and naturally thought himself entitled to marry again; not dreaming of the refinement, before unheard of, that an English marriage was indissoluble by the sentence of a foreign Court possessing jurisdiction at the time over both the parties. Gretna Green marriages by English parties have been over and over again admitted to be valid by the Courts of this country, although contracted manifestly in fraud of the English law. How therefore can we hold "a foreign law which we acknowledge all powerful for making the binding contract, to be utterly impotent to dissolve it." (Warrender v. Warrender, 2 Cl. & Fin. 488.) Until these apparent contradictions are explained, we must hold the case of Lolley to be far from satisfactory, however high the authority of the very learned judges who concurred in the decision. The case is imperfectly reported; the facts and the judgment are given; but the arguments of counsel are omitted, and no authorities are cited.

[2] Minutes of Evidence, p. 6.

whereupon he went on afterwards in the same way as his wife."[1]

The same learned, able, and distinguished person is so strong as to the necessity of divorce *à vinculo*, that he holds "it would be impossible to prevent some means being adopted by the government or the legislature of the country, for the dissolution of marriage[2];" adding, in another place, that the granting of divorce *à vinculo* by Parliament has now become so settled "that any one who should be refused it, without grounds for the exception, would think himself ill used."[3] He does not conceive that facilitating "the remedy would cause immorality;" — and while he admits that it would increase the number of applications for divorce, he nevertheless denies "that it would increase the number of cases of adultery.[4] Sir John Stoddart proceeds in a similar strain, holding that the practice of divorce by the Legislature has been so long established that such divorce is now due *ex debito justitiæ*.[5]

It is agreed, then, that divorce *à vinculo* ought no longer to be withheld in cases proper for the application of the remedy. The only question (if indeed there *can* be such a question) is, whether it ought to be made accessible to the bulk of the community, or confined as at present to the opulent classes? It is the common expression of thoughtless people that divorce "should not be too cheap." But ought it to be too dear? Ought there to be an absolute prohibition in every case, except where the husband can afford a purchase-money of 2000*l.* for the luxury? This cannot be maintained.[6]

We are told that in Scotland the average cost of divorce *à vinculo* is 25*l.* It is not alleged or insinuated that any ill con-

[1] Minutes of Evidence, p. 6. [2] Ib. p. 5. [3] Ib. p. 7.
[4] Ib. p. 16. [5] Ib. p. 29.

[6] This is not an overcharged estimate. In some cases even the preliminary proceeding in Doctors' Commons will cost nearly as much. From the evidence of Mr. Swaby, the Registrar of the Admiralty Court, before the Select Committee, p. 33., it appears that even in an ordinary litigation, with moderate opposition, and where the witnesses are at hand, the expense of obtaining a definitive sentence of divorce *à mensâ et thoro* may reasonably amount to 1700*l.*; and this merely to lay a foundation for the proceeding before Parliament, and quite independently of the action at law. It is well known that Lord Ellenborough's divorce cost 5000*l.*

sequence results from the facility thus afforded to an injured husband seeking to unshackle himself from a wife who has disgraced him. But it is said the Scotch are a people so much more moral than the English. This we believe to be a delusion. There is at least as much dissipation in Edinburgh and in Glasgow as in any English town of equal population. The difference between the two countries on the score of morals is in truth not always in favour of North Britain.

Now, in that country, the cheapness of divorce has produced no matrimonial laxity. On the contrary, it has tended very much to repress it. For the certainty of punishment is in this world the best preventive of crimes. A Scotch wife knows that a breach of chastity on her part will be followed by divorce and consequent loss of jointure, as well as by other penal consequences. She is, therefore, more circumspect, but not more virtuous, than an English wife, who, in general, has no such terrors to restrain her. To this argument we do not think that justice has hitherto been done. We will, therefore, pursue it a little further, by asserting that one great cause of a wife's infidelity in England is the notoriety of the fact that the husband, unless he be a man of fortune, is entirely without remedy. For him there is no relief, for her no punishment; as appears from the case lately cited by Lord Brougham, where a professional gentleman, who had the misfortune to have an unchaste wife, first proceeded against the adulterer and obtained a verdict, and then against his wife, and obtained a decree of divorce *à mensâ et thoro;* every step of these proceedings being attended with all manner of impediments and vexations, and with fearful expense. The wife, under the advice throughout of her paramour (a solicitor), appealed, first, to the Arches' Court, and then to the Judicial Committee, from whom judgment in the husband's favour was ultimately obtained; but not until his pecuniary resources were completely exhausted; for during the entire litigation, which the wife and her paramour managed to protract over five years, the unhappy husband was compelled to allow his wife an alimony; so that the guilty parties were living all the time on the means of the man they had injured. Nay more, he had actually to advance the very money by which she was enabled to resist

his proceedings; the Ecclesiastical Courts requiring him to make payments to her from time to time for the conduct of her defence. The result was, that he was unable to go to Parliament, and this abandoned woman is still, to all intents and purposes, his wife.

But what shall be said of the converse case, where the *husband* is the delinquent party, and the wife is innocent? Is she to rest contented with a sentence of divorce *à mensâ et thoro;* or is she to be allowed, in cases of extreme iniquity, a divorce *à vinculo?* This question is not unattended with difficulty. Let us see how one of our greatest moralists — a man of the world too — treats it: —

"I mentioned to him (says Boswell[1], in his Life of Dr. Johnson) a dispute between a friend of mine and his lady concerning conjugal infidelity: which my friend had maintained was by no means so bad in the husband as in the wife. — JOHNSON. Your friend was in the right, sir. Between a man and his Maker it is a different question — but between a man and his wife a husband's infidelity is nothing. They are connected by children, by fortune, by serious considerations of community. Wise married women don't trouble themselves about infidelity in their husbands. — BOSWELL. To be sure there is a great difference between the offence of infidelity in the man and in the wife. — JOHNSON. The difference is boundless. The man imposes no bastards on his wife."

So, in another part of the same work, the intellectual gladiator is represented as talking —

"of the heinousness of the crime of adultery, by which the peace of families is destroyed. He said, — confusion of progeny constitutes the essence of the crime; and therefore a woman who breaks her marriage vows is much more criminal than a man who does it. A man, to be sure, is criminal in the sight of God, but he does not do his wife a very material injury if he does not insult her; if, for instance, he *steals privately* to her chambermaid. Sir, a wife ought not greatly to resent this. I would not receive home a daughter who had run away from her husband on that account. A wife should study to reclaim her husband by more attention to please him. Sir, a man will not once in a hundred instances leave his wife and go to a harlot if his wife has not been negligent of pleasing."[2]

[1] Vol. vii. 288. Ed. 1835.

[2] Id. vol. iii. 46. Ed. 1835.

Dr. Johnson's notions of adultery were peculiar. In his Dictionary, he defines the crime to be "the act of violating the bed of a married person,"—a definition as absurd as if he had said that murder meant slaying one's parent. It is one of the *modes* of the offence; but is not a definition of it. He is equally wrong in holding that confusion of progeny constitutes the essence of adultery. It most frequently takes place without occasioning any confusion of progeny; as in the common case where the guilty commerce of a husband is carried on with an unmarried woman. The children begotten of such intercourse are adulterous no doubt; but there is no necessary confusion of generation; for their parentage may be as certain and as authentic as if they were the legitimate offspring of holy matrimony. The whole conversation, as recorded by Boswell, justifies the remark of a great living essayist[1] that "the manner in which the earlier years of his (Johnson's) manhood had been passed, had given to his demeanour, *and even to his moral character*, some peculiarities appalling to the civilised beings who were the companions of his old age." The utter want of the more delicate sensibilities of our nature, and a consequent disposition to ridicule grievances that did not involve corporal deprivation or suffering, rendered this powerful critic, with all his penetration and sagacity, on some points we must take the liberty to say, a poor authority in morals. Making light of a husband's irregularities, so they are unaccompanied by insult, he forgets that the passion of jealousy is at least as strong and uncontrollable in the female sex as in the male; and that the wife's happiness is no less an object of social concern than the husband's. Besides, the imposition of spurious offspring is not always a correct test of injury; for a married woman may be extremely dissolute, and yet have no children.

We are inclined to think that the tendency of public sentiment in this country has become at last favourable to the wife's claim of absolute release from her fetters wherever the husband, without any impropriety on her part, is convicted, not merely of accidental or occasional irregularities, but of long-continued, flagrant, and systematic adulteries: cases falling short of this extreme standard being fit subjects for

[1] Macaulay's Essays, vol. i. 388.

divorce *à mensâ et thoro;* but not, it is conceived, sufficient to justify divorce *à vinculo.* Further than this, (which some may think, and we confess ourselves of the number, is not going very far,) we do not apprehend that there is, at present, the slightest probability of extending favour or indulgence to the wife by any proposed alteration of the existing law. In the Select Committee of the House of Lords, indeed, it was, we understand, matter of grave debate whether divorce should be conceded to the wife under any circumstances whatever. A division however took place; and the result was a majority of two in her favour. So far this is well. But it does not import quite so much as the uninitiated reader might at first sight imagine. For it does not authorise us to say that even in the most aggravated case of adultery by the husband, the wife shall have a divorce *à vinculo.* On the contrary, the precedents are against her; and we do not understand the Select Committee to have intended to disturb the authority of those precedents, such as they are. The Committee, by their vote, have simply refused to interpose any general insuperable barrier against the wife's claim under all circumstances whatever. Indeed an abstract sweeping resolution of this kind would have been inconsistent with the relief granted in two celebrated cases[1] where redress by divorce *à vinculo* was afforded by the Legislature against husbands convicted not only of adultery, but of incest; as well as in a more recent case[2], where the charge against the husband, besides multiplied adulteries, embraced the crime of bigamy, for which he was undergoing transportation at the very time when his wife was suing her divorce bill. Excepting these three remarkable cases, no instance can be found of an award of divorce *à vinculo* by Parliament against the husband; while, on the other hand, two memorable examples of its refusal may be cited, as showing the severity of the parliamentary rule of practice, where the wife proves the utmost excess of conjugal iniquity on the part of her husband, but can establish against him no other distinct substantive offence. The first of these cases was that of Mrs. Teush,

[1] Mrs. Addison's case, 1802; Macqueen, 475. 594. Mrs. Turton's case, 1831; Macqueen, 478. 657.

[2] Mrs. Battersby's case, 1840; Macqueen, 479. 667.

the leading particulars of which are thus set forth in the only work which exists upon the subject[1]:—

"Session 1805.—The parties intermarried in 1790. In 1796 Mr. Teush formed a connection with a female named Sarah Evans, for whom he hired apartments in Chenies Street, Bedford Square, where he visited her under the name of Thorley. They subsequently left these apartments, but returning again at the end of a week, they declared themselves married, and from thenceforth Sarah Evans was called Mrs. Thorley, he sleeping with her as her husband. All this time Mr. Teush had a house in Fenchurch Street, in the city of London, and also a country place in Hertfordshire, where his real wife resided. In process of time, Mr. Teush threw off all disguise, and permitted Sarah Evans to assume publicly the name of Mrs. Teush, passing her off as his wife in the City, where he carried on the business of a merchant. Besides the shameful and open profligacy of his conduct with Sarah Evans, Mr. Teush's treatment of his wife was proved to have been harsh, insulting, and brutal; while the deportment of Mrs. Teush, on the other hand, was shown to have been throughout amiable, forbearing, exemplary, and in all respects irreproachable; it appearing that she not only excited the respect and sympathy of all the considerable families in the neighbourhood, but that even her false husband himself freely acknowledged her merit and her injuries. Mrs. Teush was at last driven to the extremity of a proceeding in Doctors' Commons, where she in due time obtained a sentence of divorce *à mensâ et thoro*, and an award of alimony against her husband, who, however, uniformly as it became due refused to pay it, until compelled by legal process. These were the circumstances under which this Bill was submitted to the consideration of the House of Lords. On the order of the day being read for the second reading, the Bishop of St. Asaph (Dr. Horsley) was of opinion that, however hard the rule might press upon a few individuals, it would, on the whole, be better if no Bill of this kind were passed.[2] With respect to the present case, he must say, it exhibits the grossest infidelity. It was not a single action upon sudden impulse of passion, but a deliberate abandonment of a well-deserving woman, and a taking up of a strumpet in his arms in which he persevered for many years. The case of Mrs. Addison was very distinguishable from the present. There the wife would

[1] Macqueen, 602.

[2] He means that no divorce *à vinculo* should under any circumstances take place. Dr. Horseley was deeply tainted with the canonistic leven, and consequently held marriage to be indissoluble.

herself have been guilty of incest if she had returned to her husband. There was nothing of that kind in the case then before the House. The Right Reverend Prelate concluded by moving that the Bill be read a second time that day three months. The Lord Chancellor (Eldon) never recollected a more favourable representation given of any woman; but yet, on general grounds of public morality, he felt it his painful duty to give a negative to the original motion. The House then divided, when there appeared for the amendment, 10; against it, 7; majority, 3."

The Bill consequently was lost. We shall see anon that Lord Eldon who, in 1805, opposed Mrs. Teush's Bill on "general grounds of public morality," saw afterwards good reason for adopting the opposite opinion—for, in the following case, Mrs. Moffatt's[1], instead of resisting the measure, he actually moved and very eagerly supported, the second reading of the Bill:—

"Session 1832.—Mr. and Mrs. Moffatt intermarried in June 1819. The husband committed an act of infidelity on the very night of his marriage, and occupied himself afterwards in constantly soliciting the chastity of his female domestics, by one of whom a child was born to him in 1821. It appeared too that he was given up entirely to debauched company, and to habits of continual intoxication, insomuch that his wife, being at last driven to the conviction that his profligate propensities were absolutely incurable, returned, in the end of 1825, to the house of her father, the Rev. Dr. Pearson. In the following year a decree of separation was obtained in the Spiritual Court, the husband then occupying apartments within the rules of the King's Bench Prison, where he cohabited with, and indeed lived upon the industry of a woman of the town, with whom he afterwards repaired to Belgium, where he was found in 1832, living with this female, whose name he had assumed. The Earl of Eldon said the novelty of the present application arose from its being an application on the part of the wife against the husband, but he had it to learn that a woman had not as good a right to relief as a man, under the circumstances which gave rise to Bills of this description; and as he saw no reason why a woman was not as much entitled to sue for a divorce as a man, he should conclude by moving that the bill be read a second time. Lord Chancellor Brougham differed from his noble and learned friend (Lord Eldon) with extreme regret. He begged their Lord-

[1] Macqueen, p. 658.

ships would look at the consequence of such a proceeding as this. Any man who desired to get rid of his wife had only to go and keep a mistress, and, as the natural consequence of such conduct, to desert his wife, and thereupon he instantly drove her to an application to this House; a divorce was obtained, and his purpose served. Parliament could afford the wife no remedy without at the same time setting the husband free from those shackles which it was his object to get rid of.

"Lord Eldon replied, and the House divided, when there were for the second reading, 9; against it, 16; majority, 7."

This therefore settled the fate of Mrs. Moffatt's application. The argument of Lord Brougham is ingenious but not satisfactory. It moreover does not express his real opinion; for although in his place, as Keeper of the Great Seal, he doubtless felt himself constrained to uphold the authority of precedent, the noble and learned Lord, in a subsequent essay[1] written with characteristic ability on this very subject, affirms it to be "certain that the protection of the husband's rights, as regards spurious progeny, ought not to be the only object of divorce; and that misconduct of an outrageous nature, such as gross cruelty, living in open adultery with another woman, refusal to cohabit, or such incidents generally as entirely frustrate the very object of the matrimonial union, ought either to be made severely punishable, or to be allowed as grounds of divorce to be obtained by the wife."

The question therefore stands now on a most unsatisfactory footing. We trust it will not long remain so; and that an opportunity will soon be taken to ascertain the sentiments of the popular branch of the Legislature regarding it. We do not believe that the House of Commons would have rejected either the Bill of Mrs. Teush or that of Mrs. Moffatt.[2] At the same time it is certain that great difficulty will be found in attempting to draw the line between cases in which the wife ought, and cases in which she ought not, to obtain divorce

[1] Lord Brougham's Speeches, vol. iii. 446.

[2] Even the civilians themselves agree that divorce, "if granted at all," should be granted to *both* parties. Dr. R. Phillimore tells us, (Pamphlet, p. 23.), that "Lord Stowell, Lord Erskine, Lord Kenyon, and Dr. Lushington, are among the many who in accordance with common sense and common justice maintain this proposition."

à vinculo. The remedy in Scotland and in other Protestant countries is granted as readily to her as to the husband. We apprehend, however, no such proposition would obtain favour in this country. It would be unwise to suggest it. But it is equally plain, on the other hand, that, there are cases of not unfrequent occurrence in which a refusal of relief to the wife would not only be unreasonable and unjust in itself, but of infinite mischief as matter of example. To define these cases is exceedingly desirable, but we fear impracticable. One distinction must always be kept in view—the distinction between cases of accidental and cases of systematic infidelity—the one admitting, the other excluding, all reasonable hope of permanent reformation; for so long as a husband is merely chargeable with occasional delinquencies, we agree with Dr. Johnson that a wife should endeavour rather to reclaim her erring spouse than try to get rid of him.

After this long exposition, it is fitting that we should say a few words, and but a few, on the subject of the plans which have been suggested to remedy the evils of the existing system of divorce; for we apprehend the rational part of mankind are of opinion that those evils ought not much longer to be endured. There seems to be an approximation to agreement on the following points:—1st. The absolute necessity of a surrender by Parliament of this jurisdiction. To this we believe the majority of the prelates have at last assented. The scruples of the episcopal bench, always formidable impediments, have therefore been got over. Opposition we think need not be feared from the unprejudiced mind of the Chancellor. His clear and powerful intellect, long accustomed to resist the glosses of sophistry, yields an immediate assent to *facts* where no party politics are involved. Witness the Bill for allowing counsel to prisoners. A thousand arguments did not move him. But one example—the hard case of Lord Lovat—converted him at the eleventh hour; and he became from thenceforth the warmest and most eloquent supporter of the measure. We augur a similar result with respect to divorce.

In the second place, we think all are pretty nearly agreed that the action at law and sentence ecclesiastical ought no longer to be considered indispensable preliminaries to divorce

à vinculo. If the jurisdiction to dissolve marriages be entrusted to a court competent wisely to exercise it, why should parties be compelled to go through a useless prefatory ordeal? Why clog the administration of justice with unnecessary expence—delay—annoyance—and humiliation to the suitors?

Holding, then, that there is at least an approach to unanimity on these two points — the question remains, and it is one of some difficulty — to what court ought this important, critical, and delicate jurisdiction to be committed? Some propose the Judicial Committee of the Privy Council.[1] Others the Ecclesiastical Courts of London.[2]

We prefer the Judicial Committee; because the transfer of the jurisdiction to that tribunal would involve a change less violent and safer. The Privy Council was formerly, and, to a certain extent, is still, ancillary to Parliament. It is composed of the highest legal authorities. The masters of Equity, the oracles of Law, the heads of the Ecclesiastical Courts, and some even of the Reverend Prelates themselves, are there assembled. The course of proceeding in this high Court is governed by the principles and maxims of the law of the land. The rules of evidence too are the same as those of the Queen's other Courts; and when witnesses are examined, the examination is *vivâ voce.* The Judicial Committee moreover has power to direct issues for trial at law *ad informandam conscientiam,* as in the Court of Chancery. And we apprehend the remedy of divorce *à vinculo* might well be granted upon bill and answer — a form

[1] Lord Brougham brought in a Bill for this and other purposes last session. It was referred to the select committee, whose minutes of evidence form one of the headings of this article.

[2] Dr. Elphinstone is one of these. This gentleman has made several meritorious efforts to awaken the attention of the House of Commons to the subject of divorce. He contends that as the Ecclesiastical Courts are allowed to grant divorce *à mensâ et thoro,* they ought therefore to have the higher jurisdiction conferred upon them. Without offering any opinion upon the validity of this argument, we should be glad to know what is the precise extent of the existing jurisdiction of these Courts as regards the matrimonial contract. Is it quite clear that, as organs of the bishops, they have authority to deal with any marriages other than those celebrated *in facie ecclesiæ?* Not only Sir W. Scott but Sir W. Wynne have thrown out something more than a doubt on this head. (Lindo v. Belisario, 1 Hagg. Cons. Rep. 140.) *Quære,* have the Ecclesiastical Courts jurisdiction in the case of a marriage by dissenters before the Registrar in pursuance of Lord John Russell's Act?

of proceeding which was anciently the common course of the Privy Council. To give this jurisdiction to the Judicial Committee would only be reviving an ancient establishment: for the Privy Council throughout the Tudor reigns took cognisance of the higher description of causes matrimonial.[1] Finally, the Judicial Committee is an open court—a *Forum Commune.* All professional men may practise before it; an advantage of unspeakable importance to litigants. For these reasons we think the experiment ought at all events to begin with the Judicial Committee.

The arguments in favour of the London Ecclesiastical Courts are stated in Dr. R. Phillimore's pamphlet[2], which we regard as a collegiate manifesto indicating but too plainly the agitated throbbings of the pulse of Doctors' Commons. It is in one respect a very curious performance; for while the learned writer maintains, with much apparent earnestness, that there ought to be *no* divorce *à vinculo,* even for adultery, he does not, as one would naturally expect from such reasoning, proceed to recommend that the jurisdiction to grant this remedy should cease altogether; but he advises that it ought to be forthwith conferred on the spiritual tribunals of the metropolis. He cites the philosophic Hume as an advocate for indissolubility;—whereas Hume merely opposes polygamy and *voluntary,* that is to say capricious, divorces,—

[1] This is well known to all who are conversant with the publications of the Parliamentary Record Commissioners.

[2] In this pamphlet Dr. R. Phillimore states that the Duke of Norfolk's was the first divorce case in which a sentence ecclesiastical "had not been previously obtained." The first case so circumstanced was not the Duke of Norfolk's but the Earl of Macclesfield's—which last case, however, is not even mentioned by Dr. R. Phillimore. Again, he says Lord Roos's bill did not pass "till after three or four sessions." It passed the very session in which it was presented, and in the short space of five weeks. So in another place he would lead his readers to infer that a statute for the reform of the ecclesiastical laws was first enacted in 1549, whereas we have already seen that the first statute for that purpose was passed in 1533. The statute which Dr. R. Phillimore mistakes for the first, instead of being the first, was the fourth and the last legislative provision on the subject. The pamphlet altogether, though not ill written, is more rhetorical and declamatory than accurate or argumentative. It evinces little care, and less reflection. There is a plaintive tone about it, too, quite out of place in this discussion. The allusion to the "graceful melancholy" of the late Lord Auckland we do not understand. Neither do we entirely approve of the neglect of referential acknowledgment with which the learned doctor propounds as discoveries of his own some things pointed out by authors who have preceded him.

as any one may see who will look into his essay, which Dr. R. Phillimore does not appear to have done. The passage relied upon affords no warrant whatever for the deduction attempted to be drawn from it.[1] Similar liberties are taken with other great names — as Burke and Mackintosh — to show how noxious a thing is divorce *à vinculo*. Now, we ask, would it be wise to commit the contemplated jurisdiction to the advocates of such opinions? How long might it be expected to live in such hands? What chance of fair play would it have? We verily believe that in a few years it would fall into entire disuse, and in the end be strangled. We have shown that the evils of the existing state of things are ascribable to the Canonists of the sixteenth and seventeenth centuries. Their successors and representatives of the present day seem resolutely prepared to imitate their example.[2]

Nothing, therefore, we apprehend, would argue a greater blindness to the lessons of experience than to entrust to tribunals whose maxims belong to the dark ages, a jurisdiction such as this of divorce *à vinculo*, which ought especially to be exercised in a spirit of liberal yet cautious attention to the altered constitution, opinions, and habits of modern society. The marriage law followed in the Ecclesiastical Courts is extracted from the opinions of the ancient Fathers, the decrees of general councils, and the epistles and bulls of the Roman pontiff; how far adapted to the wants of an enlightened Protestant community in the meridian of the nineteenth century those best can estimate who have looked into the impure and obscene Commentary of Sanchez.

Furthermore, their rules of evidence are peculiar, and in some material respects contrary to the law of the land. This is pointed out in his usual sarcastic way by Blackstone.[3] "One

[1] See Mr. Poynter's useful book on the Practice of the Ecclesiastical Courts as to Marriage and Divorce, p. 174., where the passage from Hume is given in a form that appears to have misled Dr. R. Phillimore. There is nothing in Hume about indissolubility. His reverence for Canonists was not deep; and it is in truth rather ludicrous to find him quoted as an authority in Doctors' Commons.

[2] In saying this, we must of course be understood to except that most eminent and enlightened judge, Dr. Lushington; whose common law education and constant intercourse with the world have preserved him from infection.

[3] 3 Com. 370.

witness," says he, "if credible, is *sufficient* evidence to a jury of any single fact, although undoubtedly the concurrence of any two or more corroborates the proof. Yet our law considers that there are many transactions to which only one person is privy, and therefore does not *always* demand the testimony of two, as the civil law universally requires. *Unius responsio testis omnino non audiatur.*[1] To extricate itself out of which absurdity the modern practice of the civil law courts[2] has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though never so clear and positive, *semi plena probatio* only, on which no sentence can be founded. To make up, therefore, the necessary complement of witnesses when they have one only to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his own behalf, and administer to him what is called the suppletory oath; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one: by this ingenious device, satisfying the forms of the Roman law, but acknowledging the superior reasonableness of the law of England, which permits one witness to be sufficient where no more are to be had; and to avoid all temptations to perjury, lays it down as an invariable rule, that *nemo testis esse debet in propriâ causâ.*

Cases of adultery are of all others the very cases in which a *penuria testium* is most likely to occur. To require two witnesses of facts almost necessarily secret is, in most cases, to ensure a denial of justice. Of this constant examples are to be found in the records of the Ecclesiastical Courts. But we shall content ourselves with referring shortly to a very recent case, that of Evans v. Evans, which came before Sir Herbert Jenner Fust for judgment, in the Arches' Court of Canterbury, on the 21st of November last.[3] The suit was instituted by the husband against his wife for divorce by

[1] Cod. 4. 20. 9.

[2] He means the courts canonical, spiritual or ecclesiastical, though these have not quite so much to do with the civil law of Rome as is generally imagined.

[3] The case has not yet appeared in the authorised reports of the Courts. But there is an accurate report of it in the "Times" newspaper of the 22d Nov. 1844.

reason of adultery; and the facts were, that having suspected his dishonour, he one day on his return from shooting proceeded suddenly, accompanied by a female servant, to the room of his wife, whom they found in bed in the arms of her paramour. Against that person the husband in due time recovered a verdict at the Anglesea Assizes for 500*l.* damages. The evidence of adultery in the Ecclesiastical Court depended on the testimony of the female servant. That evidence had satisfied the jury in the action-at-law. But it did not satisfy the learned judge of the Ecclesiastical Court; who rested his decision, not on any objection to the conduct of the husband, which had been altogether blameless, nor on any doubt of the veracity of the witness, whose character was unimpeached, — but simply and solely on this ground, that the testimony of a single witness, however positive and distinct, did not of itself constitute that full degree of proof — that *plena probatio* required by the Ecclesiastical Courts.[1] He therefore held that Mr. Evans had failed in his case; and he accordingly dismissed Mrs. Evans from the suit. Mr. Evans may indeed appeal to the Judicial Committee of the Privy Council. But in the exercise of its appellate jurisdiction the Judicial Committee, when reviewing the sentences of the Ecclesiastical Courts, is itself governed by ecclesiastical law; so that an appeal on so clear a point could lead to no other result than an affirmance with costs. Mr. Evans, therefore, is precluded from all relief.

One other word, and we have done. The only mode of taking evidence in the Ecclesiastical Courts is by commission and written deposition. There is no *vivâ voce* examination of witnesses. This of itself is a sufficient objection to these tribunals; although Dr. R. Phillimore seems to think it their highest recommendation. We will not argue this question with him. The opinion of the profession has long been made up on it. But we desire our readers once for all to consider whether it is reasonable that a party, in one of the most trying

[1] It is said that in the case of a Cardinal the *probatio* in order to be *plena* must be established by no less than seven eye-witnesses — so improbable does the canon law consider it, that a member of that high order can be guilty of incontinence.

predicaments of domestic life, should be obliged to forego the comfort of confiding in the friendly assistance of his own confidential solicitor, on whose honour and discretion, in all difficulties, he has perhaps for years relied? Why drive him to a stranger ignorant of his affairs, his plans in life, his connections, his interests, his resources? Yet this will be the consequence if the jurisdiction of divorce *à vinculo* be consigned to the narrow and exclusive precincts of Doctors' Commons. Why, moreover, should not an aggrieved husband or an injured wife have the privilege of selecting counsel from the bar at large? Why restrict the choice to a handful of civilians? The learning and ability of these gentlemen we have no wish to disparage. On the contrary we readily admit the important services which in many instances they are capable of affording; and we desire to see them act frequently in concert and co-operation with their brethren of Westminster Hall. Who can doubt that in the trial of Queen Caroline Dr. Lushington and Sir C. Robinson proved most valuable coadjutors? But, to indulge an extravagant supposition, let us for a moment imagine that the House of Lords had made an order in that case excluding all but civilians from the forensic argument appointed for hearing on the Bill of Pains and Penalties, which in effect was a divorce bill. What would the authors of the prosecution and the unhappy Princess who was the object of it have said to such a limitation, — compelling them to surrender their own chosen and peerless advocates, — to relinquish a Copley, a Brougham, and a Denman, — and to seek for substitutes in the gloomy vicinity of St. Paul's Churchyard. All this would have appeared unjust, arbitrary, and preposterous in 1820: yet such, or something very like it, is the grave proposal now advanced by Dr. R. Phillimore and his colleagues; an experiment on the public patience which we have endeavoured to treat as it deserves.

ART. VIII. — CONVEYANCING, ITS EARLY HISTORY AND PRESENT STATE.

1. *Principles of the Law of Real Property, intended as a First Book for the Use of Students in Conveyancing.* By JOSHUA WILLIAMS, Esq., of Lincoln's Inn, Barrister-at-Law. Sweet. 1845.
2. *Concise Precedents in Conveyancing adapted to the Act for simplifying the Transfer of Property,* 7 & 8 Vict. c. 76. *with Practical Notes.* By CHARLES DAVIDSON, of the Inner Temple, Esq., Barrister-at-Law. Maxwell. 1845.

THE connection of the clergy with the state and the extent of clerical influence on the general constitution of the country have already formed the subjects of considerable antiquarian and historical investigation; but the precise relationship of the priest to the lawyer has not yet been accurately determined, or even formed, so far as we are aware, the subject of separate investigation. It would be, however, an important and highly interesting chapter in the history of the profession and of our legal institutions. Into the more general question we shall not at present enter, especially as much of it would be familiar to our readers. They will all remember, among other things, Blackstone's vivid description[1] of the attempts of the ecclesiastics to make laws for this country, by the introduction of the civil and canon law, and the constant struggles of the laity to rescue themselves from their thraldom in this respect. The result was that the good old common law was handed down in a great degree intact, and was at any rate guarded with contemptuous jealousy by the judges of the courts of Common Law: the civil and canon law were confined to the Ecclesiastical Courts, and in the end the clergy (to whose body the great bulk of the advocates belonged) were early in the reign of Henry III.[2], expressly forbidden by episcopal con-

[1] 1 Black. Com. 19. *et seq.*

[2] Dugdale says (*Orig. Jur.* 21.) that the professors of the law till 2 Hen. III. were usually of the clergy; to which Selden adds, (*Disser. ad Fletam,* 519.) "or rather till the year 1164, temp. H. II., when by a canon in the Synod of

stitutions from appearing as advocates *in foro sæculari* [1], although they continued to act as judges there till a later period. The laity were then left to find among themselves persons qualified to be advocates, and hence the institution of the inns of court, and ultimately the present division of professional labour.

But the clergy only retired from the Common Law Courts to renew the fight in another and more extensive field, which they exclusively retained. They still kept possession of the office of Lord High Chancellor (under whom the Court of Chancery gradually rose into consequence), which was almost invariably held by a churchman down to the time of Sir Thomas More in 1530, and frequently after that period down to the year 1625, since which time the Great Seal has been always held by a lawyer. This long dominion in the Court of Chancery gave the clergy great power and importance, and enabled them by degrees to model the process of the Court at their own discretion. And there seems every reason to believe that the clergy acted here as advocates, besides unquestionably monopolising the other important offices of this Court as Masters in Chancery, and acting ex-

Tours under Pope Alexander III., it was ordained 'quod post votum religionis nullus ad physicam vel ad leges mundanas *legendas* permittatur exire.'" But the "votum religionis" here spoken of appears to be the monastic vow, and not the less rigorous engagement of the secular clergy, and "legendas" seems to refer to public lectures rather than to forensic practice. See Serjeant Manning's learned Report of the Serjeant's case, 171. It clearly would not and did not apply to conveyancing.

[1] There can be no doubt, however, that at this period the clergy were by far the most competent advocates, and after the Norman conquest, when litigation was principally conducted before judges appointed by the King, the ecclesiastics received large fees by the practice of advocacy before the courts of law. Indeed, they devoted themselves, somewhat to the scandal of the body, to the study of the law in preference to that of divinity and other more fitting studies, and were thus open to Papal rebuke. (2 Palgrave's *Eng. Commonwealth*, 386. *Matt. Paris*, 759, 760.) They were indeed with the greatest difficulty driven from the practice of advocacy, as is shown by the familiar story of Serjeant William Bussy, A. D. 1259, quoted from M. Paris by Blackstone, who being called to account for his knavery claimed the benefit of his clergy, which till then remained an entire secret, and to that end, voluit ligamenta *coifæ* suæ solvere et palam monstraret se *tonsuram* habere clericalem; and hence Sir H. Spelman conjectures (*Glossar.* 335.), that coifs were introduced to hide the tonsure of such renegade clerks as were still tempted to remain in the secular courts in the quality of advocates or judges notwithstanding their prohibition by canon. 1 Bla. Com. 24. n.

clusively as attornies and solicitors under the name of the Six Clerks and Sworn Clerks. [1]

There was also another important branch of the profession almost exclusively in the hands of the clergy down to a very late period of our history. The laity might talk, and some few of them might be able to read, but the priest could write and waved his pen at them in defiance. From an early period all the charters and other written documents had been exclusively prepared by the clergy, for the simple reason that the art of writing was known to them alone. In all cases, then, in which writing was employed, either in the transfer or devise of property, the assistance of the priest was absolutely essential. The great early assurance of land was the feoffment, to which writing was not rendered necessary until the reign of Charles II.[2]; the livery of seisin which was essential to it, being considered notice to all men, and which mysterious ceremony was manageable by the capacity of lawyers who could not sign their names. But that part of the profession who could, the clergy, never relished this public mode of transfer, and to them and to their ingenuity are to be ascribed most of those convenient but secret dealings with property which now go under the general names of deeds and wills. It cannot be doubted that all the transactions which formed the first attempts of *conveyancing* to develope itself were from the earliest period under the superintendance, and were in fact actually prepared by the clergy. This fact is however not a little curious, and as it has led to important and interesting results, we shall here enter a little into detail.

The earliest conveyancers were no doubt the Druids, who alone possessed the art of writing when the use of letters was reckoned dishonourable by all the barbarous nations of Europe.[3] One of the most ancient and inviolable laws of the Britons of which we have any information, is that which forbad the committing their laws to writing.[4] But the Druids, while they had no objection that all others should remain ignorant of and even despise the art of writing, took

[1] Spence's Abuses of the Court of Chancery, 1839, p. 6. and post, p. 393.

[2] 29 Car. 2. c. 1. (The Statute of Frauds.) The origin of the feoffment seems referrible to Saxon times. See 1 Reeve, Hist. C. L. p. 10.

[3] Ælian, Varior. Hist. l. 8. c. 4. [4] Cæs. de Bel. Gal. l. 6. cc. 13, 14.

care to be acquainted with it themselves. The letters which they used were probably those of the Greek alphabet [1], which the Druids of Gaul learnt from the Greek colony at Marseilles; and Strabo expressly says, that they wrote all their contracts and deeds in Greek letters.[2] There is no reason to suppose that the British Druids were inferior to their Gaulish brethren in any thing; and we may therefore conclude, that the letters of the Greek alphabet were used by the Britons in writing contracts, treaties, and other important deeds, before they were invaded and conquered by the Romans. By that conquest the Roman letters were introduced, and from thenceforward continued to be universally used in such matters.[3]

On the invasion of the Anglo-Saxons, it is most probable that they were strangers even to the most simple mode of disposition, that by will[4]; but after they had possessed themselves of Great Britain, they soon became acquainted with and adopted this method of conveying their estates, which had been established by the Romans and practised by the Britons; and thus the most ancient Anglo-Saxon testaments that have been preserved are agreeable to the Roman forms[5], and it became the custom for the bishop[6] or other priest to make all wills, in which they did not forget to take especial heed to the interests of the Church.

The clergy being once possessed of this power took good care to retain it, and in this they had of course no difficulty so long as the art of writing remained exclusively known to them.[7] It was indeed one of their great holds of the

[1] Cæs. *ubi sup.* Speaking of the Gauls, Cæsar says, "Publicis privatisque rationibus, literis *Græcis* utantur," lib. 6. c. 14. Hottiman rejects the words, *Græcis*, but Dr. Clarke has preserved it. See Wynne's Eunomus, 216. 5th ed.

[2] Strabo, l. 4. p. 181. cited by Henry, vol. ii. 58. 2d ed.

[3] Henry, vol. ii. p. 59.

[4] Henry, vol. iii. p. 403.

[5] Hickes's Diss. p. 50—63.

[6] Murat.'s Antiq. t. v. 654. Henry, iii. 405. 1 Hallam's Middle Ages, 511.

[7] Down to the end of the thirteenth century, it was not usual for a person to be able even to sign his name, and, before the use of seals, charters were subscribed with a cross. A few signatures to deeds appear in the fourteenth century; in the next they are more frequent. The Emperor Frederic Barbarossa could not read; and Charlemagne, it is to be feared, could not write. See the authorities for these and other illustrious instances cited, 2 Hallam's Mid. Ages, 351. 8th ed. Seals were introduced by Edward the Confessor, (1 Reeve, Hist. C. L. p. 10.) who appears by those extant bearing his effigy to have had a most formidable pair of mustachios.

people. During the whole of the Anglo-Saxon, Danish, and Norman periods of our history the clergy were absolutely necessary to the people in most of the ordinary transactions of life. All instruments in writing, whether of sale, gift, or exchange *inter vivos*, and all testamentary dispositions, were of necessity drawn up by a priest or a monk, and in some charters this is expressly mentioned.[1] Among the archives of the monasteries were to be found precedents for all the usual transactions and dealings with property, and the copies of the Church Bibles were not unfrequently employed as the most effectual repositories for transcribing private charters.[2] This power was sometimes grossly abused, and as if their means of accumulating what they could not legitimately enjoy were insufficient, the monks prostituted their knowledge of writing to the purpose of forging charters in their own favour.[3]

Not only were the clergy the conveyancers of that day in knowledge, it seems certain that they acted as the paid servants of the public in this respect. Our early kings had their conveyancers, (as now Her Majesty has her attorney and solicitor-general,) an important station held by the king's priests or chaplains similar to the "clerks of the palace" of continental sovereigns. Their signatures were affixed to the royal charters with a notice of their station, and we find eleven of these clerks together with the twelfth, the *chancellor*, subscribing a charter of William Rufus. The chaplain or clerk was also attached to all large establishments, being the only person in the household who could use his pen. In the exercise of these functions it cannot be supposed that they were not liberally remunerated. "Their office," says Sir F. Palgrave[4], speaking of the clerks of the chapel, "was

[1] Palgrave's English Commonwealth, vol. ii. p. 204. Kemble's Anglo-Sax. Chart. vol. i. 65. 92.

[2] Hickes's Diss. Epist. pp. 9. 30. Sir F. Palgrave says, "Conveyances of land as employed among the Teutonic nations settled upon Roman ground, were almost exclusively prepared by the clergy, and as the clergy constituted but one body throughout all Christendom, a general uniformity of style was soon introduced. All the monks of Latin Europe were virtually bred in the same college. The members of the Church were constantly in migration from province to kingdom, *and a good precedent carefully settled at Monte Casino was rapidly transmitted to the Scriptorium at Worcester or at Canterbury.*" vol. ii. 204.

[3] 1 Hallam's Mid. Ages, 503. 8th ed. Palgrave, vol. ii. 204, 205.

[4] Palgrave's English Commonwealth, vol. i. 178, 179. 651.

merely ministerial; no authority had yet been delegated to them by the King, but the suitor might find the quill did not glide smoothly over the vellum which contained an ungrateful name, and the wax would melt more readily to oblige a friend. The chaplains also were shrewd and learned clerks; they could not make the grant, but their advice might influence the King's irresponsible discretion.[1]"

It might be well for chaplains and other clerical persons thus to practise on their own account. The monks and ecclesiastical bodies had higher aims and objects: they were not usually satisfied with that portion of the value of the property conveyed which comes into the pocket of the conveyancer in the shape of his fee: they coveted and obtained a much larger portion to be employed to pious uses, and on these occasions they no doubt kindly drew the deed for nothing. Indeed, we are inclined to think some knowledge of law, and more especially conveyancing, was an essential part of the education of the priest; hence the familiar proverb, *nullus clerus nisi causidicus.* The statutes of mortmain interfered from time to time with these benevolent but perhaps not strictly professional practices.[2] The struggle to evade them, however, led to most important results. If it is to the priest that we are to ascribe some of the subtleties and intricacies of the art and mystery of conveyancing[3], we must not forget that we are indebted to him (although perhaps unintentionally, except for selfish ends) for removing the restraints on the alienation of property, by the invention of common recoveries, and the introduction of the doctrine of uses (the foundation of modern conveyancing), and thus giving the means of escape from the hurtful fetters of the system of feudal tenures. In perfecting the invention of uses they had a friend at hand in the Court of Chancery, in the person of the clerical Judges of that Court, and more especially in John of Waltham, Mas-

[1] Palgrave's English Commonwealth, i. 652.

[2] The mortmain laws were enacted not only from the jealousy of the great power of the religious bodies, but with a view of preserving to the lord, and to the king as the chief lord, the advantages and incidents of tenure. That too much stress has been placed by modern writers on the first reason for their origin is clearly shown by Mr. Burge and Sir F. Palgrave in their evidence before the Mortmain Committee (1844), an inquiry of much interest.

[3] "I shall not scruple," observes an agreeable writer, "to say, that much of the conveyancing now in force was originally the offspring of fraud and evasion." Eunomus, 217. 5th ed.

ter of the Rolls, and for a short time Keeper of the Great Seal[1] in the time of Richard II., who devised the writ of subpœna returnable in Chancery alone, and designed to make the feoffee to uses accountable to his *cestui que use*, a writ which, although it encountered great opposition in the first instance, has yet maintained its ground, and forms the first step in a suit in Chancery at the present day.

There is great reason to suppose that this state of things continued down to the Reformation, and that much of the learning relating to the law of property and the actual practice of conveyancing were in the hands of some portion of the clergy. There can be no doubt that the clergy transplanted the doctrine of uses from the civil law at the close of the reign of Edward IV., and its convenience, as we know, led to its being soon employed extensively, indeed almost universally[2], not only for clerical purposes, but in all conveyances and dealings with land. To whom then could the laity so properly go to "draw and settle" the deeds and instruments taking effect by virtue of this doctrine, as to the clergy, to whom they were familiar, and to whom the people had long been accustomed to go in all such matters? Certain other persons, it is true, had begun for some time also to attend more or less to conveyancing. The learning relating to real property had formed part of the study of the serjeant-at-law, and among his other qualifications, Chaucer says

—— "he could *endite and make a thing*,
There could no wight pinche *at his writing*:"

and in later times, extending indeed to the present era, there can be no doubt that conveyancing was and has been greatly in the hands of the serjeants. Thus in the reign of Elizabeth Lord Chancellor Bromley, on the 15th October 1580[3], in his address to (among other serjeants) Serjeant Thelwood, Recorder

[1] Blackstone calls John of Waltham "Chancellor to King Richard II." (3 Bla. Com. 52.) But this is a mistake He was Master of the Rolls in 1381 (Beatson, vol. ii. 326.), and Lord Treasurer in 1390 (Beatson, vol. i.). But he never was Chancellor, although it is true that the Great Seal was entrusted to him in 1386 by Chancellor Michael de la Pole during his absence on his private affairs. (Hardy's List of the Chancellors, 44.) It is believed that he was rather the *improver* than the *inventor* of this writ.

[2] 2 Bla. Com. 329. 1 Rich. III. c. 1. 1 Sand. Us. ch. i. s. 5.

[3] Reg. Lib. fo. 189. We are indebted for this reference to the kindness of Mr. Monro, one of the Registrars of the Court of Chancery.

of London, points out to them their duties as conveyancers. But it will readily be remembered that the earlier serjeants are supposed to have been ecclesiastics, and the coif is said to have been invented to hide the tonsure.[1]

Besides the serjeant there were also the scrivener and the notary, but the latter was frequently in early periods an ecclesiastic, and is to this day an ecclesiastical officer appointed by ecclesiastics, and the former was an inferior person both in learning, standing and pretensions, more especially until they were incorporated into a guild or company by James I. in the fourteenth year of his reign.[2]

It will be seen therefore what a sway and power the clergy then had in all dealings with property. This, we think, is pretty clear so far as England is concerned, but that they acted as conveyancers in Scotland down to a late period is certain; and we know that during a considerable period of our earlier history, the laws of England and Scotland, more especially the law of property[3], were the same. That the clergy so acted in Scotland has been clearly shown by Mr. Walter Ross in his learned and able Lectures on Conveyancing, from which we shall make one or two extracts, as the book is not in many libraries on this side of the border.

[1] See antè, p. 383. n. [1]. Serjeant Moore, it is generally said, invented in the reign of Hen. 8. the great assurance of modern times, the lease and release.

[2] In Shakespeare's time the scrivener seems to have been employed in marriage settlements. Thus, in the *Taming of the Shrew*, Tranio says —

> "Send for your daughter by the servant here,
> My boy shall fetch the *scrivener* presently." — Act iv. Sc. 4.

And so it is in other plays of the same date, which are good evidence of the manners of the time. But the deed was no doubt in many cases, but not in all, *settled* by counsel. The more ordinary duty of the scrivener was to receive into his trust and lay out other men's monies. "It has now," says Gibbs C. J. "been partially adopted by the banker and partially by the attorney. Jack Ellis is mentioned in *Boswell's Life of Johnson*, as the last person who exercised it." *Malkin* v. *Adams*, 2 Rose, 30.

In the preface to the book known by the name of *Shepherd's Touchstone*, this Shepherd (who, however, did not write the *Touchstone*) speaks of "there being almost in every parish a lawless *scrivener* that may perhaps have some law-books in his house, but never had more law than is on the back side of Littleton." This preface is of no other merit than as showing that at the time it was written, there was a class of conveyancers. Of the "Jack Ellis" here alluded to, Johnson says, "It is wonderful, Sir, what is to be found in London. The most literary conversation that I ever enjoyed was at the table of Jack Ellis, a money-scrivener behind the Royal Exchange, with whom I at one period used to dine generally once a week." Vol. vi. 138. ed. 1835.

[3] 1 Hale's Hist. C. L. c. 10. pp. 189,—195.

"However unnatural and impolitic the institution of monasteries now appears, it is certain that to them we owe the preservation of that learning which has taught the world to despise them. The painful copying of a book was the only possible method of multiplying it. Unless there had been men separated from the world, freed from its cares, and shut up in cells, who would have submitted to the tedious, weary, splenetic labour of copying volumes? Habit to the monks made this an entertainment, and fancy exercised itself in illuminations, paintings, gilding, and ornament. What was to repay the trouble of learning to read where nothing was to be had to be read? However much the Roman clergy encouraged the art of writing in their own order, they were not at any trouble to extend it among the laity. *Every day's experience pointed out the value of the distinction. It secured them in the exclusive office of notaries, in that of clerks to the courts of justice, to the power of making testaments, and the profit of all civil business. They were the only clerks,* and on that account obtained in most places for their order the *benefit of clergy.*[1] *The principal benefit was the acting as conveyancers and notaries.* There can be no doubt they acted as such in Scotland down to a very late period, and it has been presumed that they might so act at the present day, which, however, is extremely doubtful."[2]

Mr. Ross's account of the progress of conveyancing in Scotland is instructive and is undoubtedly applicable to some extent to the same science in England.

"Towards the beginning of the thirteenth century the language and ideas of the Roman jurisprudence became visible in the style and in the manner of all deeds upon the Continent and even in this island. Before that time the style in general appears to have been laconic and simple; the clerks were equally frugal in their expressions and in the materials they made use of; but in going downwards the style lengthens — a thousand precautions start out formerly unheard of, — a thousand frauds which our forefathers had not a single idea of seem all at once to have burst forth, — and if the manners of the time were to be taken from the work of the notaries and public conveyancers, any person would have good right to conclude that one half of mankind had in less than fifty years learned more wickedness than their fathers had done in the course of ages: at the same time that the other half had as suddenly acquired wisdom, address, foresight, and ingenuity to

[1] Lectures on Conveyancing, by Walter Ross, W. S., 1822. 4to. 2d ed. vol. i. 153.

[2] 1 Ross, 160. See also pp. 459, 460.

guard against and defeat the frauds of their neighbours. The historian who should make such a reflection would commit a great mistake. No such revolution had happened either in the affairs or minds of men. The churchmen (*the lawyers, the notaries, and clerks in continental countries*) had got hold of the Roman law, which presented them at once with the experience of ages and with the wisdom and refinements of the lawyers of the governors of the world. Proud of their new acquisition and fond of displaying it, these men filled their deeds with precautions against evils which were never intended, with reservations, declarations, prohibitions, &c., the want of which had never been felt among their forefathers. *So far from bestowing security, this new style only served to drown the meaning of parties in an endless redundancy of words. In place of preventing it served only to elicit disputes by affording a world of new materials for the inexhaustible lucubrations of the doctors of laws.*[1]

"Towards the end of the fourteenth and beginning of the fifteenth centuries, the Roman law had become the prevailing jurisprudence in Scotland, and the notaries public and clerical conveyancers had exhausted their learning and their knowledge, by introducing into the substance of writs and securities all the niceties, the technical terms, the subtleties and exceptions of the Roman jurisprudence, though it neither corresponded to the manners of the people nor to the state of society at the time. It is to the introduction of the Roman law and the vanity of the ecclesiastical conveyancers of the fourteenth century that the tautology, redundancy, and repetition so much complained of in our styles are wholly to be imputed. All the transactions between England, France, and Scotland were executed by deeds formed in this ostentatious manner, entirely founded upon the Roman law. This style had the benefit of being universal, like the Latin language itself, all over Europe, and it was the pride of the notaries public, who were then appointed and instructed by the Pope, to vie with each other in the number of their clauses or the excess of precaution and endless verbosity of expression." [2]

Such was the progress of conveyancing in Scotland. In England there was a much greater admixture, as we conceive, of the good old common sense. Still there was doubtless much refinement by the clerical professors of the art.

We need refer only to the most familiar text-book to show

[1] 1 Ross, p. 11.

[2] 1 Ross, 26., who gives a curious account of the ancient and the present form of bond.

that in the hands of the clergy was the practice, administration, and control over almost all dealings with real property. The effect of the doctrine of uses and the construction it received in the Court of Chancery was in effect to make the priests, the inventors and subtleizers on this subtle doctrine, the real masters of the land; and although the Legislature strove by a host of statutes, ending with the Statute of Uses itself (27 Hen. 8. c. 10.) to emancipate the country from their yoke, it failed so to do, and by the narrow holding of the Common Law Judges [1] the power of the Court of Chancery was restored, according to Blackstone's words [2], "with ten-fold increase," We do not wish to say that this power was always selfishly or unjustly used: we are simply stating the well-known fact, which we may give in Lord Hardwick's [3] emphatic words, that "a statute made upon great consideration, introduced in a solemn and pompous manner, by this strict construction, has had no other effect than to add at most three words to a conveyance," which, although untrue in the result, is perfectly correct as applicable to the effect of the holding of the Common Law Judges at the time. It is possible that when this decision was made, the existing Chancellor was not an ecclesiastic, but after the death of Sir Thomas More down to 1592, "the Great Seal was indiscriminately committed to the custody of lawyers, or courtiers, or churchmen, according as the convenience of the times and the disposition of the prince required." [4] At the time of the Reformation at least the Court of Chancery must be considered as a Court governed by ecclesiastical doctrines, and the great bulk of the assurances of the country were conveyances to uses. [5]

[1] Dyer, 155.

[2] 2 Bla. Com. 335.

[3] 1 Atk. 591. Vaugh. 50.

[4] 3 Bla. Com. 54.

[5] "The conveyance to uses were those in common practice (temp. Eliz.) with very little alteration, except that they were more encumbered with substitutions of estates, and with provisoes, covenants, and conditions; all couched in a minuteness and prolixity of language, which had been gradually increasing ever since the beginning of Hen. VIII.'s reign both in deeds and Acts of Parliament. These conveyances were mostly *covenants to stand seised* and other *covenants*. The conveyance by lease and release, invented in the reign of Hen. VIII. does not seem to have been very common, for there is no precedent of one in any of the Books of Precedents of this period. (*Boke of Bec. and West's Symbols.*) Feoffments were rarely made use of but when possession was to be gained or when the estate was small and the objects of conveyance few, and the parties could not easily bear the expenses of the other voluminous instruments." Reeve's Hist. C. L. vol. v. p. 188.

All the writers employed in the Chancery seem to have been in holy orders, and the Chancellor was originally *complimented* with the right of presentation to all crown benefices under the value of twenty marks, for the purpose of enabling him to provide for the clerks. As late as the reign of Edward II. the Chancellor was considered the chief of the king's chapel, and from the officers called the "clerks of the chapel" the present Masters in Chancery are lineally descended.[1] They were in fact in holy orders down to the time of the Reformation: hence also the derivation of six *clerks*, sworn *clerks*, writing *clerks, et hoc genus omne clericorum* of high and low degree. It is to be observed that by stat. 14 & 15 Hen. 8. c. 8. s. 1. the six clerks were enabled to marry and hold their offices, which was afterwards followed up, as we shall see, by an extension of this privilege. Little doubt can indeed exist that one main reason for usually appointing an ecclesiastic to be Chancellor was, that he was peculiarly learned in the matters and dealings that then came before the Court of Chancery. When the Reformation was fairly established, the restriction against the marriage of the clergy was effectually removed[2]; and we know that a great number of the clergy availed themselves of this liberty, although they were generally averse to the other innovations.[3] Such of them as had married were, however, afterwards expelled from their cures by Mary[4], but restored by Elizabeth[5], although with some reluctance, as that Queen seemed always to grudge any one the silken fetters of matrimony.[6] This right was, however, afterwards finally established.

An important privilege was thus bestowed on the clerical conveyancer; if he joined the new religion he could continue to practise, and might share his joys and sorrows with a partner of the softer sex.

"The gospel light which beam'd from Boleyn's eyes,"

kindled a fire in humbler bosoms than Henry's. A great

[1] Palgrave, vol. ii. 345. [2] 2 & 3 Edw. 6. c. 21. 5 & 6 Edw. 6. c. 12.

[3] Hallam's Const. Hist. vol. i. 127. [4] *Ib.* 142. [5] *Ib.* 151.

[6] Her Majesty's gracious speech on taking leave of Mrs. Parker, the wife of the archbishop, after a sumptuous entertainment, is well known: "*Madam* (the style of a married woman) I may not call you: *Mistress* (the appellation of an unmarried woman) I am loth to call you, but, however, I thank you for your good cheer."

era took place in the domestic history of a portion of this branch of the law. The whole body of clerical conveyancers were allowed to marry, and were enabled to partake of matrimonial privileges with ecclesiastical sanction, which it is to be feared that they had to some extent enjoyed without.

We have now given our reasons for supposing that down to the period of the Reformation some of the clergy actually practised as conveyancers and prepared deeds and wills, and we know that they have retained the jurisdiction in the latter large class of instruments down to the present day (by means of the Ecclesiastical Courts), and in Scotland, we have been informed, it is not unusual at the present day for the minister to prepare the will of a person *in extremis*.

We have no intention on the present occasion to continue at any length the history of conveyancing from that period down to the present time. We shall in some future article devote some attention as well to this as to the *philology* of the science, a curious and interesting subject. We think, however, we have said enough to show that the clergy were the early founders, inventors, and nurses of the art, and it seems to us they have left their traces in the common assurances in daily use. The solemn commencement of wills, "In the name of God, Amen," to be found in modern Precedent Books and still in use, — the ordinary commencement and ending of all bills of lading, "Shipped by the Grace of God," "and so God send the good ship to her designed port in safety," and many other expressions still in daily use are the vestiges — to our feelings not idle or unpleasing — of a time when the direct interference of Providence was recognised in every transaction of life. We believe, although the traces are faint, that a class of persons continued all along to practise exclusively as conveyancers. It is true that all the most eminent and learned lawyers were distinguished for a profound knowledge of the law of property, and many of them mixed up this branch with others: still we think there was always, under perhaps the more humble name of notaries and scriveners, a class of persons whose sole occupation was the preparation of deeds, wills, and other written documents.

We know that the most eminent lawyers of the seventeenth century, and more especially Coke, Bacon, Palmer, and

Bridgman, were eminent property lawyers, and the two last, it cannot be doubted, practised as conveyancers. When the Parliamentary powers had, in the words of Thomas Page Johnson[1], the faithful clerk of Sir Orlando Bridgman, "usurped the government, Sir Orlando, betaking himself to a sedentary kind of life in his chamber, he became a great oracle not only of his fellow-sufferers but of the whole nation in matters of law; his very enemies not thinking their estates secure without his advice;" and he then drew those deeds which were afterwards published as Precedents, and they show that the forms of deeds used in the middle of the seventeenth century were in many respects the same as those now employed.

Roger North also (we wish a Roger had lived every fifty years) tells us that Lord Keeper Guildford signalised himself in

"Conveyancing, and that he was no less expert at that sort of practice than any one of his time, *although professing no other.* And he despatched a great deal, especially of the more intricate kind, — that of settlements in noble families, who entirely relied upon him; and besides his knowledge of the law gained by reading, he had, as I must always remember, the benefit of many useful notions and hints from Sir Jeoffrey Palmer, not an iota of which was lost upon him. At the beginning of his business he had no clerk, and not only drew *but ingrossed instruments* himself, and when he was in full practice he scrupled not to write any thing himself. A lady in Norfolk told me he made some agreement for her, and, at the sealing, a bond was wanted, and there was no attorney or clerk at hand to draw it, so they were at a stand, and then he took the pen, and said, 'I think it will not foul my fingers if I do it myself;" and thereupon he wrote the bond, and it was sealed. I have often heard him complain of the *community of conveyancers*, and say that some of them were pack-horses and could not go out of their road."[2]

Thus have we found that in the middle of the seventeenth century a community of conveyancers is clearly alluded to

[1] Pref. Bridg. Prec.

[2] Vol. I. p. 142. ed. 1826. Roger North a little further on (p. 185.) sneers at Lord Keeper Bridgman as "a hinderer of a useful reform for a formal reason which makes me think of Erasmus, who, having learned somewhat of English law, said that lawyers were *doctissimum genus indoctissimorum hominum.*"

as a separate and established body. Subsequently, Sir Edward Northey, and other learned serjeants were much consulted on conveyancing points. And this brings us down to the eighteenth century; and here we become more familiar with the names, and even the drafts of many of the most eminent persons who practised in this branch of the law. From a MS. note of Mr. Butler with which we have been favoured, it appears that he supposed Mr. Pigot, the learned author of the *Essay on Recoveries*, to have been the first "regular conveyancer." We have our doubts as to this, for the reasons we have already stated: but he was one of that body of Roman Catholic conveyancers who transacted the principal conveyancing business of the eighteenth century: Booth, Duane (the master of Lord Eldon), Maire, and subsequently Cruise and Butler himself, and others less eminent, were all of this religion, which gives some foundation to a curious supposition that these learned men are the direct representatives of the clerical conveyancers who lived before the Reformation, who availed themselves of the power to marry, but remained of the ancient faith of the land. We think this not only possible but highly probable, but it may also be accounted for by the fact that Roman Catholics could not until late in the eighteenth century be called to the Bar, and were thus driven to practise as conveyancers.[1] Mr. Butler was himself the first barrister of this religion (after the disabling Act), which now, however, gives its fair share of talent and respectability to the profession, and enjoys in return a portion of its rank, business, and emoluments.

We have thus endeavoured very briefly to trace the earlier history of this branch of the profession, and we have shown that it must fairly be considered to represent the learning and intelligence, not only of all the early periods of this country but of much of that of later times. It is a matter, then, of great congratulation that with the learning and intelligence,

[1] By an Act of the 7 & 8 W. 3. c. 24. the English Bar was inhibited to Roman Catholics, and was not opened to them till the Act passed for the relief of the Catholics in 1791. Mr. Pigot had been called to the Bar previously to the disabling Act in 9 W. 3., but after the passing of the Act he thought it prudent to sacrifice to the temper of the times, and confined himself to chamber practice. (Butler's Rem. vol. ii. 274.) We hope in a succeeding article to give some fuller account of the conveyancers of the eighteenth century.

the present race of conveyancers have imbibed so few of the failings and so little of the spirit of the clerical order from whence they are unquestionably derived. The advocate of the Common Law Courts is, and has at any rate since the reign of Henry III. been a layman; and so perhaps in a greater degree is the attorney at law, who only till lately had any thing to do with conveyancing. But the conveyancer down to a much later period was a priest in orders. The habits also of the conveyancer assimilate much to those of the monastic Bodies. With men they have comparatively nothing to do. As we have already had occasion in this volume to notice[1], in giving some account of one of the most eminent of the class, they live in an atmosphere of their own. They are strictly men not of words but of *deeds*. Each sitting in his own chambers issues his own rules and orders, makes his own decrees, and rules his own subjects. Occasionally his law clashes with that of a neighbouring sovereign, and a conference is sometimes the result; or, the more usual case, both opinions are referred to some third potentate, whose authority is recognised by both the contending parties. But all this passes with but little intercourse with the outer world. As effectual a seclusion from mankind may exist in this great and crowded metropolis as in the wilds of Calabria or the fastnesses of Bohemia, and it is the tendency of the conveyancer's life and practice to keep up this seclusion. A man may enjoy the first practice as a conveyancer, and may never move from his chambers, and never see the face of man except those of his fellow genii of the Lamp. This cannot well exist in any other branch of the Profession. We are not saying that this is so with all conveyancers: on the contrary, many of them mix in general society, and are some of its most agreeable members. We could easily give living instances of this, but many must remember Mr. Butler and Mr. Humphreys as mixing much in many circles, and taking a not undistinguished part as men of the world. We are only saying that a conveyancer *may be* almost entirely secluded from the world, and that with a very great practice as a conveyancer he must be so to a certain extent. A conveyancer of the nineteenth century may differ in fact but

[1] See antè, p. 139.

little from a monk of the sixteenth except in the matrimonial privileges already mentioned. He may go to his chambers and return to his house at night with little or no intercourse with his fellow man. The habits of the Recluse are strictly his:

> " ——— from that bleak tenement [say Old Square]
> He many an evening to his distant home,
> In solitude returning . . .
> . . . . all alone,
> Beholds the stars come out above his head,
> And travels through the wood with no one near
> To whom he may confess the things he sees." [1]

With all this isolation and exclusion, then, we repeat that it is highly to the credit of this branch of the profession that they have shown so much liberality, and so little of the monastic spirit, so little of the true clerical desire to legislate for all the world but to resist all legislation on themselves. And yet their power has been great. The body of conveyancers have in fact from age to age legislated for themselves, and thus for the whole country. All other branches of the Law, every species of Court, have been regulated by Parliament or by Judges; pleadings have been the subject of direct rule, order, and ordinance, the language and practice changed and rechanged: but in Conveyancing the practitioners have made the laws; the persons who carry the law into execution have been the sole legislators; and they have established a body of law which they have forced the Courts of Common Law and Equity to recognise under the name of "the Practice of Conveyancing." [2] But though they have thus had the giant's strength, we do not think they are disposed to abuse it. We have already had the pleasure of remarking that as a body they have proved themselves free from prejudice and self-interest [3]; and far from resisting inquiry and proper alteration, we are quite satisfied that the most eminent of this body are willing to join in that important Movement for Promoting the careful and judicious Amendment of the Law which we must ever consider to reflect so much credit on the Profession of the present day. All perhaps have not been

[1] The Excursion, book i.

[2] This is at least as old as Lord Somers. Radnor v. Vandebendy, Show. P. C. 70., and see Maundrell v. Maundrell, 10 Ves. 249.

[3] See antè, p. 170.

animated by this spirit: a comparatively small portion has shown some jealousy of legislation from without — a somewhat blind idolatry to phrases and language which they themselves often admit to be useless. But that this feeling is confined to a few we are certain.

The Act of last session, 7 & 8 Vict. c. 76., may be considered to be the first direct attempt of any general importance to legislate in this matter.[1] The works which we have placed at the head of this article, among others, (for we do not profess to have either read or even seen all that the Act has called forth,) are proofs that the Profession is quite willing to second the intention of the legislature, and to take this opportunity of altering and revising their forms, and thus to diminish materially the expenses of dealings with land.

With respect to the measure itself, we have already said that we consider the Lord Chancellor is entitled to credit for it. The intention of the Act is highly praiseworthy; all the objects endeavoured to be obtained are proper ones; and we are not quite sure that the Lord Chancellor is more responsible for the partial failure of the measure, than the Duke of Wellington was when the army-contractor supplied his soldiers with muskets which wanted the touch-hole. It cannot be disputed that it was a difficult Act to draw. It should have been the result of the deliberative experience of many. A failure, however, it must be said to be, and so far as we have seen ourselves or been able to learn from others, *it has been hitherto as far as possible treated in practice as a nullity*, and has led to little or no alteration in existing forms. We have already endeavoured to facilitate the adoption of this Act.[2] It appears useless at present to attempt to carry this further. The works of Mr. Williams and Mr. Davidson, both of which are of considerable use and merit[3], are written

[1] The Act abolishing Fines and Recoveries, 3 & 4 W. 4. c. 74.; the Dower Act, 3 & 4 W. 4. c. 105.; and the Lease for a Year Act, 4 Vict. c. 21., are all partial in their operation, legislating for specific changes.

[2] See antè, p. 163.

[3] We must couple this remark with one observation. We cannot at present recommend our readers to adopt any specific alterations arising out of the Act in the form of deeds. We think it better, at present, to adhere to "*This Indenture*," and to refer to 4 Vict. c. 21. The general abbreviation of the forms is a distinct question.

with the view of explaining and assisting the operation of the Act. They have done probably all that can be done in the matter; but the Profession is unwilling, so far as we can learn, to make any alteration in its practice by reason of the Act, and we cannot doubt but that there will be some further legislation in the matter early in the approaching session. If the Act came before the Court, it is highly probable that, looking at its general scope, a Judge would hold that the intention of its framers was carried out; but it is the great and wise rule of all practitioners to limit their own responsibility; and thus it is that few are inclined to take upon themselves the slightest risk in making any alteration. It would be useless, therefore, to plunge into the labyrinth of conflicting opinions and commentaries which the Act has called forth or to attempt the hopeless task of reconciling them.

Some doubt also hangs on another important practical question which is brought before us by Mr. Davidson: that gentleman has given in his edition of the Act forms of deeds which are drawn with great care and ability, but which are in many respects one sixth of the usual length. Let us take the very familiar instance of covenants for title, which he thus abridges: —

"And the said *A. B.* doth hereby for himself, his heirs, executors and administrators, covenant with the said *C. D.*, his heirs and assigns, that notwithstanding any act, deed, or thing by the said *A. B.* or any of his ancestors made or done or knowingly permitted or suffered, they the said *A. B.* and *D. B.* now have power to grant, convey, and release the said premises hereinbefore conveyed, or expressed and intended so to be, unto and to the use of the said *C. D.*, his heirs and assigns, free from incumbrances; and that he the said *A. B.* and his heirs, and all other persons lawfully or equitably claiming through or in trust for him or any of his ancestors, will, at all times, at the cost of the said *C. D.*, his heirs or assigns, make, do, acknowledge, and execute all such acts, deeds, conveyances, and assurances for further and better conveying and assuring all the said premises hereinbefore conveyed, or expressed and intended so to be, unto and to the use of the said *C. D.*, his heirs and assigns, as by him or them shall be reasonably required." — p. 54.

And in his introduction he says,

"The general words have been very greatly abridged by omitting for the most part the enumeration of particulars. It is to be hoped that the legislature will soon enable conveyancers to dispense with these altogether by enacting, *in the language of the general words themselves,* that all things they specify, and all other rights, easements, and appurtenances, shall pass by the conveyance of the property itself. At present, indeed, what is strictly appurtenant in law will so pass; but there are so many rights and easements which are not strictly appurtenant in law, but are only appurtenant by representation and enjoyment, that the general words in modified shape must be retained. The clause called "All the Estate Clause" has been retained (although in a very abridged shape), to meet those cases in which the conveying party has a term of years or some other interest in the property distinct from his estate which appears in the deed, and which might be held not to pass except by virtue of this clause. In ordinary cases, however, the clause may be wholly omitted. The clause called "And the Reversion, &c." has been dispensed with; it was wholly useless, and has of late been much disused in practice." — Introd. p. 7.

Now we are disposed to agree with Mr. Davidson in almost all these recommendations, but the difficulty of acting on them in practice is considerable without some legislative sanction. A body of conveyancers in London, being in communication with each other, may agree to act in conformity with these or similar suggestions, *but the great body of the Profession throughout* this country must have some further warrant for taking upon themselves the responsibility of departing from established forms and usages.[1] We believe there is no indisposition in the Profession to shorten and omit these and other forms; all that they want is to be saved harmless if they do. In the mean time in many hundreds of deeds which are daily prepared, these forms, admitted by the truly skilful and

[1] Mr. Butler, as we have already shown, antè, p. 159., a decided reformer in this respect, says, in allusion to a particular settlement prepared by him and Mr. Shadwell, and framed in the most concise manner, "Greater conciseness has since been adopted by some most respectable practitioners; they have the writer's warmest sympathies, but he conceives it impossible, *while the law of title remains in its present state,* to proceed much further, without abandoning established forms and language so much as to render the innovation a matter of experiment. Now experiments are always dangerous, and never so dangerous as when legal instruments are the subjects of them." 2 Butl. Rem. p. 279.

learned practitioner to be useless, are inserted. In a previous page, (p. 2.) Mr. Davidson says somewhat too authoritatively:

"The only assistance required from the legislature is such an enactment as will enable the draftsman to dispense with general words, covenants for titles, and limitations to uses to bar dower. *In all other respects* a simple conveyance may now be drawn in a form and language quite as concise as the legislature could devise."

Having admitted the principle that the legislature may supersede the necessity of these forms, we are unable to see why it should be thus limited. If legislation can proceed safely or properly at all, we do not see why it may not be carried further than Mr. Davidson here suggests. What is wanted, as it appears to us, is some legislative sanction for those alterations which a learned and skilful conveyancer would advisedly make.

We have only room to say a few words on Mr. Joshua Williams's book, which is intended as an elementary work on conveyancing. The author does not "profess to present the reader with so ample and varied an entertainment as is afforded by Blackstone, neither, on the other hand, is it as sparing and frugal as the 'Principles' of Mr. Watkins, nor, it is hoped, so indigestible as the well-packed 'Compendium' of Mr. Burton." In a work of this nature much novelty was not to be expected: but it appears to us written in a pleasing and agreeable style, and well calculated to make a favourable impression on the student, and the information it contains seems to us to be generally accurate. Mr. Williams also considers that some alteration or revision of the mode of remunerating the Profession, and of the *common forms*, is necessary.

"The labour," he says, "of a lawyer is very different from that of a copyist or printer; it consists first and chiefly in acquiring a minute acquaintance with the principles of the law, then in obtaining a knowledge of the facts of any particular case which may be brought before him; and lastly, in practically applying to such case the principles he has previously learnt. But for the last and least of these items alone does he obtain any direct remuneration; for deeds are now paid for by the length, like printing or copying, without any regard to the principles they involve, or to the intri-

cacy or importance of the facts to which they may relate [1]; and, more than this, the rate of payment is fixed so low, that no man of education could afford, for the sake of it, first, to ascertain what sort of instrument the circumstances may require, and then to draw a deed containing the full measure of ideas of which words are capable. The payment to a solicitor for drawing a deed is fixed at one shilling for every seventy-two words, denominated *a folio;* and the fees of counsel, though paid in guineas, average about the same. The consequence of this false economy on the part of the public has been, that certain well-known and long-established lengthy forms, full of synonyms and expletives, are current among lawyers as common forms, and by the aid of these, ideas are diluted to the proper remunerating strength: not that a lawyer actually inserts nonsense simply for the sake of increasing his fee; but words, sometimes unnecessary in any case, sometimes only in the particular case in which he is engaged, are suffered to remain, sanctioned by the authority of time and usage. The proper amount of verbiage to a common form is well established and understood, and whilst any attempt to exceed it is looked on as disgraceful, it is never likely to be materially diminished till a change is made in the scale of payment. The case of the medical profession is exactly parallel; for so long as the public think that the medicine supplied is the only thing worth paying for, so long will cures ever be accompanied with the customary abundance of little bottles. In both cases the system is bad; but the fault is not with the profession, who bear the blame, but with the public, who have fixed the scale of payment, and who, by a little more direct liberality, might save themselves a considerable amount of indirect expense. *If physicians' prescriptions were paid for by their length, does any one suppose that their present conciseness would long continue?* — unless indeed the rate of payment were fixed so high as to leave the average remuneration the same as at present. The student must therefore make up his mind to find in legal instruments a considerable amount of verbiage; and at the same time he should be careful not to confound this with that

[1] "By a recent statute, 6 & 7 Vict. c. 72. s. 37., the charges of a solicitor for business relating entirely to conveyancing are rendered liable to taxation or reduction to the established scale, which is regulated only by length. Previously to this statute, the bill of a solicitor relating to conveyancing was not taxable, unless part of the bill was for business transacted in some Court of Law or Equity. But although conveyancing bills were not strictly taxable, they were always drawn up on the same principle of payment, by length, which pervades the other branches of the law." — *Note of Mr. Williams.*

formal and orderly style, which facilitates the lawyer's perusal of deeds, or with that repetition which is often necessary to exactness, without the dangerous aid of stops." — pp. 146—148.

There would be no want of other evidence to prove that the inquiry on this important subject which we have already suggested, is necessary and loudly called for; and if we said this before the stat. 6 & 7 Vict. c. 76. came into operation, how much is the necessity for it increased since that event, when it has gone far to bring on us one of the greatest misfortunes that could happen — an unsettled practice in the common assurances of the land. We venture therefore respectfully to reiterate this demand, and we think we cannot do so in better terms than these employed by the Chancery Commissioners of 1826.

"No person can have much experience," they say, "in Courts of Equity without feeling that many suits owe their origin to and many others are greatly protracted by questions arising from the niceties of the law and practice of conveyancing. Any alteration in this system must be made with the greatest caution; but as connected with the object of saving time and expense to suitors in the Court of Chancery, *we venture to submit to Your Majesty's consideration whether it might not be proper to entrust to competent persons the task of examining that part of our law with a view to determining if any improvement can safely be made in it, which might lessen the expense and narrow the field of litigation respecting the transfer of property.*"

ART. IX. — A MEMOIR OF THE LATE RIGHT HON. SIR JOHN BAYLEY, BART.

AMONGST the zealous and deserving servants of the public, the late Sir J. Bayley must be considered as holding a distinguished place. Having been raised to the Bench at a then unusually early period of life, he continued his useful and honourable labours for upwards of twenty-five years: nor were they at last interrupted by any wish for retirement or love of ease, but by the pressure (not so much of age as) of infirmities, which rendered that retirement inevitable.

About the time of his appointment, a most objectionable practice had prevailed of selecting for judges men who ought rather to have been receiving the reward of past services, than entering upon the performance of them. The late Mr. J. Chambre and Mr. B. Wood, though most eminent for their legal attainments and knowledge, were called to the exercise of their most weighty and responsible duties after the age of sixty: Mr. J. Burrough was appointed at a much later period of life, and the Lord Chief Baron Alexander, when seventy years old, — and, moreover, after having been removed from practice in any Court for not less than twelve years. In truth, an opinion seemed to have grown up that the proper time for bringing men into the public service, was, when individuals began to entertain suspicions of decline, and, for that cause, to entrust their business to younger hands. The case of Sir J. Bayley, as has been already observed, and will appear, when we come, in order, to notice the precise date of his elevation, was an exception to this absurd and vicious rule: — the more obviously absurd, when it is recollected that what Cicero says of an orator is true of a judge — the duties require the possession "laterum et virium."

Sir J. Bayley was of a highly respectable family upon the

confines of the counties of Huntingdon and Northampton—Bayley of Elton; his mother (a Kennett) being descended, in a direct line, from Kennett, Bishop of Peterborough. John was the second son; and his position, therefore, pointed him out for a life of employment. His original destination was the Church, and he was placed upon the foundation at Eton, in the hope of being drafted off to King's College, Cambridge. In this hope, however, he failed, and the disappointment extended to after life, not merely from his preference for the Church, but from a belief which he entertained, that his advancement would have been greater in the profession of his choice, than in that which he was driven to pursue.

Upon his being superannuated (as it is called) at Eton, he was sent at once to the law, and commenced his career by entering, or, as the phrase is, having the run of the office of Mr. Lyon, an attorney, for a year. He then entered at Gray's Inn, and was two years in the office of Mr. Lamb, a special pleader, who went the northern circuit for many years, and was the friend, and nearly the contemporary of Chambre and Wood. He then, according to the prevalent usage, commenced practice on his own account with considerable success. In Easter Term, 1793, he was called to the Bar with such indications of advancement, that, in Trinity Term, 1799, he, together with the late Mr. Serjeant Lens, took the degree of the Coif. His business then consisted chiefly of legal arguments — business which, although not of the most showy, or, as it is called, leading description, is, nevertheless, best calculated to improve the lawyer: and the manner in which he acquitted himself attracted the notice of those whom it concerned; for, in May 1808 (then in his 45th year), he was appointed a Judge of the King's Bench, in which he remained till November, 1830, when he was removed to the Court of Exchequer, and, at the end of Hilary Term, 1834, he resigned — having completed the unusually long period of twenty-six years, within three months, of judicial service. Having been created a Privy Councillor and a Baronet, he died in October, 1841, and was succeeded in the title by his eldest son, Sir John Bayley, the present Baronet.

The industry which distinguished Sir J. Bayley at the Bar, did not forsake him when he was raised to the Bench.

Amidst his various occupations as a Judge, he never failed (as had long been his habit) to abstract and index every reported case. We mention this chiefly as a proof of his labour and pains-taking: It has been said, however, that this "repertory of easy reference" was found of much use,—especially in the latter part of the time of Lord Ellenborough. For himself, although, when composing judgments (in which, it is understood, he had a large share) he might wish to know where every thing was to be found on the subject, it was a common remark that he did best when he trusted most to himself; — this was, certainly, most true, when he was sitting at Nisi Prius. With respect to his conduct towards his brethren on the Bench it appeared always of that useful and unpretending kind, which exhibits an anxiety to forward the general business of the Court without any affectation of shining or display. As to his deportment, generally, towards the whole Profession, and the opinion entertained of him, all comment is superfluous when we bear in mind the regret with which his departure from the King's Bench to the Exchequer was attended, and the sincere expression of admiration of his many most valuable qualities then conveyed to him; than which it is impossible to conceive a more authentic and honourable testimonial.

In points of practice, a very necessary though not the most attractive part of legal lore and labours, Sir J. Bayley was absolutely unequalled. The clearness and certainty with which he disposed of questions of this sort, was so great that people were half persuaded to believe that there must be something of system and principle in it. The late Mr. B. Bolland, when at the Bar, used to observe, that no man living ever pretended to venture a guess, when "a trial had been lost," except Bayley.

As a Judge presiding at Nisi Prius, Sir J. Bayley had many qualities of great importance and value. His knowledge of all the details of business, belonging to both branches of the Profession (thanks, perhaps, to the first part of his legal education) was remarkably extensive and accurate. His apprehension of the evidence, as it was given, was very clear, and, until his infirmities began to appear, his notes (rapidly taken) full and satisfactory; though, for

some cause or other, he chose a little duodecimo volume, in which nobody but himself could have written at all. In one particular, requiring no ordinary grasp and comprehension of mind, he was never surpassed: Written documents, generally, — including deeds of any length and complexity, —were explained by him, and their peculiar bearings pointed out to the jury in a manner the most luminous and intelligible. For this cause, or, perhaps, from his high estimate of the value of written evidence, he always seemed to feel, and often expressed great satisfaction, when the parties had fixed themselves by indelible black and white.

In his management of parol testimony he was not always equally successful, —and that, not from any want of apprehension or sagacity, but owing to the goodness of his own disposition, and his too favourable opinion of human nature. Fully sensible of the most pernicious tendency of perjury (as, indeed, who is not?) and the heinousness of the offence, he was, and probably for that reason, somewhat sceptical as to the frequency of its existence, which, from sad experience, we know to be too certain. When contradictions were staring each other in the face, he would sometimes torture his faculties in an attempt to reconcile them; and in so doing, would have recourse to suppositions sufficiently arbitrary and far-fetched, when the simple solution, that one or both of the contending parties were "bearing false witness," would have been nearer the truth.

In the conduct of criminal business, Sir J. Bayley was above all praise. The "suaviter in modo" was never put in practice more uniformly or successfully. If he had studied, (as perhaps he had,) the wise and dignified remarks of Don Quixote to the supposed governor of Barataria, when about to enter upon his office, ever so attentively, he could not have acquitted himself better. The unhappy culprit could not but feel that he was treated, not only with fairness, but indulgence. The story, a thousand times repeated, and as often disbelieved, that the stolen property was found in a ditch by the highway, or in a footpath over a field, was listened to without any symptoms being betrayed of that entire incredulity, with which the narrative was attended. The result, as to conviction and a penal example, was, of course,

precisely the same, whilst the effect produced upon those who were witnesses of such demeanour, was to increase and fix their attachment to the laws of their country. Sir J. Bayley, though of a tender and kindly nature, did not shrink, when the occasion required it, from the performance of that stern and awful duty which necessity imposed upon him: it has been said, however, that he would sometimes retire to his chamber; there, by prayer and supplication, to bring himself to a state of due humiliation, when about to exercise the tremendous power entrusted to him over the life of a fellow-creature.

We have adverted to the beneficial effect which the judicial conduct of Sir J. Bayley was calculated to produce. We consider it, however, as an instance only (though a favourable one undoubtedly) of what is continually going on, in a greater or less degree, from the same cause. In no respect does the working of the constitution appear in so favourable and attractive a shape as in the administration of justice, and especially that part of it which, at certain intervals, circulates throughout the country. In other respects the great body of the people do not see much to approve of or admire. Certain apartments in Downing Street, and even the occupants of them, of whatever party (for with that we do not meddle) excite little interest or attachment. The periodic time of the tax-gatherer has no charms; and even the pomp and parade with which Majesty is occasionally exhibited, dazzle but for an hour, leaving, perhaps, some sore and half-angry feeling occasioned by the inequality of human condition, which accident and not merit has produced. The very immunities and privileges, which, by those who reflect justly, are recognized as the indicants and accompaniments of good government, are in their nature negative; the absence of vexation and oppression. Men who have been long in the enjoyment of this habitual freedom, no more think of inquiring into the causes of it, than they do of examining the component parts of the air they breathe; they soon fall into the lazy and inconsiderate enjoyment of undisturbed possession.

But with the administration of justice it is otherwise. Though recurring at stated and not distant periods there is enough of novelty to create an immediate though temporary

interest, and to excite attention; and if the agents employed on these occasions are enabled to produce a favourable opinion of their conduct throughout the country, they are at the same time conferring a lasting benefit upon the government which they represent in one most important particular. There were persons who affirmed at the time that the acquittal of Tooke and Hardy saved this country from revolution. We do not say that the circuits of the judges create an attachment to the constitution of their country, but, assuredly, they increase it. We are not indiscriminate panegyrists of the judges, nor do we mean to insinuate that they all deserve the encomiums bestowed upon Sir J. Bayley. In natural abilities,—in legal and other acquirements so necessary,—in manner, temper, and demeanour they must differ: — how should it be otherwise? But they have one common and prevailing recommendation; one never-failing passport to the respect and esteem of the country,—a firm belief of, and confidence in their fairness and impartiality, and that, if any be committed, they are errors of inadvertence and not of design.

If these observations upon the general estimation of the judges and their services be well founded, a slight — to say no more — with which the whole body was recently treated, must occasion some surprise, if not regret. We allude to the rank conferred upon the two additional Vice-Chancellors; and in these remarks we are, of course, to be understood as intending nothing uncourteous to the very eminent and respectable individuals who were appointed, and who could have no concern in the transaction. But the office! — an office which, until tried, could have no peculiar claim to distinction, but possibly might earn it, — an office of somewhat doubtful expediency and precarious existence, — an office with no prejudice in its favour, but, on the contrary, connected with the most unpopular of all our civil institutions! Unceremoniously to lift the new possessors of this office of yesterday over the heads of the old established magistracy, "the judges of the land," their seniors in standing, — the judges entrusted with the administration of the Common Law, the favourite of the people of England, — the judges, who, by virtue of the Queen's Commission, with which they are sent out, actually take precedence of every

subject of the realm, does seem to have been a step which, unless called for by some inevitable necessity, was inconsiderate and improper.

We cannot conclude this article without making some remarks, addressed especially to those who are entering upon the profession of the Law. The career of Sir J. Bayley must, of course, be considered as successful. It is true that he probably felt a certain degree of mortification when Lord Tenterden, then a junior judge of the King's Bench (by a precedent, without reference to him, of a very questionable tendency) was raised over him, to the Chief Justiceship of that Court; and some also, perhaps in a less degree and certainly with less reason, when Lord Lyndhurst was created Lord Chief Baron, he (Sir J. Bayley) then being the senior judge of the Exchequer. Yet his was a case of success obtained by industry and perseverance, in his instance not tardily rewarded; — we say by industry, for he was not distinguished by any marked superiority of powers of speech, which, other things being equal or nearly so, must necessarily lead (and what wonder?) to reputation and ascendancy. There was in him nothing like distressing superiority to depress and discourage, but every thing to encourage hope and animate exertion. "Go and do likewise," may well be said, without any violence to probability, to every young man of fair abilities and resolute application. Instances there are, undoubtedly, unfortunate instances of failure; most of the cases, however, we suspect, admitting of some particular explanation and solution. As a general rule we affirm, as the result of much observation, that a fair share of attention and attainment does, in the Law, with reference to other professions and employments, produce a reasonable return and compensation. Be it, however, that success is uncertain and the pursuit difficult! what is there excellent of which the same thing may not be said? — what science or art worth knowing that can *easily* be acquired? — what pursuit, in short, by which men can make "sui memores alios," except upon the condition attached to it by the philosophical poet, "*merendo?*" Let not our youthful readers deceive themselves: there is no royal road to distinction. Superiority

cannot be begged or borrowed; it must be earned. And if men have been found of that "clear spirit" which can "scorn delights, and live laborious days," with no expectation of present honour or advantage, but fed by the reversionary hope of a splendid immortality; — how much more may exertion be expected, when the prize to be contended for is not dimly seen in obscure, because distant, perspective, but is set directly before the aspirant, and, as it were, within his grasp?

ART. X. THE LEGAL BUDGET.

Inequality of Taxation among Suitors, and Improvidence of its Collection.

The suitors at law and in equity are taxed to the judicial exchequer for the mere support of those establishments to the enormous extent of from 300,000*l.* to 400,000*l.* a-year. But in assessing this tax every recognised principle of public taxation is set at nought; and in collecting it there is an utter absence of all arrangement to secure the transmission of the money raised into the judicial or public purse: 300,000*l.* or 400,000*l.* a-year (there is no one who can by possibility know the precise amount) is assessed upon the suitors (that is to say, upon the *subjects* of the judicial empire), upon principles utterly abhorrent to all our first ideas of justice; and this enormous sum of money (and how much more is a mere matter of conjecture) is then collected by about 200 fee-bailiffs, and the 300,000*l.* or thereabouts is received from them in full for their receipts, without the slightest pretence of checking their accounts, and, as to two-thirds of them, without even requiring any affidavit or averment of the correctness of the amount. Thus recklessly is our poor suitor dealt with! He not only has to pay, when he ought not to pay, to maintain the public judicial establishments, that from them he may get, by means of complicated, conflicting, and defective systems of procedure, the justice which the public interest in his person requires; but what he does pay is extorted from him on the most confessedly unjust principle of taxation ever yet invented — by a poll-tax; and when it is extorted, finds its way into the judicial exchequer, just so far as the conscience or the prudence of 200 uncontrolled fee-takers may determine, no small sum doubtless staying somewhere by the way.

It is not our intention in this article to attempt to point out at length the cure for this disgraceful state of things. This can only be done by a more public and extensive in-

vestigation of the subject than any private individual can give. We shall merely here attempt to detail the leading facts as they now exist, and also to state what we conceive are some of the governing principles which should be held in view by Parliament, or rather by the Judges, who, as to this matter, are the real legislators in legislating on this very important matter.

Let us remark, before going farther, that not only is immediate regulation of the public judicial fee-system imperatively due to the direct pecuniary interest of the suitor, as well as to the position and influence of the judicial institutions (which must be greatly impaired by every suspected dishonesty in the offices of justice); but also that such legal reform, as those we are now proposing are precisely the reforms which are all gain to the suitor. Unlike the rules and orders as to pleadings and practice which have as yet been almost the only fruit of the public demand for reform in legal procedure, such regulations as we are advocating cost the suitor absolutely nothing in carrying them into practice. Not so with our rules. A great outcry is made against some or other obstructive regulation in pleading or practice. Acting as legislator, the judge makes a rule to remedy it. He reduces the rule into writing, promulgates it, and has it enrolled on the solemn records of the Court. Here he lays down his legislative power. The rule has next to be interpreted by him in his judicial capacity. He does this as if it were an Act of Parliament, which he had not seen before; an order from some power superior to himself and to his own sense of justice. Its generalities have now to be applied to some individual occurring case. The judge, though he himself made the rule, conceives it right to suppose himself utterly ignorant of its object. He looks at it with great reverence, possibly with some superstition. It is no longer a formula subservient to the immediate ends of justice, and by the use of which he is to do justice. Justice now, on the other hand, must subserve to the rule, and is to be done, so far as done, "according to the rules of the Court." The records of the Court must be kept pure. The judge's own creation has grown at once into his master. The thing of form has become a thing of substance. His own form of words has become a very monster,

and he, the judicial Frankenstein, stands aghast at it. If he be an Equity Judge he puts on his judicial robes to it, and requires counsel, two at least, to be briefed and *feed*, and solemnly to argue what this *his* rule can mean. He listens with all the gravity of his high office. The grammar and construction are profoundly discussed and weighed. And, after due debate and deliberation, he proceeds to pronounce, with judicial state, what his own legislative meaning must be taken to have been. By this meaning, so weighed, discussed, and probably qualified or distorted, and by it only, can he in future allow himself to act. The intended blessing has possibly by this become an added curse to the suitor. The distortion has become a new grievance, which in time grows so great as to call out a new legislative rule, and this again is a new shackle, and has to be re-argued and re-distorted perhaps just as the first was.

This is the course, more especially in Equity (for our Common Law Judges are less formal, less expensive, and bolder), of our pleading and practice reforms. But then, all this ceremony has to be paid for, and that by the bewildered suitor. And the ceremony is very dear, so dear, that it is well known that the late Mr. Jacob used to say, "every line in Lord Redesdale's book had cost 1000*l.*;" the cost, that is to say, of the ceremonies, (of the recorded ceremonies, that is,) is 1000*l.* for each line of their history.

A better assessment of fees, on the other hand — the abolition, for instance, of the poll-tax principle, now universal in our system of judicial imposts, or some scheme of checks in the money-takers' accounts, — wants no written formula (or rule of court) to embody it — no solemn debate to interpret it — no unvarying deference to be paid to it — will not, in short, cost one farthing. But such reform will widely extend legal protection to the poor, economise the suitor's money, improve the officer's character, save the officer's time, enable the judges and the public to get most important statistical information, greatly tend to simplify the practice, and yet, as we have said, not cost a single farthing to the suitor, either poor or rich.

To attempt to carry out the larger and truer reform of making the public pay for the whole of its judicial police,

(which we have already glanced at[1],) would be, no doubt, to encounter the overwhelming opposition of a Chancellor of the Exchequer, backed, probably, by nearly an entire House of Commons; but to the lesser, and yet invaluable improvement of better fiscal arrangements, we should find no external opposition whatever. As to it, we have nothing but our own ignorance, indifference, and *vis inertiæ*, to overcome. We do not want even the legislative sanction. The Judges, at least in Equity, have already legislative powers deputed to them. But even Judges, when they are to act as legislators, must have some concurrence of external opinion, and some pressure from without. Let but the law reformers of the day speak out on the subject, and there can be no doubt that they will find the judges fully disposed to effect the amendments desired. The abject position of the injured parties appeals to us also. The public at large can meet in knots throughout the empire to discuss its affairs, and can detail them in petitions to *its* legislature. But how are the suitors to know or represent the sad grinding grievances by which they are oppressed?

But in our anxiety to speak out and earnestly, we are somewhat forestalling the proper order in which our subject should be presented; and must, therefore, risk some recapitulation in what we have yet to say.

If the public will not pay for judicial establishments, the Legislature (whether that Legislature be *pro hac* the Parliament or the Judges of Westminster Hall) should, at least, take care —

1st. That the suitors are taxed fairly as between rich and poor; the rich suitor paying in some proportion to the amount at stake.

2d. That the taxes are imposed in the best way.

3d. That all the money taken goes to its object, and that there should be no leakage in the conduit pipes.

We have already stated that none of these objects has yet received any systematic legislative attention.[2] We need

[1] See antè, p. 314. We shall speedily return to the subject.

[2] We are quite sure that this statement is altogether inapplicable, as regards the private individual attention which the Judges of the different Courts have bestowed on these matters. Of course the public can have no means of know-

hardly add that they are all of them farther from being effected than can well be conceived.

We have also stated that the present position of our judicial fiscal arrangements is altogether owing to the system which, until the present day, has pervaded all our Courts — of treating justice as a thing to be sold, and official fees as a matter of private personal right and property. To a great extent, this barbarous system is done away with, but much remains still to be done. The Duke of Grafton, for instance, we believe, in the character of the Sealer of Writs, is still entitled to exact, and continues to exact, a fee from every person who has to seek the assistance of the Courts, either of Queen's Bench or Common Pleas, for the recovery of any, the most trumpery, civil right. He renders in this capacity no useful service whatever to either suitor or judge. He is a pure janitor of the Courts — a taker of toll from every suitor who walks into them. Though no service is done by him, an income of probably, at least, 2000*l.* a year is levied by him.[1] There are still existing many other cases of fees taken by the officer for his own use. The Judges, both at Law and in Equity, unfortunately have still permitted their own personal officers (secretaries, &c.), to continue to be fee-taking officers. The marshals and associates of the Judges, and other fee-takers at *nisi prius*, for instance, still receive head-money from plaintiffs, amounting to above 4*l.* on each trial, a very serious tax indeed on actions for small debts.

There is also a newly-created fee, which belongs to this class of tax, and is, in many respects, one of the most objectionable specimens of them — i. e. the copy money in the equity master's offices. The under-clerks are allowed to take to their own use 1½*d.* for folios of 90 words for any copies

ing what this may be, or how extensive may be the remedies likely to follow. We hope much that they will be large and not long deferred. We regret to say that not less than five years have now elapsed since the second and third of these heads were brought clearly before the public in a pamphlet which had the fortune to receive a good deal of attention; and that, notwithstanding, nothing has yet been *done* to remedy the abuses in question.

[1] We may be in error in this sum. There are no returns that we know of showing his emoluments from this source. He gets 10,584*l.* a-year out of the excise and post-office; but his receipts as a judicial officer are not included in the very imperfect return printed June, 1844, on Mr. Williams's motion.

made in those offices. Without alluding to any thing now going on, it will be enough to say that their power of affording facilities to the solicitors has too often enabled them to get copies bespoken and paid for, which are not only not wanted, but are never, in fact, made; and the common interest which they and the solicitors have (the emoluments of both being almost altogether dependent on the length of the documents taken into the office) in counting forty, fifty, or sixty words as ninety, coupled with the absence of all check on their doings in this respect, can hardly be supposed to have tended to improve the honesty of either solicitor or under-clerk, or to keep up that public respect for the purity of the *officina* of justice which it is so desirable for the moral tone of the community should be maintained.[1]

This system of remunerating the officers by personal fees, taken and kept by themselves, is also very objectionable on other grounds. It leads to the continuance of forms and ceremonies which are useless, and therefore are sources of impediments and expence. The continuance of orders of course we believe to be of this kind. Any order which a party is entitled to *of course*, i. e. upon his own allegation, unsupported by evidence, without notice to the adversary or discretion by the judge (*e. g.* orders for plaintiff to be at liberty to amend his bill, to set down a demurrer, and so forth,) is indisputably needless and mischievous. We are unable to conceive an argument in favour of orders of course, — we have never heard the semblance of one attempted to be offered. But there is a very large number of these drawn up every year, and very large sums of money taken to remunerate the officer, of which, we believe, no public account whatever has hitherto appeared. The various changes in practice during the last twelve or thirteen years must very materially have increased the fees received under this head by these fee-remunerated officers. If these officers had not been allowed to take these fees to their own use, we cannot imagine that an absurdity so amazing as that of orders of course could have been continued to the present time. They must have found out that they were writing a great many

[1] This may not be the case in all the Masters' offices; but it has existed in some, and *may* exist in any, which is sufficient to warrant our statement.

words with no corresponding benefit. This remark is by no means in depreciation of the high characters of the officers alluded to. We have, on the contrary, selected this particular instance because these officers are under the peculiar control of a judge unquestionably of the most minutely scrupulous integrity, and who has sedulously devoted himself to the investigation of all matters of this kind. The officers themselves are altogether such as would be expected from the selection of such a judge. How is it, then, that orders of course are continued? Must we not attribute it to the well-known effect of personal interest in blinding men's judgment as to matters in which the public need is opposed to that interest? Except for some such ground of obstructed vision, would it not before this have been found that the official trouble of drawing up some, at least, of these *pro formas* might have been dispensed with? At any rate, it is certainly scarcely right that when a great principle, like that of substituting salaries for fees, has been adopted and carried almost entirely through our judicial establishment, the old system should be still continued in favour of those few officers (and we may almost say of those only) who are the personal attendants of the judges. Ill remarks, very ill deserved, have, they may be sure, been largely the consequence. Their ears are the last such would reach. The total extinction of these and of all other remnants of the old system should, any way, precede any effective improvement in the mode of levying fees to the judicial exchequer. Splendid salaries for them would, in our minds, be far less objectionable than the merest pittance taken by them in the shape of fees.

The change of paying by salaries instead of fees may be said to have originated in the Report of the Committee of the House of Commons in 1833, which reported in favour of this scheme as an important "experiment." Since that time there have been abolished in the Equity Courts offices which received fees to the officers' own use to the amount of about 80,000*l.* a-year, and in the Common Law Courts to about the same amount. Besides these abolitions, a large number of officers have been put on a salary footing, instead of remaining upon a fee remuneration.[1]

[1] And see antè, p. 308.

Unfortunately, however, on the abolition or change of all these various offices, nearly all the old fees were kept up almost exactly the same in number and amount as before; and the officer who, up to that time, had received such fees for his own use and put them into his own pocket, or some substituted officer, was ordered for the future to continue to receive them and to account for them to the judicial exchequer. But, as we have already stated, that to secure a better system of judicial taxation for the future, we have, first, to take care that the suitors are fairly taxed as between rich suitor and poor. At present we are doing to the suitor what was successfully resisted when attempted to be done even to such a public as there was as long ago as Jack Cade's time. A poor man has to file a bill to obtain payment of a 100*l.* legacy. A rich man has to file one to obtain a 100,000*l.* legacy. Each pays exactly the same fee, of the same amount, in every stage. There is 5*s.* 6*d.* charged to each on issuing a subpœna; 1*l.* to each on filing his bill: each bill is probably of the same length: each is compelled to take an office copy of the answers, whether he wants it or not: each pays the same price per folio for such copy. The interlocutory orders for payment into court, production, &c. cost each the same — altogether, 20*l.* or 30*l.* a-piece — each has to pay the same fee of 3*l.* 10*s.* for his decree. When in the Masters' Office the rich man pays no more for his warrants or reports than the poor, though the matters he is dealing with there are respecting hundreds and thousands of pounds, while the poor man is dealing only with shillings and pence. So the thing goes on to the end. True enough is the old saying that "Chancery is the cheapest steward for a large estate while it devours the whole of a small one." Now this is a palpable and most enormous injustice. Name it, and it is a disgrace to all who do not forthwith attempt to remedy it.[1]

[1] While the tax is of like amount to poor as to rich, see what the benefits to the rich are in one item alone. Sales by auction under an order in Chancery are exempt from duty. On a large estate this drawback or bonus from the public to the suitor is of so large a sum of money that the whole administration of an estate is often paid for by the public in this way, and a rich estate gets all the benefit of a sale through the Court of Chancery, and comes out richer than it went in, by the overplus of the auction duty beyond the costs.

Even where there is no auction the amount paid to the judicial exchequer on

The principle of distinguishing between rich and poor suits has to some extent been, for a few years past, acted upon at Common Law. In all actions for debts not exceeding 20*l.*, a scale of charges affecting chiefly the attorney's fees, but also, to a small extent, the fiscal impost, was established by rule of Court H. T. 4 W. 4. The principle of justice to the poor man for which we are contending does, indeed, as we are well aware, require also an extensive modification of our present fixed and peremptory scale of professional remuneration. The important question, however, of "How should the Lawyers be paid?"[1] would not be properly entered into by us on this occasion.

So long as a public tax is imposed on the suitor in Equity, we should be careful to levy it as far as possible upon the administration business. In our opinion it would be never right to except this class of business from taxation. In doing such business the Court is acting merely as steward or trustee for individuals. It would be a great advantage if a very large portion, if not the whole, of the judicial budget were now to be raised from these suits. But so far from this being the case, we believe we are correct in saying that the administration business is, to some extent, really done at the expense of the judicial business. The Lunacy branch is purely administrative; but, as far as we can understand a paper laid on the table of the House of Lords by the Chancellor on the 19th of February, 1844, we have no doubt that the poor litigants of the other part of the Court of Chancery are com-

a rich estate is absurdly small. A suit was instituted a few years ago to administer the estate of a very eminent functionary of the Court of Chancery. There was no question of a litigatory nature. A sum of nearly 200,000*l.* was paid into the Accountant-General's hands; and orders were obtained, under which the Accountant-General will act as trustee of this large sum for a long period of years, and pay away, from half year to half year, the income among all the tenants for life, and the whole cost of this suit was under 200*l.* The sums actually paid to the Court for the most important stewardship services rendered formed items in this 200*l.*, and probably, altogether, were not more than 20*l.* or 30*l.* So for such a sum as 20*l.* or 30*l.* paid to its fiscal fund, the Court actually manages 200,000*l.* for perhaps forty or fifty years, and performs all the trusts of the will.

[1] An interesting pamphlet under this title was published a few years ago at New York by Mr. Sedgwick, on a sort of repudiation scheme, aimed at legal emoluments, being broached in the legislature of that State.

pelled in part to support that branch of the Court, and that the lunacy estates are not taxed high enough to pay for their own administration. Now seeing that the claim upon these lunacy estates is so just, and that, in the main, they are very rich, if the fact be as we have surmised, the chancery litigants are very unfairly treated.

The Lunatic Visitors' Office affords a correct example of the mode in which a tax should be levied on administration suitors. Every chancery lunatic is visited by one of these medical official visitors at least once a year, in whatever part of the kingdom he is resident; and a most invaluable arrangement this is; but the cost of these visits and of the visitors' secretary, &c., instead of being paid for by the lunatics' estates per job or per mile, is paid for by a per centage of one per cent on the income of each lunatic estate paid annually by the committee. This per centage, we conceive, should be raised to a sufficient amount to produce enough to pay the whole lunacy establishment and compensation and perhaps a proportion of the cost of the Chancery court, and all the other numerous fees levied on suitors in lunacy should be abolished. The plan of putting a tax on every step leads to a needless multiplication of steps. The officers often force the suitor to go through certain forms, to take copies not wanted, &c. to protect the fee fund. But, by these steps, there are often further costs incurred to the solicitor, and delay is occasioned. Thus the tax by steps becomes a tax doubled perhaps in amount when the suitor pays it. This compulsory system is practised in some parts of the Court of Chancery, and not in others, but we believe is not used at all in the courts of law. The tax by steps has another evil effect. The due conduct of a suit is often injured, where we have an option of avoiding the tax, by its leading us to refuse to take copies, &c. otherwise desirable, *merely* that we *may* avoid the tax. While writing this article, we have had placed before us, fresh from the office of the Master in Chancery, an office copy of an affidavit of executors' receipts and payments which has cost 20*l.* 13*s.* 4*d.* Now there are several parties interested in investigating these accounts, and each should take a separate copy of this document. To avoid the payment of this large tax, some of them will probably shift as they can

without it, to the detriment however, in other respects, of their client's interest. Thus it is that this constant recurrence of toll-bar and tax on our way, embarrasses every step we take in the conduct of suits, and involves with perpetual irrelevances that question which should be the single element of consideration, "Which is the nearest and smoothest way to the end of the suit?" The case we have to make is really almost a counterpart of the *Rebecca* one, except that our turnpikes stand on a most labyrinthine road.

If, by way of substitution for all the taxes now levied, an annual tax could be levied on suits according to the amount or value (on the principle on which a per centage is levied in lunatics' estates), we conceive that a vast improvement and one telling to a degree beyond expectation on the whole practice of the Courts, would be effected. And we think that such a scheme as this would not be found so difficult as at first sight might be supposed. The machinery of the Accountant-General's Office would afford great facilities. The accounts of receivers and trustees in the Master's Office would also give great assistance. What the Stamp Office does for its revenue can surely be also done by the Court for the revenue the Court requires. Indeed we can admit no excuse of that sort. The difficulty of assessing a poundage, and of doing it with perfect justice, may be great; but are we for this to be content to go on doing nothing, after the utter shamelessness of our present way? We are bound, as honest men, to determine, that there shall be *at once* some very extensive change, and that the poor man shall contribute only according to his stake. Any difficulty must be overcome which stands in the way of so sacred a duty.

If some such plan as we have suggested for securing a fair taxation as between rich and poor should be adopted, our second head of consideration will have been disposed of. In raising a tax on suitors, we are bound to consider the convenience of the suitor in the mode of levying. Now, so far from this having been the basis of our judicial tariff, the basis was the old fees payable to the old abolished officers. They were a matter of property, and were established when the suitor had no right to have his conveniences or wishes consulted. The Registrar in Chancery, for instance, had his own

fee for minutes, he and his clerk another (divided in some way, we fancy, between them) for the order; the clerk his for the office copy, and the entering registrar his, for entry. But now, to continue this system of fees for one undivided instrument — to make a suitor pay at three or four separate times, by three or four separate dribblets, for one single indivisible document, when all the sums are alike received on account of the judicial exchequer, is abundantly absurd.

The third point to be attended to in levying any tax is, of course, to take care that all money collected really goes into the judicial exchequer. This is only provided for in the Equity Courts by requiring certain officers to make an affidavit, from month to month, that they are paying in a true balance. But in Equity there are about 105 or 110 individuals, officers or subordinates, who actually take cash from the suitors, while only about forty of these undergo the paltry ordeal by which alone their faithful accounting for their stewardship is now professed to be secured. The other officers or subordinates account, or should account, and in some way or to some extent, to these forty. But how far this sub-accounting does take place, and under what securities as to accuracy, no one knows. There is no legal provision for it — no check whatever.

Now, let us suppose some subordinate officer with a place known to produce him 600*l.* to 700*l.* a-year; that he is known to keep his carriage; that he has a wife, and, perhaps, other not creditable sources of expenditure besides; that, in respect of his office, he contributes to the suitors' fund a sum so small that it is the public remark of the practitioners; that there are, perhaps, parliamentary returns showing a proportionably large quantity of business to be transacted in it; that this man dies; that the same office, under his successor, immediately contributes double to the suitors' fund; and that it turn out, that (with all the personal expenditure our subordinate indulged in) he left behind him a large property; — would such a case be investigated on behalf of the public or the Court? Certainly not. This case must be looked on as imaginary. To deal in personal accusations would be very foreign to the object we have in view; but we must, notwithstanding, protest against its being assumed that

such a supposition as we have now been putting *may* not be founded in fact. Let there be some effective system of fiscal control put in operation, and we are confident it will soon appear that there was most ample reason for the change.

But we have passed by the Common Law Courts. Here we have about 100 more fee-takers, taking for the public use (for this money goes in great part into the *public* exchequer) about 150,000*l.* a-year. What check is there on them? Positively none whatever. Money brought is taken by the Treasury without question. Audit of accounts is undreamt of.

That there should be either a public receiver of fees, or some law fee stamp, as in Ireland, to secure the faithful transmission of all fees taken to the judicial exchequer, admits of no question. The character of the Court and its officers, and the pecuniary interest of the suitor also require it. If the present shameful poll-tax system is to be continued, and the poor suitor is still to pay as much of the unjust burthen as the rich one, then the Irish plan is, we think, the best; but if any more equitable principle of assessment is to be made, and suits are to pay in proportion to the property at stake, then of course the plan of a law fee stamp will not do, and there must be some well devised system established of a receiver of fees, and accurate accounts duly audited.

The Irish mode of collection is grounded on the 1 & 2 Geo. 4. c. 112. Stamps denominated Law Fund Stamps, are furnished from the Stamp Office to proper officers as retailers or distributors; and by means of these stamps of course the receipt by the public of the whole tax paid by the suitor is secured. It would appear that the officers themselves, till lately, had been allowed to sell these stamps, and that evils had arisen probably similar to those arising from the copy money charge in the offices of the English Masters in Chancery, for by an Act of the last session (7 & 8 Vict. c. 107.) this was abolished.

If, however, any system of impost, fair as between suits for rich stakes and suits for poor ones is to be adopted, the plan of the Lunacy Per Centage Tax will, we conceive, be found to indicate the mode in which it is to be collected.

The Accountant-General's office will afford a ready machine for realising the greater part of it.

Any full investigation of this matter would lead to a minute inquiry, as to what fees are still allowed to be taken: for instance, why in the Court of Chancery the head registrar is still allowed to take a poundage of 5 per cent on all deposits paid to him.[1] Why the Accountant-General allows his clerks to take fees, and also allows the Stamp Office to pay them a fee on every legacy discharged through the Court of Chancery. Why the large fees to private use still taken at the Public office are continued; and why the judges' secretaries, &c. are still allowed to be remunerated by fees. The whole bankruptcy fee-taking system (which we have not even alluded to), with the diverse, and in many respects objectionable methods of paying the official assignee, would also have to be looked fully into.

We have felt it important to abstract from other branches the fiscal branch of procedure, and to submit it to detached examination, because the chief difficulty in the reform we are here contemplating, as indeed in most other amendments of legal practice, is that of perceiving evils in things to which we are habituated. Our state is by no means one of *clairvoyance.* The perpetual closeness to the eye of an abuse makes it to be utterly overlooked. Its hourly recurrence makes us callous to its enormity. The daily life, in truth, of a lawyer is so mixed up with the forms of legal procedure, that their defects in great measure actually become his own personal bad habits; and this of course he is the last to see.

At any rate the subject is one of urgent importance. We are sure our readers will agree with us that the present system of assessing and collecting fees of court is a most disgraceful system — based on a principle of the grossest injustice, and carried out with a reckless want of supervision quite marvellous. To effect the reform we now contend for, our Judges (our Equity Judges at least) possess the most

[1] Why this is done in the teeth of 3 & 4 W. 4. c. 94. s. 41., expressly prohibiting fees, except those mentioned, we cannot understand, though probably there is some loophole in the Act we have not been able to detect. It is not that we object to these fees in themselves, but only to them as exceptions, without adequate reason, to a salary remunerating system.

despotic power. Over the fees of court they are autocrats. All legislative powers have been deputed to them. And our readers will feel with us, that not the least surprising part of the matter is that a body of men such as that on the English bench, with integrity the admiration of the world, whose whole lives and energies are devoted to the furtherance of right, and whose ever-flowing stream of stern impartial justice is a very chief source of that spirit of honesty and fair dealing which pervades this community, should, at least apparently, have overlooked so abundant a field of oppression and fraud as the one under exploration — a field their own peculiar property — under their absolute power — lying at their very feet, and most easily cleansed.

ART. XI.— THE JUDICIAL SYSTEM OF FRANCE.

THE general principles of jurisprudence, and among these the principles which ought to govern the judicial establishments of any country, were treated of in our last Number. The practical application of these is of still more importance than their abstract statement. It is an old maxim of the Schoolmen, "*Nil theorica sine practica valet.*" We shall in this paper, therefore, consider some important parts of the French judicial system, with a view to ascertaining how far it is framed in accordance with the fundamental rules formerly propounded. This examination, while it will serve to point out defects and suggest amendments in the jurisprudence of our neighbours, may also tend to throw light upon the principles themselves. It is above all desirable that two great and refined nations, and such near neighbours as the English and the French should live on friendly terms, especially as their amity must be equally and mutually beneficial, and their enmity equally and mutually mischievous. But so far from any ill-feeling being engendered by a free discussion of each other's polity, there can no greater act of friendship be rendered than by each communicating its lights to the other; each will thus profit by the other's experience, and the improvement of both will be promoted. England may learn from France the great advantages of a well-regulated court of appeal, and of a provision for executing the laws by public prosecutors. France may learn from England the inestinable benefits of keeping separate the judicial and legislative functions, of remunerating judges more adequately and reducing their numbers, and generally, of removing all chances of political corruption from the neighbourhood of the Bench.

We begin with referring to the heads of our former paper on Jurisprudence, as containing the principles which are about to come in question, or rather those by which we are going to try the system of France. These are the 1st, 7th, 9th, and 10th[1], of the second head, or that relating to the construction of Judicial establishments. We there laid down three rules:

[1] Antè, p. 10, 11.

that the Judges should be as numerous as the Bar can well furnish of able men, and as the exigences of suitors require to avoid delay; that such ample salaries should be given as to secure the services of the best men; that no judge should be capable of holding any political office, or being directly or indirectly connected either with the Government or with the Legislature of the country. These principles are plainly necessary to secure the able and the honest exercise of the judicial office; and these principles govern the judicial system of England. But they do not govern the judicial system of France, and we are about to show three great deviations from these fundamental rules. The judges are too numerous and they are ill paid; they are not excluded from the legislature; they are not only not excluded from political interference, but are obliged to take, and do take as judges a political part.

1. The functions which with us in England are committed to thirty-five judges, (allowing ten Masters in Chancery, and all the other judges to be of the number,) are in France supposed to require nearly 3000. Now if it be said that our unpaid magistrates divide with the regular professional judges the office of criminal jurisdiction, we answer, that suppose one-third or even one-half the occupation of the 3000 judges in France to be criminal judicature, there would still be 1500 judges in civil causes; while if only a fifth part of the number of our thirty-five be criminal, there would remain but twenty-eight civil judges with us, and if twelve be added for bankruptcy, only forty in all. Then suppose the extent of the country to be double, we should have the number of French judges 750 in comparison of our 40 or 50. So that at the very lowest computation they have from fifteen to twenty times more civil judges than we have. But take the actual numbers, and add three regular judges for each county, (a much greater judicial force than all our justices at Sessions), we have to compare 3000 with 250, and suppose we consider the one country as double the other, with 500. This gives a difference of six to one.[1] But

[1] This is in fact understated. From subsequent information obtained from unexceptionable authority, we find there are 1200 Judges in 27 Cours Royales; in Cours de premier Instances, 4200; in all, 5400.

then the French have as many more juges de paix, from 3000 to 4000 in number, and the mayors of municipalities have some limited jurisdiction. So that they have at the very least twelve times as many judges as are at all needful well to administer the justice of the country.

Two most pernicious consequences follow, both struck at by the general principles to which we have referred — the first and the seventh. It is impossible for the Bar to furnish a sufficient supply of men well qualified for the judicial offices; and it is impossible for the State adequately to pay so many Judges. Hence an inferior race of men are placed in the situations most requiring learning, and talents, and integrity. The salaries of the French Judges are wholly inadequate to draw men of eminence from the Bar. Not more than 120*l.* to 160*l.* a-year are the incomes of Judges in the highest courts, the Cours Royales; from 60*l.* to 100*l.* in the Cours de premier Instance; the great tribunal of all, the Cour de Cassation at Paris has only salaries of 700*l.* or 800*l.* a-year. If it be possible to obtain for the latter sum the men most fit for the high office — which may be doubtful — it cannot be supposed possible to obtain Judges of the inferior courts, who decide, however, all causes civil and criminal in the first instance, for such pay as would hardly satisfy an inferior clerk in a merchant's house, or the engineer on a railway.

But then it is said that men take the office for its dignity, and that having some private fortune, it is worth their while to become Judges with the very small addition of their salary. The answer is, that this narrows the choice of the Government to such men as have a fortune of their own. Now it is certain, both that men the best qualified may have no fortune, and that men without any other qualification may have some land or some money of their own. That men who make 40,000 or 50,000 francs a-year should quit the Bar to become Judges at the pay of four or five is impossible. How much less such practitioners as gain 90,000 or 100,000 — and there are some who gain a good deal more — should retire upon a salary little more than nominal! The fact, accordingly, is, that you see the ablest, the most learned, the most experienced advocates in France conducting their

causes before Judges who never had any practice or who had lost all they ever gained. Can this give the Judge his proper weight, or keep the advocate under the fit restraint?

It is needless to add, that the question of salary and of numbers is one and the same. If so many judges are deemed necessary, neither France nor any other country can afford to give them adequate emoluments.

2. The French Judges are allowed to sit in the Chamber of Deputies, to which they are elected by the people. There is nothing to prevent a judge from being the representative of the district over which he judicially presides. He is of course, if a candidate for that representation, at liberty to canvass the votes of those whose causes he is daily determining, nay, on whose offences he is daily pronouncing sentence of acquittal or of condemnation. That the very worst abuses must arise from hence, who can for a moment doubt? Accordingly we have been informed, and we could name the district, that the friends of a judge, candidate for the representation, used one very powerful argument with the voters: "If you choose to vote against the president, well: but then you had better have no law-suits before him hereafter." Can any kind of corruption be more scandalous? It is an intimidation of the elector operated by a threat that for election purposes the sacred office of the Judge will be made an instrument of corrupt revenge, because a man under his jurisdiction has honestly done his duty. But though such cases may be rare, the constant and unfailing effect of the system is to undermine the judicial character. The Judge becomes a politician; he sides with a party; he is either a ministerial supporter, or an opposition member, or a neutral belonging to a third party just as much under the influence of factious views as either of the regular bands. How can such a man possess his mind equally in causes between men of opposite parties; above all, how can he hold the balance equal between the Government and the people? The eager desire to be in the Chamber, especially when parties stand evenly balanced, has its meaning in France as in England; the representation of the people is the road to reach the favour of the Court. The number of places held by deputies is considerable. The places held by the relatives of deputies are

numberless. Shall it be said that a judge is best employed in voting himself into a higher judicial station, or in voting his connections into lucrative employments; in obtaining for this man, or even this woman, a country post-office; for that other a *débit de tabac;* for a third a berth in the *Douanes;* for a fourth a comfortable situation in the Prefecture? Surely this is not the right occupation for a judge, whatever be his own salary; but for a judge who has hardly any salary at all, it is such an occupation as cannot fail to raise temptations which in many an instance will find judicial integrity too feeble to resist them.

It is remarkable how uniformly our English Legislature has proceeded in the right direction of excluding Judges from seats in the lower house of Parliament. As often as a new judicial office is created, the Act creating it excludes its holder from the House of Commons. So it was with all the three Vice-Chancellors' places; so it was with all the new Commissioners of Bankruptcy. Then when a salary was given to the Admiralty Judge instead of fees, he was excluded from Parliament; and the Masters in Chancery can now no longer sit there.[1] There are but two Judges who can now sit in the House of Commons, the Dean of the Arches and the Master of the Rolls. The House of Lords, being a judicial body, stands upon a wholly different footing; but the Law Lords actually upon the Bench, who are Peers, deem it incumbent on them to abstain generally from taking an active part in political debate, and to keep themselves aloof from all party intrigues.

3. There is a further and a greater vice in the French judicial system; and how it can be submitted to either by the statesmen or the people of that great and enlightened country does appear astonishing. In all the proceedings connected with the transfer of property and with litigation respecting it, there are certain public notices required to be given for perfecting the rights of parties; and the publication must be in the newspapers which circulate within the district. Now it is not optional to the party in what paper his judicial advertisement (*annonces judiciaires*) shall be inserted. Certain papers are pointed out, and in these the insertion must be made. There may be some reason for not allowing a party

[1] This last exclusion is, we conceive, by no means clear. — Ed.

to choose, in case he might prefer a paper of small circulation. But in whom is the power of naming the paper vested? Not in the Stamp Office, according to the amount of circulation which different papers have; that would be a safe, and a rational, and an honest course of proceeding, because the object being to give the advertisement publicity, the paper should be preferred which has most circulation. Nor is the choice left with the Prefect as representing the Government; that would be liable to great abuses, but still it would only tend to influence the press and would not corrupt the Bench. But the choice is left to the Supreme Court of each district, through whom the Government endeavours, and with infallible success, to influence the press. For, observe, a paper being once named is not secure beyond one year: December in each year is the time fixed by law, (*Code de Procedure Civile, L.* 697.).[1] In the course of the first fifteen days of that month each Cour Royale, and there are twenty-seven, is required, on the representation of the Cour de premier Instance and on the written statement of the Procureur-General, representing the Crown, to name a paper or papers for the insertion of all judicial advertisements (*annonces judiciaires*), and to fix the rate of payment for each insertion. The privilege thus conveyed to each paper endures for one year only. The renewal or the cessation of it is in the limit of the Court, with the aid and advice of the Government, at the end of that time.

Now the importance of this privilege is very great to provincial journals. The papers in Paris which sell so many thousands are beyond the reach, it may be supposed, of the influence thus curiously devised to guide the lesser papers. In the provinces that influence must needs be all-powerful; for very many of the country papers are unable to support themselves without the constant supplies which the *annonces judiciaires* secure to them. Hence the conduct of these papers is sure to be influenced by this machinery; and we do not imagine that any means of ruling the press ever was devised of a more exceptionable character. It needs not many words to prove that, how bad soever may be the plan of thus cor-

[1] The date of this law is very recent. We are sorry to say it appears to be a law passed during the present virtuous and able administration, (June 2. 1841). But it may have existed previously in another form.

rupting the papers, the device of making the Judges themselves the instruments of the corruption is incomparably worse. The case, we should think, needs only to be stated in order to expose its revolting aspect and hateful colours. How it has so long escaped the censures of different parties in the legislature we can hardly understand. The opponents of the Government seem to prefer making play with the worst passions of the mob and the army; to prefer crying out against England and in favour of war; to clamour in behalf of slave-trades, and against all attempts at putting it down. Any approach to liberal views and virtuous principles appears to be a matter of no interest with any of them.

It is remarkable enough that though we certainly have nothing of this kind in our ordinary judicial system, one kind of tribunal is brought very much in contact with an influence of the same kind, only rather more corrupt. The great publishers, with us, are great patrons to newspapers by the number of advertisements which they insert in the newspapers. Now these *affiches littéraires* are, as we happen to have heard, made the means of influencing newspaper proprietors in their accounts of works. They are withdrawn, or a hint of withdrawing is conveyed to the owners of the papers. It is probably this machinery that makes the criticisms which we see in their extracts of intelligence upon new books, generally speaking, exceedingly favourable. They who are under the influence of the *annonces littéraires*, with us, care as little to exercise their freedom of discussion on authors, as their brethren, under the influence of the *annonces judiciaires* in France, do to speak out upon ministers and judges.

A book, or large pamphlet, has lately made its appearance in this country, where the truth of its statements could not be tried, rather than in France, where they might have been refuted and exposed. It is entitled *France, her Government, and its Administration.* It contains from the first page to the last a bitter, an unreasoned, and an undistinguishing assault upon the whole conduct of French affairs, and upon the character both for capacity and for integrity of all the public men of every party to whom either now or formerly it has ever been entrusted. The whole system is represented, and in detail, as one of the vilest corruption, facts being dis-

torted, or exaggerated, or fabricated, when wanted to serve the purpose of the general and indiscriminate attack upon all persons and all things. In declaring against the use of influence by the Government, not the least regard is ever had to the similar means adopted by all administrations in every country for retaining their power; and to read the expression of virtuous indignation which break forth at each turn against the giving places to the friends of peers or deputies, one would think that in England, pure from all stain, no such thing had ever been heard of as a member of either House obtaining a place for a connexion, or a voter; that our Customs, Excise, Stamps, Post Office, were filled with persons recommended by their strong merits alone, and that all Downing Street and Whitehall, overflowing with generous zeal, burning with patriotic fire, was solely occupied with search after the brightest talents and purest virtue, wherewithal to fill each department of the Navy, Admiralty, Horse Guards, Ordnance, at home, and to send forth upon every foreign mission, not the nobles of the land and their sons, but the men most thoroughly qualified by capacity and by conduct to represent the nation in foreign courts.

Nor is the attack confined to the present system. The men of most spotless purity in their public conduct are represented as the authors or the instruments of the most unprincipled practices reduced to a system of gross abuse; and when by some accident there occurs the name of one, like the Duc de Broglie, whom to charge with corruption would be certain to bring down on the audacious calumniator the scorn and execration of all men and all parties, he is immediately treated as a poor drivelling creature, wholly below contempt. The judicial system is among other departments the object of invective; and to show with how much judgment and how large a knowledge of the subject this work is composed, not the least notice is taken of by very far the worst abuse to be found in the whole system and practice of French judicature; while things are fancied, or perverted, or grossly exaggerated, to serve the writer's purpose. To comment further on such a work would manifestly be superfluous. It may be enough to note as among the marks of the author's fairness the fact of no copy of his work having been found at

Paris, when search was everywhere made for it, — at Paris to which the appeal, if worth any thing, should plainly have been made.

We here insert a letter from a correspondent at Paris on this important subject.

To the Editors of the Law Review.

"GENTLEMEN, "Paris, Jan 1. 1845.

"I have read with the greatest satisfaction the first Number of your Work. Its plan is most excellent, and no one can well overrate the importance of the objects which it has in view — the promotion of candid and learned and liberal discussion upon all subjects of Jurisprudence and all events that happen in the legal world. The execution of this plan, as far as your commencement goes, appears to be admirable, and I trust, with all friends whether of law or of literature generally, (whereof I indeed consider Law as one great branch,) that its fame will increase, while its composition maintains the character it has already acquired.[1] I observe with pleasure that you do not confine yourselves to the jurisprudence of England, but extend your views over the countries of the Dupins and the Berryers, the Savignys and the Storys, the Jeffreys and the Moncrieffs. Permit me, therefore, to offer you a very small contribution, a New Year's Gift, or, to speak the language of the profession, "in the nature of" a New Year's Gift, as I send it on the first day of the year. I wish to aid you in the "*reciprocation*," as the French term it, of good offices, the interchange of lights between the two countries, my native land and the place of my residence for many late years. The subject is an abuse of the most flagrant nature, inflicted by the present Minister of Justice, whom I name to distinguish him from the able and honest men his colleagues, M. Martin, who takes the title of *Nord*, calling himself *du Nord*, I presume for dignity sake and to make him known from conjurors, actors, notaries, *et id genus omne*, who bear the name of the old bishop and the old reformer. But I intend to give him other marks whereby he may be known, and if any one will call him the *kakonomist*, or the *paranomist*, or the *misonomist*, or the *ecthronomist*, or any other term of opprobrium whereby the author of the law of June 2. 1841 may be designated, he will supersede the necessity of the mummery whereby this third-rate provincial advocate has pompously inflated his appellation.

You can little conceive such a law as the one I have referred to. In England such a proposition as he had the boldness to make and the legislature the weakness to let him pass, no man, no party, no government durst have even mentioned. It is the law which requires all the courts of justice in France yearly to reward the newspapers of whose conduct the Judges approve, that is the Ministry, and punish all those whose conduct they dislike, by giving those

[1] We insert thus much of this letter for the purpose of begging our correspondents to spare our blushes. The fact of taking the trouble to write to us is quite sufficient proof of their opinion of our merits and influence. — ED.

favoured journals, or taking away from these disfavoured ones, the monopoly of all judicial advertisements or notices, (*annonces* or *affiches judiciaires*).

(*Our correspondent here enters into the subject at length; but the preceding article makes it unnecessary to insert his statement, which in the main agrees with our own. We add, however, his remarks on the author of this law.*)

It is quite impossible that M. Martin's colleagues could be aware of the offence against all principle which they were committing in giving their sanction to this vile scheme for bribing the press and corrupting the Bench; for making the newspapers servile and the Judges factious and servile too; for using the ermine to procure and pander to the Ministry and the Court. It is equally impossible that the Chambers should have been aware of what they were sanctioning when they passed this statute. But so much for placing at the head of the law as well as of religion (for this man is both ministre de justice and des cultes), such a person as M. Martin. Instead of a great lawyer, a man of high reputation, a man of powerful understanding like the Dupins and the Berryers, we have had for three critical years a third-rate provincial barrister who had no reputation even at Douai, and whose only recommendation was his devotion to the Jesuits' party! Why of all merits this was the very worst! And a more Jesuitical measure than this of the *Annonces* never was invented at St. Omer for any bad purpose. While he remains in his present state, adieu all hopes of even tolerably good conduct in either the judicial or the ecclesiastical administration of France — much less can we look for any one measure of the least improvement in her jurisprudence. But what is more; the present ministry is doomed, if they retain such a man among them. The law we have been discussing must, and that speedily, be abandoned, else no honest man can stand by the Government. But the author of it, the perpetrator of the vile fraud upon his colleagues and the Chambers must be extracted from the Government, else no one can wish for its continuance or lament its downfall.

"I have the honour to be,

"Your humble Servant,

"JURISCONSULTUS."

ART. XII. — ON THE CONSOLIDATION OF THE CRIMINAL LAW.

A Bill intituled, "An Act to amend and consolidate the Criminal Law of England so far as relates to the Definition of Indictable Offences and the Punishment thereof." (Ordered to be printed by the House of Lords, 1844.)

BEFORE we proceed to observe upon the subject of this bill, we propose to premise some general observations on the Criminal Law and upon the present state of that branch of the law in this country.

This branch of the law is in one sense the most important of all, for upon its vigour and efficacy the wholesome operation of all other, including remedial, laws depends. Its principle is of the most plain and simple character, that is, of prevention; consequently its construction is not encumbered with the consideration of a multitude of laboured distinctions such as are necessarily incident to branches of the system accommodated to the numerous and complicated exigencies of an advanced state of civilisation.

Considering the simplicity of this branch of the law as regards its principle, and its vast importance as regards society, the long-continued neglect of it by the legislature may seem remarkable. It may, however, safely be asserted that till lately the Criminal Law of England was more sanguinary in its penalties, and more unjust in its processes, than that of any other code or system of law throughout Europe.

The causes which have conduced to such evil results may be told in a few words. The foundations of this branch of the law were laid in times of barbarity, superstition, and ignorance, — when life and liberty were held in small estimation, and when crimes of outrageous, and often open violence, required restraints of great severity, — when commercial dealings were few, and criminal frauds comparatively

rare. Laws adapted to the exigencies of such times could, it is obvious, be little suited to an improved state of civilisation; yet it might reasonably have been expected that at some time or other a general revision of this branch of the law would have taken place, for the sake of rejecting what was barbarous, obsolete, or useless, and substituting rules better accommodated to the exigencies of an advanced stage of society. Century after century has, expired, but no such amendment on any considerable scale has, till very recent times, been effected. Many of the most cruel and oppressive laws were long, it is to be feared, preserved for the sake of their tempting fruits — confiscations, forfeitures, and fines. It exceeds the bounds of charity to suppose that the harsh restraints imposed on persons whose conviction would produce profit, and which made a trial but an unmeaning form and a cruel mockery, were so long retained from any other motive.

Be this as it may, ages were suffered to elapse without any general reformation of the criminal law, although from time to time, as particular grievances pressed hard, or some act of great atrocity excited public feeling, and the legislature was stimulated to extraordinary exertion. Laws were passed to suit present exigencies. These, however, were usually of a desultory, isolated character, ill-penned, as Lord Coke observes, "being hastily made on the spur of the occasion." One great error was common to most of these: the legislature seem in former times to have been constantly impressed with the notion that the efficacy of a penal law was directly proportioned to the severity of the punishment.

An extraordinary instance illustrative at once of the resort to this principle, and of its fallacy, is afforded by the statute 22 Hen. 8. c. 9., which was founded on a most atrocious offence committed by a cook in poisoning broth, by which a great number of persons lost their lives. Sir E. Coke, in speaking of the offence, says, "This offence was so odious that by Act of Parliament it was made high treason, and a more grievous and lingering death inflicted than the common law prescribeth, viz. that the offender should be boiled to death in hot water; upon which statute Margaret Davy, a young woman, was attainted of high treason for poisoning her mistress, and some others were boyled to death in Smith-

field the 17th day of March in the same year." But this Act *was too severe* to live long, and therefore was repealed by 1 Edw. 6. c. 12., and 1 Mar. c. 1. Sir W. Blackstone [1], observing on the severe statute of 21 R. 2. c. 3., which made the bare purpose and intent of killing or deposing the King, without any overt act to demonstrate it, high-treason, says, "And yet so little effect have over-violent laws to prevent any crime, that within two years afterwards this very prince was both deposed and murdered."

Our limits forbid the entering into any lengthened detail of the particular instances in which the legislature have by sudden impulses, on particular and urgent occasions, been roused to the enactment of numerous desultory penal laws. Great and similar errors are characteristic of the whole; the same erroneous reliance on extreme severity as regards the penalty denounced, the same want of system in neglecting to accommodate the new law to the laws *in pari materiâ* already existing or to repeal any which had become unnecessary, pervade this branch of the statute-book.

To attribute such neglect to the legislature generally, without looking to the causes why so important a branch of the law should have been neglected and some inquiry as to the source from which amendment might properly have been expected, would be little better than a mere figure of speech.

The duty of submitting to the legislature such laws, and the necessary repair and amendment of such laws as properly speaking concern the State generally or the public in their aggregate capacity, must naturally and properly devolve upon the executive government, as much as any other matter does which concerns the public weal; and so also must all penal laws in respect of injuries to individuals, to the prevention of which the power of mere remedial laws is insufficient, and which therefore require more forcible restraints.

Essential as the vigorous operation of the Criminal Law is to every interest, public or private, incident to society, — absolutely necessary as it is for the protection of the State, the

[1] Comm. B. 4. c. 6. It is ever a rule (says Lord Bacon, in his proposal for amending the laws of England), that any over-great penalty (besides the acerbity of it) deadens the execution of the law.

public peace and tranquillity, the lives, liberty, and property of all, — its general regulation and correction belongs to no individual, and excites little individual interest: it belongs peculiarly and solely to the State. The prospect of remedy by a civil action, where a remedy is given, stimulates an injured party to pursuit. Failures in such cases, from the want of adequate legal means of remedy, are the subject of complaint, it may be of redress: in criminal proceedings it is far otherwise, and the party injured is not stimulated to exertion by the hope of remedy[1]; he is restrained by humane feelings, and has a great aversion to add to his loss by incurring the expense and trouble of prosecution. It is no adequate compensation that the miserable offender is hanged or transported, and should he through defect in the law escape, the prosecutor does not complain as a man does who has lost his suit for damages. The affair is altogether an unlucky accident, which is not likely to happen to him again, and it is therefore not worth while to think any more about it. Such being not uncommon feelings as regards even persons who have suffered injury, they are little likely to unite for the purpose of suggesting systematic penal laws for the benefit of the public.

We refer to one striking instance amongst many which might be cited in illustration of the preceding remarks. It is notorious that where a defendant in a civil case thinks that he has suffered wrong from a jury who have found a verdict against him to the amount of 20*l.*, the proper Court is open to receive his complaint, the matter is fully investigated, and justice is done; yet had the verdict affected his life, or the whole of his personal property, in a criminal proceeding, the gates of justice would have been fast closed against him.[2] We should deviate from our present purpose in making any other remark upon this contrast upon the present occasion, than by observing how much more easily improvements are yielded to pressure from private interests than to such as are of a public nature — to those which merely concern property, than to those which involve life and liberty.

It may perhaps appear to be somewhat singular that the

[1] With the exception of the few instances where a prosecutor may be entitled to restitution.

[2] The exception to the rule, where the case is sent from the Queen's Bench to be tried at the sittings or assizes only renders the general rule the more remarkable.

exertions of professional lawyers should not have contributed more largely to the improvement of the legal system. Unfortunately, however, law in this country has been rather practised as an art than cultivated as a science. Subject, no doubt, to many great exceptions, lawyers regard a knowledge of the law as a means of livelihood, the source of wealth, a stepping-stone to dignities, caring little for any selection of principles or regular deduction of truths, or the scientific application of those principles and conclusions to the exigencies of society. "We are all" (says Sir Henry Spelman) "for profit, and *lucrando pane* taking what we find at market, without inquiring whence it came."

It must, however, be admitted that the oppressive character of the Criminal Law in past times, in refusing to a party accused the means of defence to which he was in natural justice entitled, particularly in excluding him from the benefit of defence by counsel except upon technical points, and the cruel manner in which laws in themselves so harsh were administered, and by which their severity was aggravated, were circumstances which well might warrant the indifference of lawyers (whose exertions were thus unjustly limited) to this branch of their profession. Mr. J. Foster in his Discourses deems the very reading of the proceedings, in criminal courts before the Revolution, to be a penance.

Whilst many who are not lawyers are apt to regard the legal system as unintelligible to all but lawyers, and its mysteries as penetrable by lawyers themselves only, after twenty years' lucubration, there are others who fall into the opposite extreme, and imagine themselves to be fitted to legislation by mere intuition. Sir W. Blackstone observes[1], "Indeed it is really amazing that there should be no other state of life, no other occupation, art or science in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical; a long course of reading and study must form the divine, the physician, and the practical professor of the law, but every man of fortune thinks himself born a legislator."[1]

[1] 1 Bl. Comm. p. 9.

After all, the habit of neglect incident to the former class is less to be complained of than the crude notions and injudicious meddling often attributable to the latter.

The inadequacy of the ancient criminal laws to the exigencies of a more improved state of civilisation, coupled with neglect on the part of the Legislature to make corresponding alterations suitable to the wants of society, have been productive of important consequences. The ministers of justice, left without direct and express laws adequate to the restraint of offenders, were under the necessity of adopting one of several different courses, — of submitting to the Legislature the difficulties which thus occurred [1], and requesting a remedy by express declarations or enactments, or of declining to go beyond the express law and the authority of precedent, and thus, as it were, forcing the consideration of the subject on the Legislature [2], or of extending from time to time already existing rules, by the aid of constructive interpretations and enlargements, or even by making new application of principles to cases before unprovided for. Direct communication between the legislative and judicial powers would have been little consonant to habits and practice of very early growth, and originating in causes for which we have at present no leisure for inquiry. It seems to us that applications to the Legislature for alterations or extensions of the existing law would more properly emanate from the ordinary executive powers of the State.

When it is considered how long the practice has obtained of supplying or palliating legal defects by indirect means, rather than that present offenders should escape, it is not surprising that the evils naturally resulting from legislative supineness should have been greatly alleviated.

[1] Which they were required to do in the particular case of treason.

[2] "The disorders," says Beccaria, "that may arise from a rigorous observance of the letter of the penal laws are not to be compared with those produced by the interpretation of them. The first are temporary inconveniences which will oblige the Legislature to correct the letter of the law, the want of preciseness and uncertainty of which has occasioned these disorders, and this will put a stop to the fatal liberty of explaining the source of arbitrary and venal declamations." It is to be remembered that Beccaria speaks of the interpretation of *written* laws only: the inconvenience likely to arise from the strained construction of unwritten laws did not enter into his contemplation.

Whilst the adoption of such a course has been of partial benefit to society, by the mending of some defects, it has been accompanied by some disadvantages, the ancient rules of law have been continually extended by the aid of construction; hence constructive treasons, constructive force, constructive possession, and numerous other such enlargements. Every strained extension of a pre-existing rule operates unjustly as an *ex post facto* law. Every such enlargement of a definite but too rigid rule is subject to the serious objection that, whilst it throws down a known and definite boundary, it substitutes no other in its stead; the arm of the law is lengthened, but no one knows to what extent. Last, but not least, an indirect system of legislation is introduced, which, although under the superintendance of the best of Judges and for the best of purposes, cannot possess the certainty and efficacy of a direct law, and thus it singularly happens that palliatives of this nature in one respect operate prejudicially,—they become a substitute for legislative measures which would otherwise be indispensable, and therefore interfere with the making of laws by that constitutional power which alone can invest them with state authority, and provide for their effectual promulgation.

We now advert to a very remarkable result from the imperfect state of the Criminal Law to which we have alluded,—a result which, whilst it is demonstrative of such imperfection, is strikingly illustrative of the want of reliance on legislative aid for amendment, and of the preference for judicial palliatives: — we allude to the ordinary course now pursued in respect of doubts and difficulties which occur in the administration of criminal justice before the Judges at the assizes. The practice, it is well known, is to reserve all points of sufficient difficulty to warrant such a reference for the opinion of the fifteen Judges. A voluntary but most important and useful Court is thus in effect constituted, not warranted by any direct authority, which exercises absolute control over its own proceedings, deciding after hearing, or not hearing, as may seem most proper, arguments of counsel, and afterwards giving effect to its decisions by arresting the judgment where judgment has not been given, or applying for a pardon where it may be necessary. Such an

extrajudicial tribunal, so constituted, might, in some countries, be regarded with some degree of jealousy or suspicion in others; in this country it is esteemed and respected as one founded in an earnest and benevolent desire to promote the interests of justice, and to supply, so far as is practicable without legislative aid, most serious defects in this branch of the law. Some of these, indeed, are of such a nature as admit of remedy, although attended with difficulty and expense, by the existing law, as where doubt arises on matter apparent on the face of the record. Even in such cases justice is often done in the course adverted to in a manner attended with great saving of time and expense; in others, and where the objections do not appear on the record, as where a party has been convicted on improper evidence, or a mistake has been made in directing the jury, no other means of consideration are open to relieve an innocent party from the effects of an unjust, or at least doubtful, conviction. Beneficial as such an extrajudicial and anomalous course of proceeding is, it must be remembered that it is but a palliative affording no complete remedy, and perhaps even, by diminishing the amount of injustice, rendering that legislative remedy more difficult of attainment which must otherwise be yielded to the necessity for interfering to prevent injustice no longer tolerable. It must also be recollected that this remedy is partial, being limited to cases tried before justices of Oyer and Terminer and Goal Delivery, and not extending to any of the numerous cases tried at the Sessions before ordinary Justices of the Peace:—that even where the trial is had before any of the Judges of Oyer and Terminer or Gaol Delivery, it does not extend to that most necessary of all incidents to the trial by jury — the power to grant a new trial: — that frequently it cannot be made directly available, but only indirectly through the Royal prerogative of mercy; and although such an exercise of the power is never withheld, it would be more satisfactory that errors in the administration of criminal justice should be remedied by direct and judicial means, rather than indirectly by appeals to the indulgence of the Crown for the exertion of its prerogative powers. It is by no means creditable to the laws of this country, that whilst laborious provision is made

for the correct decision of all questions concerning property even to a small amount — Court after Court being open to the revision of every such case, for the prevention of even the suspicion of injustice, — so little regard should be had to the greater interests of life and liberty; and that even that little should depend, not on any direct measures founded on natural justice or analogy, but on mere extra-judicial practice.

Having thus briefly alluded to the defective state of the Criminal Law, as it existed till lately, we proceed to observe upon what has been done, and what is further proposed to be done.

It is remarkable that, from the time of the Norman dynasty downwards, no one statute of a general nature for the improvement of the Criminal Law was enacted until the passing of Sir Robert Peel's[1] Acts in the year 1827.

The measures brought in and carried by Sir R. Peel were very valuable on two accounts: first, because they actually embody the provisions relating to an extensive portion of the Criminal Law and effect many material modifications and alterations in respect of its general rules; and secondly, because they establish the justice of principles which ought, now that experience has proved the benefit of their first application, to be more generally extended.

Sir Robert Peel's opinion as to the absolute necessity for a consolidation of the Criminal Statute Law, the best mode of effecting it, and of the great advantages to be expected from such a measure, will be best explained by referring to some of his observations in giving notice of his Bills and afterwards bringing them before the House. On the first occasion[2] he observed that

"Indeed it required no very powerful reasoning to show the necessity and policy of consolidating the Criminal Laws of this country, and of simplifying as much as possible those statutes relating to crime and misdemeanor which had hitherto created so much error and confusion in our courts of justice. Such a course as that of revising and consolidating confused and unintelligible statutes appeared so consistent with reason and common sense, that

[1] Then Mr. Secretary Peel.

[2] Hansard's Parliamentary Debates, Feb. 22. 1827.

he scarcely thought it necessary to adduce any arguments in its favour, when all whom he had the honour to address must agree as to the necessity of the measure."

And afterwards, upon the same occasion, he observed that, —

"Although he had suggested many changes, he had not, after all, proposed any very *material alterations* in the Criminal *Statutes*, because he was desirous of proceeding *gradually* in the course of improvement, and to avoid as much as possible the use of rash experiments. What he wished was to collect all that was valuable from existing statutes, and to preserve from a mass of contradiction and confusion various clauses and provisions introduced at different periods into our Criminal Laws. He was desirous of selecting all that was worthy of being preserved, in order to present to the House an useful and efficient statute, and thus to place as it were in juxta-position *all the law* connected with the criminal jurisprudence of the country. It was his wish to abolish every part of the Criminal Statutes that could not with safety be acted on, and to accommodate the laws relating to crime to the present circumstances of the country and the improved state of society."

On bringing in his Consolidation Bills, he observes [1], —

"In the Bills I have the honour of submitting to the House, a middle course has been steered between the redundancy of our own legal enactments and the conciseness of the French code. I do confidently hope that when a little further advance has been made in the work of repealing many of our old statutes which should no longer be retained, and in the substitution of new ones in their place, the House will determine to take into its consideration the general state of the whole statute-book, when I am convinced it will find a vast number of old or defective statutes which it might determine to expunge, while it could retain those only which it may be absolutely necessary to preserve. The effect of such a proceeding would be evinced in many valuable and beneficial results. I think there ought to be a commission to ascertain what statutes at present remain in force, and what from their obsoleteness, or the fact of their being no longer applicable to the circumstances of the age, might be entirely dispensed with, or preserved only for the future information of the curious. Some statutes,

[1] Hansard's Parl. Debates, March 13. 1827.

like those of Magna Charta for instance, will always be retained, and treated of course with the respect and gratitude that is due to them. But others, though of great antiquity, are of such a character that it would be exceedingly expedient to get rid of them altogether. I am confident that the fact of my being able to repeal by these Bills 130 statutes, and to compress all that it is necessary to retain of them or to substitute for them into twenty-nine pages will ultimately tend to an immense reduction in the bulk of our statute-book."

Sir Robert Peel on these occasions very clearly and fully described many of the principal amendments which he proposed to make, to several of which we propose to advert.

The distinction between grand larceny, *i. e.* theft to the amount of 1*s.*, and petit larceny, or theft to a less amount than 1*s.*, was abolished. This was done in order to put an end to a constant evasion of the law, by stating property worth, it may be, many pounds to be worth only so many pence, in order to enable a party to prosecute the offender before a tribunal which had jurisdiction in respect of petit larceny but not in respect of grand larceny.

The doctrine of admitting to the benefit of clergy was also abolished, and several direct and salutary provisions were substituted.

An immediate consequence of this abolition was, that the severe law that an offender in respect of a second theft to the amount of 1*s.* should be liable to capital punishment, because he could not have the benefit of clergy twice, was also abolished.

An important provision was made in the law against obtaining property by false pretences, and to prevent an offender from being acquitted when indicted for an obtaining property by a false pretence, upon the objection that the offence amounted to a felony, the owner having consented to part with the temporary possession only and not with his right of property.

A very material alteration was made in respect of the Common Law crime of burglary, by a limitation of the Common Law description of a dwelling-house, which comprised all buildings within the curtilage, and restraining it to such as are connected with the actual dwelling-house by some internal covered communication.

Several very important and wholesome enactments are introduced concerning procedure, particularly as to the bailing of offenders.

Very beneficial alterations were also made with respect to accessories. The crime of an accessory before the fact is constituted a distinct and substantive offence; and by this provision many of the technical difficulties by which the prosecution of such accessories had previously been encumbered were excluded.

In 1828 a very useful Bill for the Consolidation of the Law relating to Offences against the Person, was brought into the House of Lords by the Marquis of Lansdowne, and was passed during the same year.

After the improvements thus made in the Criminal Law, principally by Sir R. Peel's Acts, a commission was issued at the instance of Lord Brougham, when Chancellor, appointing commissioners for the digesting of the Criminal Law, including as well the Common Law as the Statute Law. This Commission has already led to important results. An Act has been passed, according to the recommendation of the Commissioners, for the admitting such a full defence by counsel in all felonies, as had before been allowed on charges of high treason and misdemeanors.

This Bill was brought into the House of Lords, and most ably supported by Lord Lyndhurst. Another Bill was introduced into the House of Commons by Lord John Russell for diminishing the number of capital offences, upon the principles recommended by the Criminal Law Commissioners, and was afterwards supported in the House of Lords by the then Chancellor, Lord Cottenham, and by the Lords Lyndhurst and Brougham.

The Commissioners having afterwards submitted a digest of crimes and punishments as regarded indictable offences, the Bill already referred to was proceeded in by Lord Brougham, who brought the Bill before the House of Lords, and it was read a second time.

Upon this subject we proceed to make some observations. These regard, 1st, the expediency of a measure of general consolidation of the Criminal Law.

2dly, the mode of effecting it.

The expediency of such a measure may, we think, be fairly inferred from the consideration that the consolidation already effected, chiefly by Sir R. Peel's bills, has been attended with complete success. It cannot therefore be fairly doubted that a more extensive consolidation, conducted on the like principles, would be productive of corresponding advantage. The necessity for amendment may seem also to have been admitted by the Governments which have instituted and continued a Commission for the purpose of further extension.

We purpose, however, to refer to some direct tests of the necessity for further consolidation, the more particularly as regards the unwritten law, although we apprehend that the same reasons which apply to the Statute Law are applicable, and even with superior force, to the latter branch of the Criminal Law. Where the statute law depends on the unwritten law and is of no effect without it, it is plain that every defect in the latter is practically a defect in the former; they together constitute but one law, and if the foundation fail the superstructure must fall, and it is even unreasonable and unjust to load the statute-book with laboured and precise descriptions of complex aggravations, whilst the simple offences themselves, which are necessarily of far more extensive operation, are left undefined.

It will scarcely be disputed that the following conditions are essential to the effective and salutary operation of the Criminal Law.

1st, That the law be accessible and intelligible.

2dly, That it be practicable; and,

3rdly, That it be adapted to its principles, especially as regards the due proportion between crimes and punishments.

These are in effect the conclusions of Beccaria[1], with some little amplification for the more convenient distribution of the following observations: —

As the principle of this branch of the law is the prevention of wrong through fear of the punishment to be inflicted on transgressors, it equally fails to be effectual in all cases of mere ignorance of the law, whether that ignorance result

[1] Essay on Crimes and Punishments.

from want of access to a law in itself intelligible or from obscurity in the law itself.

It is invariably *presumed* that every one knows the law, not as Selden observes, "that all men know the law, but because it is an excuse every man will make, and no man can tell how to confute him." It would be more simple and direct to say at once, that if an act punishable by the law be wilfully done, ignorance of the law shall be no excuse. Although this be a matter of strict necessity in the administration of justice, in the course of which it would be impossible to be constantly making the enquiry whether the offender really knew that in doing what he did he transgressed the law, yet is it a clear and manifest defect in the penal system, that its laws should not be duly and fully promulgated.[1] The same principle, as we have already remarked, applies as well to unintelligible as to inaccessible laws. The actual possession of a whole library of law books is unavailable to one who cannot comprehend the law, whether the reason be that it is written in an unknown language, is wrapt up in technical terms, or is confined to detached isolated decisions from which he is unable to derive any certain practical conclusions for the regulation of his conduct. As a matter of civil polity, the infliction of punishment, especially capital punishment, for the violation of laws of which due notice have not been given is wholly indefensible. The right[2] to visit offenders with capital punishment stands solely on the ground of absolute necessity, to prevent greater evil; to act on anything less than absolute necessity is a fearful assumption of authority unwarranted by any divine sanction or any consent which has actually been given or which can be presumed to have been given.[3]

[1] Beccaria observes that "Crimes will be less frequent in proportion as the code of laws is more universally read and understood, for there is no doubt but that the eloquence of the passions is greatly assisted by the *ignorance* and uncertainty of punishments."

[2] This right is recognised in the 39th Article of the Church.

[3] "Every punishment which does not arise from absolute necessity," says Montesquieu, "is tyrannical." "A proposition which may," says Beccaria, "be made more general thus, every act of one man over another for which there is not an absolute necessity is tyrannical. It is upon this that the sovereign's right to punish crimes is founded, that is, upon the necessity of defending the public liberty entrusted to his care from the usurpation of individuals."— Becc. c. 2.

The criminal law of this country is defective in both of the above particulars; it is neither of easy access nor is it expressed in an intelligible form suited to practical and effectual promulgation. It consists of some hundred statutes[1], which are dispersed through 30 quarto volumes of the ordinary edition of the statute-book, enacted during the course of six centuries; of decided and reported cases, the number of which cannot well be estimated at fewer than 3000; in records of courts not published, in numerous resolutions and dicta of authority, and in text-books of greater or less weight. Our notice of the latter will be for the present postponed.

The unwritten or common law branch of the Criminal Law, diffused as it is through many hundred volumes of reports, is of course inaccessible except to a few, and those chiefly members of the legal profession. Were these authorities accessible, they would, to the great mass of the community, be in a great measure unintelligible. Some of them are written in Norman French: they are detailed according to technical forms and in technical language, understood only by lawyers and legal antiquaries, and not always even by them.

It frequently happens not only that the reports of different cases, when compared, tend to widely different conclusions, but that even different reports of the same case are inconsistent. Rowley's case shows how much reporters may differ from each other in material points, and how much may depend on apparently slight variations. The report of that case given by Lord Coke himself[2], states, that the prisoner, having pursued a boy who had been fighting with another boy, the prisoner's son, and given him a bloody nose, killed him by striking him on the head *with a cudgel*, and that it was held that it was not murder, because done in sudden heat and passion: but Sir M. Foster[3] denies this to be law, and observes

[1] The number has been diminished by the Consolidation Acts above referred to, and also by the repeal during the last Session of a great number of penal statutes against Roman Catholics (7 & 8 Vict. c. 102). The number is still very formidable.

[2] 12 Rep. 87. Godbolt, 182., says with a *rod*.

[3] Disc. on Homicide.

that it is founded on a misreport of the case, and that the case is *truly* reported in Cro. Jac. 296., where it is stated that the prisoner struck with a LITTLE cudgel, and he regards the case as no warrant for the legal inference from it by Lord Coke and Lord Hale.[1]

It is plain that a mass of precedents, however valuable as an aid to the legislator, can possess no such certainty of law, or such publicity, as the principles of the Criminal Law plainly require. We are under the necessity of pursuing the subject beyond the ill effects which result to society from the want of accessible and intelligible laws sufficient to warn offenders of the penalties annexed to violations of the law. The mischief is much more extensive, when it is considered that, for want of legal certainty, even Judges of the Superior Courts are sometimes left in doubt.[2]

It is not every day that defects in the Criminal Law or its processes excite public attention, or that the soundness of legal machinery is put to the test; and when, upon some great and important occasion, its inefficiency is manifested, a clamour for amendment is raised, which, however, speedily subsides; and as the same difficulty may not be likely, after such warning, to occur again, it is not inquired whether the defective rule be but one of many equally defective or be a mere solitary exception.

It is scarcely necessary to observe that these observations, as to the difficulty of drawing precise conclusions from the ordinary legal sources, necessarily apply with much stronger force to inferior magistrates than to Judges of the Superior Courts, whilst the means of correction are in the former case far more difficult.

We have already referred to the Text-books written by private authors on the subject of the Criminal Law. The more ancient of these are of considerable authority to prove what the law formerly was, and yet even these are available

[1] 1 Hale, P. C. 453.

[2] It is remarkable that in a modern case, Rex v. Cabbage, Russ. & Ry. C. C. 292., there was a division in opinion among the Judges as to the essentials of so common a crime as that of theft, five being of opinion that the taking must be *lucri causâ* and six being of opinion that the *lucri causâ* was not essential.

only as evidence for that purpose, and can rarely indeed be relied upon as conclusive; and the frequent alterations in the law, as well by statutory enactments as judicial decisions, render it impossible to rely on such evidence in proof of the existing law.[1] The more modern treatises are more copious than the more ancient ones, and are eminently useful as containing extracts from and references to the Statute Law, as well as abridgments of the principal decisions in the Criminal Courts, and valuable commentaries upon both common and statute law. Whilst the utility of these aids is acknowledged by the Profession, they must still be regarded only as aids to those engaged in the practice of the Criminal Law, and still deficient as regards the two great essentials of certainty and publicity. Written as they must be in a technical form for the use of the Profession, and necessarily encumbered as they must also be with thousands of authorities, stating, as they must do, all the doubts which have arisen, but which have never yet been fully decided, such works, after paying the utmost attention to the author's own opinion when he thinks fit to give it, when most complete and most to be depended upon, are, in the first place, too bulky and too expensive for extensive public circulation, and they are frequently of too technical a nature to be generally understood, and the inferences, though ever so ably made, want the sanction of either state or judicial authority. The legal principle, in short, requires plain rules, comprised within moderate compass, and capable of being understood by persons of ordinary intelligence, not encumbered, as a law treatise must be, with ancient and modern difficulties, arguments, and conflicting decisions.

[1] "Those (ancient) writers," says Sir M. Foster, (Report, &c. 131.) "must always be read with great caution on the subject of homicide. Bracton, whom the writers of that age for the most part follow, was a doctor of both laws before he came to the Bench; it is no wonder, therefore, that having before him no tolerable system of the English law, then in its infant state, he should adopt what he found in the books of the civil and canon law, which he had read and seemeth to have well understood. Succeeding writers of that age refined upon him, and in their loose way wrote upon the subject rather as divines and casuists than as lawyers, and seem to have considered the offence merely in the light in which it might be supposed to be considered *in foro cœli*. See also that learned judge's opinion of Hale's Pleas of the Crown and Hale's Summary.

The mischief, however, which arises from the want of due promulgation of the Criminal Law falls principally upon society, who are in effect deprived of the protection which the law was intended to confer. It may indeed frequently happen that the very nature of the crime itself must be sufficient to warn the offender as to its criminality, although he know not the precise amount of the penalty which he would incur on conviction. This is not, however, generally true; there are cases where a man may act an essential part in the commission of a crime in the belief, that the immediate perpetrators only, are amenable to justice. Besides, this uncertainty as to the extent of punishment is but one of a multitude of legal uncertainties, all of which tend to encourage malefactors. As illustrative of the former of these positions, we will refer to a case of great enormity which was tried several years ago at the Lancaster assizes, tending to show the necessity of giving greater publicity to the law: — Three persons of the name of Ashcroft, a father and his son and nephew, were tried with a fourth man of the name of Holden for murder committed at Pendleton in the neighbourhood of Manchester. The house in which two women had been murdered about mid-day adjoined the high road leading to Manchester; the two younger Ashcrofts and Holden entered the house, and were the actual perpetrators of the murders and also of robbery. The elder Ashcroft was stationed in a field at the distance of about a quarter of a mile from the house, behind a hedge, so situated, however, that he could see the front door of the house, and it was agreed that if necessary he should put his hat upon the hedge as a signal that some one approached the door. No such signal was given, and the murders and robbery were accomplished. The counsel for the prosecution, in opening the case to the jury, stated the law as concerned principals in the second degree, referring to the authorities cited by Lord Hale to show that the elder Ashcroft was guilty as a *particeps criminis*. It was not till then that this wretched man knew that his life had been forfeited some months before, and learning that it was so, he struck his clenched fist with violence upon the bar, exclaiming, in great horror, "Then I'm a murdered man."

Although it be impossible for any human being to say what effect a previous and distinct knowledge of the legal consequences of his act might have had upon this offender, whether it might have deterred him, and whether the want of his assistance might have prevented his associates from committing so horrible a crime, it is certain that the murdered women had not the full benefit of that law which was devised for the protection of society from wrong, a benefit which cannot be completely accorded without a full and effectual promulgation of the law. Observations such as these are, we are persuaded, applicable but too generally. Ignorance among the worst educated order of society is attended with errors of dangerous tendency, including confidence that the secresy with which a criminal act is done will secure impunity, and also a notion that the actual perpetrators of a crime are alone liable to punishment.

Provision, as is well known, has been anxiously made by legislators of almost every age and country for a due promulgation of their laws. The importance of the principle being undoubted, let it shortly be considered for present purposes to what it extends: without any controversy, to all statutes of the realm, whether they be original statutes or be passed for the purpose of explaining or limiting such as are already made; for the law consists in these taken together, not on either singly. If so, then the principle also extends to the due publication of judgments or decrees by which the sense of any statute is explained or limited, for these taken together constitute the entire law by which conduct is to be regulated, and it is as essential to the restrictive vigour of the law, that the explanation or limitation should be published, whether that be added by one authority or the other. So it is if an offence be made punishable by a statute, although not defined by a statute; if it be contrary to natural justice and inexpedient to inflict a punishment without notice by the statute, a party ought also to be informed in what that crime consists; unless that be known the fear of punishment cannot effectually deter him from offending. It must be presumed that the legislature does not impose a penalty without knowing within what limits those penalties are to be incurred,

and these, if known to the Legislature, ought in principle to be promulgated.

It is not only essential to the vigorous administration of criminal justice that crimes and punishments should be clearly defined and the knowledge of them duly provided for, it is also requisite that where the law is violated the punishment should be certain, that is, as certain as the necessary imperfection of human laws will reasonably permit. We scarcely require the great authority of Beccaria to convince us of the truth of the assertion that uncertainty of punishment is one of the greatest possible encouragements to malefactors.[1] The reason is manifest, — future suffering is threatened to deter an evil-minded person from doing a criminal act; if that penalty were sure to be inflicted, although but at a future time, it might not in all cases be effectual to deter a party from committing the act which he meditated, yet would it operate to the greatest possible advantage; and it is clear that as the probability of escape from ultimate conviction increased, the practical efficacy of the law would be diminished, the chances of escape being always sure to be greatly magnified in the view of the offender. Uncertainty may proceed in the first place from the want of clear and distinct definition. Upon this subject we have already offered some observations. Supposing the definition of the offence to be clear and distinct, it may be one of difficult investigation. We may adduce as an instance the rule which in the case of theft in respect of any property which has been delivered by way of bailment, as to a carrier to be conveyed, to depend on proof that the carrier has broken open the package and stolen a part, he not being amenable for fraudulently appropriating the unsevered whole. And so again, that which makes theft of the husband's goods in conjunction with the wife to depend on the fact of adultery. It is essential, not only that adequate means should be provided for securing the persons of suspected offenders and inquiring as to their guilt, but that means should be afforded for the correction of such errors as may occur in the course of such investigation; if these be wanting, the defect is prejudicial; either the course

[1] There is no doubt (says that author) but that the eloquence of the passions is greatly assisted by the ignorance and uncertainty of punishments.

of justice must labour under the suspicion of causing hardship and injustice, a consequence of itself sufficient to prejudice its due course, or indirect means must be resorted to for the prevention of injustice such as oftentimes operate injuriously to the public. We allude particularly to the practice of petitions to the Crown after the conviction of a criminal, when a new trial cannot be moved for on account of misdirection on the part of the judge, the improper reception of evidence against or exclusion of evidence for a prisoner, or misconduct on the part of the jury, and other instances where a conviction cannot be sustained without hazard of injustice, and when, on the other hand, as there can be no new trial or further legal investigation, the result must be the discharge of the convicted party, frequently to the detriment of the public. In instances not unfrequent, circumstances which were unknown at the time of the trial, throw doubt, if not on the propriety of the conviction, yet on the question of the real guilt of the offender, as where there is room to doubt of the convict's sanity or identity. There can be no questions more decidedly questions of fact, or which more peculiarly require investigation and determination by a jury than these do. A rigid rule strictly carrying the verdicts of juries into effect, where a question of reasonable doubt was raised, would, though legal, be barbarous; to pardon without inquiry, would be a strong and unadvisable exercise of the Royal prerogative; what remains then but an inquiry, that is, in effect, a second trial on the particular issue, but one wholly extrajudicial, and without any of the forms and sanctions of ordinary justice, and under circumstances open to the strongest suspicion.

We have not time to dilate upon the overt defects of the existing law, as regards the apportionment of punishments; they are much considered by the Criminal Law Commissioners in their Seventh Report. Suffice it to say, that they are multiplied to an extravagant extent, with little regard to consistency or principle. We cannot however refrain from adverting to a most cruel and unjust consequence, which may at present attach to one convicted of felony; viz. the forfeiture of the whole of his personal estate. Such a forfeiture may occur in respect of manslaughter, although

under circumstances so mitigated as not to warrant more than a nominal imprisonment.

Believing that some, whose opinions we respect, are adverse to the reduction of the unwritten Criminal Law to a more precise form, we with deference submit a few remarks on the subject of those doubts.

We conceive that these must stand on one or other of the following grounds: First, that the Criminal Law cannot be expressed in such a form; or, that if it can, — secondly, that it cannot so well and conveniently for practical purposes be so expressed.

Considering that so many codes of law, ancient as well as modern, are expressed in this form; that a very large portion of the laws of this country, and even of the Criminal Law itself, including treason, all offences punishable in a summary manner, and numerous offences, including felonies as well as misdemeanors, are regulated wholly by the Statute Law, there can, we think, be little room for the first objection. It surely would not have been wise, as to these important branches of criminal jurisprudence, that the legislature should have suggested mere general principles, leaving the effect to be worked out by judicial authority according to mere general Common Law rules.

It has been seen that several of the Common Law rules have been altered by Sir Robert Peel's bills in many important points, and with great success.

Considering that all capital offences exist, as such, merely by force of the Statute Law, it would be a startling conclusion to arrive at, that death was to be inflicted for some acts or other done under some circumstances or other which no lawyer could *a priori* define. It must be presumed that the legislature, in sanctioning such a penalty, knew the limits to which it was to extend, and did not mean to leave the lives of all exposed to the injustice of *ex post facto* laws. It is probable that greater stress would be laid on the second ground, viz. that the unwritten is the more convenient and efficient form for the purposes of justice.

With a view to this question it is, in the first place, to be remarked, that there are many rules of Criminal Law which are regarded as *certain and established*, although they never

have been reduced to any authentic written form. As regards this class, there cannot, we conceive, be a doubt as to the expediency of expressing them in that form, and by legislative authority conferring upon them increased publicity and force. Thus as regards parties to a crime, no rule of law can be more certain, than that a party present aiding and assisting in the commission of a crime is equally guilty with the party who with his own hand does the act. So is the rule of law clearly established that if A. maliciously intending to shoot B., miss him and kill C., he is guilty of the murder of C. Or that if a man wilfully fire at a crowd, and kill one who is a perfect stranger to him, he is guilty of the murder of that stranger. Or that if two persons agree to fight with deadly weapons, and one kill the other, it is murder. With respect to these and a great multitude of other rules of law established and known to be such by lawyers, there can, we conceive, be no possible objection to give them the greatest possible degree of publicity under the most solemn and authentic form of State authority. It may perhaps be said that this is unnecessary, and that such laws are already sufficiently notorious. We believe the contrary to be true, and have already adduced an instance in support of that opinion, to which it would be easy to add many others.

We next advert to rules comprised within the unwritten law, which, although they be not so generally known and acknowledged as such, are yet *certainly deducible* by persons of legal skill. Where such a degree of judicial certainty exists that when it became necessary to extract a rule for the decision of a particular case, different persons skilled in the law would from legal sources deduce the *same rule*, the abstract certainty of the law to that extent must of course be admitted. But if such rules can be so deduced, it follows that they ought to be so deduced: the law ought not to be confined to the knowledge of a few — it ought to be known to all. The reasons already urged as applicable to the more plain and certain class of rules apply to the present with increased force: as the rules of law are in themselves more recondite, the necessity for giving them publicity and authority is evidently the more urgent. The knowledge of laws which are to govern *all* surely ought not to be confined to a

few: they cannot possibly operate as laws until they are extracted and published, any more than if they were to be expressed in a dead language [1] or by means of hieroglyphics.

We believe that, if our limits permitted, it would not be difficult to prove that a system of adjudication by precedent simply, or by the united authority of precedent and principle, must be more or less subject to the operation of individual judgment [2] as distinguished from predetermined rules, and of course liable in some degree to the objection incident to all decisions by *ex post facto* laws. For present purposes, however, be it assumed that some one certain rule is deducible in every case by learned lawyers. Supposing this, it is impossible to conceive a more unscientific or inartificial course, or one better calculated to frustrate the very end and object of penal law, than that of leaving the extraction of a legal rule, thus attainable, to be deferred until the crime has been committed, and thus incurring the useless labour of perpetually going through the process of extraction, when the doing so once for all would serve the purpose so much better. A penal law, to prevent punishment, must be known previous to the temptation to commit a crime. It is of no practical use, as a rule for the multitude, that a few lawyers would agree as to the criminality of the act when committed. It is scarcely worth while to remark how contrary, not merely to any scientific method, but to all notion of caution and prudence in the conduct of human affairs, such a course of proceeding is. Nothing in a philosophical view can be more nugatory than the continual repetition of the same process, and even that at the risk of occasional failure, when it may be more safely done at once, and with so much greater advantage to society.

If such a course of proceeding be not scientific, still less is it warranted by the spirit of caution by which men are usually guided in the ordinary affairs of life. Men do not become members of public companies or copartnerships, or even of societies of a less important description, without some specific

[1] What would be thought of expressing the Decalogue in churches in the Hebrew language?

[2] Every man (says Beccaria) has his own particular point of view, and at different times sees the same object in very different lights.

and written rules by which their liabilities are to be regulated. The resort to these is the result of common sense and experience; the want of such rules is the cause of uncertainty and litigation.

No invention has been productive of greater benefit to mankind in the improvement of almost every branch of science and of art than that of printing, and to no temporal purpose could it be more usefully applied than to the diffusion of a knowledge of the law; it would be singular that this should be the only science to which the application of so beneficial an improvement was not practically applied.

We have hitherto assumed that certain rules of law, although not actually deduced, are deducible by skilful lawyers from competent sources, and have endeavoured to show, that all such rules, to operate in the most beneficial and effectual manner, must be reduced to a definite form. Let it now be supposed that a class of cases remains in respect of which *no certain rule* is deducible, that is, where, as to any such case, skilful lawyers would *not* draw the same conclusion as to its criminal quality. Here of course no certain conclusion could be drawn *a priori* from legal sources. But where this cannot be done, we see not on what ground a party can be punishable at all. There is no sanction, divine or human, for the infliction of suffering, least of all that of capital punishment, except for disobedience of an existing law, and there can be no such law, unless it be either directly expressed or can plainly be inferred from certain sources. A criminal court may justly, upon enquiry, come to the conclusion that the particular act ought to be made penal, but unless its criminality be rendered apparent, either by an express law or one plainly and certainly to be implied from pre-existing authorities, this is but matter of mere opinion, which can never, on any principle of humanity, reason, or justice, be substituted for LAW.

It has been objected, that written laws are more likely to produce doubt and litigation than those which are unwritten. Upon such a general question we have no room to dilate; we will, however, observe, in passing, that the number of questions which may occur on an express law afford no certain evidence of its insufficiency or inutility. *Primâ facie* the ex-

tent of the number shows nothing more than facility of means of appeal, much more is necessary to fix any charge on the law itself, and still much more to show that an unwritten law would have been more conducive to justice. A statute may have been founded on the very ground that without it the law was too vague to admit a specific appeal or did not permit an appeal. Were a law to be judged of by the infrequency of appeals as to its application, the most sweeping, arbitrary, and indiscriminating laws must be adjudged to be the best for those most effectually exclude all pretence of appeal. Again, it is observable that statutory enactments are often founded on the actual deficiency of the unwritten law, and in all such cases the objection arising from any comparison of the kind mentioned is singularly unreasonable. It is, however, on the present occasion unnecessary to make further observation, because the object of the measure to which our attention is at present turned, is not in any material respect to alter, but to consolidate and extend the existing law: if the proposed law be efficient for this purpose, of which the legislature is to judge, such objections are no more than may be gratuitously made to any alteration in or addition to the law, however trifling. It remains to observe, that were it even true that any difficulty would be introduced by more precise definition, an advantage would still be gained beyond all comparison greater, that is, as to the means of effectual promulgation.

It has also been urged as a reason for dispensing with written laws, that unwritten ones are convenient, because they are flexible and are easily accommodated to fluctuating exigencies. We protest strongly against the application of this principle to the criminal branch of the law. Murder and robbery and rape are not crimes of a changeable fluctuating nature requiring laws to be suited to their varying fashions at so great an expence as that proposed. If, however, our positions be true, they afford an answer to this suggestion. It is, indeed, applicable only to the class of cases which are unprovided for by any rule deducible from authority, for all other cases are governed by rules applicable without any bending force. Now to apply the principle to cases not reducible to existing rules, means,

in reality, that where there is no law, law is to be made by those objectionable contrivances to which we have already alluded: it is scarcely necessary to add, that we deem such a course to be objectionable; it tends to the confusion of the legislative and judicial functions to the injury of both; it overthrows settled distinctions without substituting others, and is attended with all the simple inefficiency but substantial injustice of *ex post facto* laws.

It may, perhaps, also be objected, that it would be impossible to frame laws with so much care and accuracy as to include all possible crimes. Should this be deemed entitled to weight, it would still be excluded by the reservation proposed by the Commissioners [1] for avoiding this difficulty.

The great interest taken as to this important measure by the noble and learned person [2] by whom the Bill was presented to the House of Lords is already well known. His anxious endeavour has been to improve this important branch of the law, not by any fundamental change in its structure, but by a reduction of its principles and rules to a more complete, systematic, and useful form. His views of the subject may be collected from the Commission to which we have already referred, which was issued whilst he was Chancellor, and are expressed in a masterly manner in his letters to Sir James Graham, from which source many of the preceding observations have been borrowed.

The Lord Chancellor proposed that the Bill should be read a second time, and should stand over till the next session; that the articles of the Bill should in the mean time undergo revision, and that on the completion of the consolidation of the law of procedure, on which the Commissioners were then employed, a measure would result consolidating the statute law, the forms of proceeding, and possibly consolidating also all the principles and rules of the Common Law. The Lords Denman and Campbell expressed themselves strongly in favour of a consolidation of the Criminal Law. We regret that the want of space prevents us from giving extracts from the speeches of the noble Lords who took part in this important debate. To conclude — it is, we think, manifest that

[1] Seventh Report.

[2] Lord Brougham.

the Criminal Law has till lately been much neglected; that valuable practical improvements have been already made by Sir R. Peel's bills and some others, to which allusion has been made; that this branch of the law is still very defective and capable of improvement, by the extension of measures already tried with success; that the apprehensions of those are not well founded, who would confine such attentions to a consolidation of the Statute Law, the more especially as those already beneficially effected have not been confined to the Statute Law; and as the principle of consolidation is now sanctioned by the declared opinions of a number of most learned Peers[1], upon the reading of the bill.

We will venture to say that a more striking and decisive manifestation of opinion by persons so eminently qualified by natural talent and professional acquirements, to give a correct judgment on the question — one better supported by all the weight and importance which can be derived from high legal dignity and personal character, could not have been placed on the record of history.

[1] Lord Lyndhurst, Lord Brougham, Lord Denman, and Lord Campbell.

CORRESPONDENCE.

[In conducting this Journal we shall be willing under this head to insert any letters in opposition to the views maintained in our pages. But of course we expect that any such letters shall be in temperate language; and we may also hint that they must not be too long, as the space to be devoted to them is very limited.]

ON THE APPOINTMENT OF JUDGES.

To the Editor of the Law Review.

SIR,

As you with so much candour invite the expression of opinions, even though they be different from those avowed by yourself, I hope you will allow me to make a few observations as to the appointment of Judges.

The importance of this subject cannot be denied, and so far from not being readily admitted on all hands, it is much more likely to be overrated than undervalued. A general impression prevails, that on the pure and able administration of justice, more large and universal interests depend than upon any other branch of our civil polity; and the necessity of placing the scales in hands both strong enough to preserve the balance, and prompt enough to exclude all bias, seems to be felt with a sincerity proportioned to the extent of that which is at stake.

Nevertheless, it is right to avoid every kind of exaggeration, if we would arrive at sound and safe opinions upon any subject; and I cannot help thinking, that some of the opinions now pretty generally afloat on this, derive their origin from a view of the question which would represent the judicial system as peculiarly situated and different from all the other departments of the public service. Thus nothing is so common as to hear it said, that no political or party consideration ought ever to interfere with the appointment of Judges, because it interests all members of the community alike that justice should be well administered. But so does it interest us all that the care of our defence should be entrusted to able hands, that the conduct of our negotiations on which peace or war may depend, should be confided to men of

capacity, nay, that the direction of our affairs should be given to men of integrity and talents adequate to discharge the weight of public duties. Yet no one shudders at the idea of a general or an admiral, an ambassador or a foreign secretary, a commander-in-chief or a prime minister, being chosen for his political virtues or even his party services; and if some of these places are connected necessarily with politics, others, as the army, navy, negotiator, most certainly are not; and yet at all times command by sea and land, foreign missions and foreign governments, have been conferred upon their political adherents by leaders of political parties in the state.

It is no doubt true that one class of the community have a very great and an immediate interest in propagating the opinion that judicial appointments should be made without regard to party considerations. The lawyers are that class; and if they would always, or even generally, keep themselves aloof from politics, they would more effectually serve the end they profess to have in view when they cry down party appointments to the Bench. But the fact is quite certain, that no profession so largely mingles with politics, no class of men are more anxious to obtain seats in Parliament. Then to what does their doctrine amount? Why to this very convenient one; that they should get from party all they can, and risk nothing the while; that each should be rewarded by his own friends according to his party claims, and by his adversaries according to his professional merits. Now I feel as strongly as any of those who put forward this doctrine, the vast importance of keeping pure and free from all pollution of faction the sacred ermine. But this strong impression leads towards another conclusion; it takes a different direction, as to the means by which the great object in view may be best attained.

Surely it must be evident, that in order to prevent political Judges from being appointed, the true course is to name none who have been political partisans at all. If the lawyers will engage in the game of party, let the stake they play for be political and not judicial office. The Attorney and Solicitor General are necessarily political officers; they are of course the legal advisers and *quasi* colleagues of the minister. It has been thought good, that the Chancellor too should be himself a minister of state. The President of the Council may be reckoned in the same way. Nor would there be any great harm in continuing to fill the places of Chief Justices in both the Courts of Law and Equity with those who had been the Crown lawyers. If the twelve puisné Judges, those who have to try political offences, be wholly un-

connected with party, the party connexions of the chiefs can do little harm to the even administration of criminal justice, and it is on criminal justice alone, that the question we are now discussing bears. Can there be any harm whatever in laying down the rule that political partisans shall always be excluded from these twelve places; that they shall be filled by men whose lives have been devoted to the study of the laws and the practice of their profession, and who have never been either the zealots or the tools of faction?

Observe how very inefficient is the plan contended for by those against whom I am arguing. They think it enough to secure the promotion of able and honest men that their party connexions should be overlooked. But, in the *first* place, this principle is sure to be seldom kept in view by the Government of the day; when it is the guide of a minister's conduct, we see by the praises and the censures it calls forth how much it is regarded as the exception and not the rule. *Secondly*, it affords no kind of security against political and party judges, for the partisan, when appointed, is pretty sure to take one or other of two courses — either to go too far against his known opinions, in order to show his impartiality, or to act under the influence of these opinions. He will take the latter line if he be a man of firm and fearless mind and high principles: he will take the former line if he be a feeble and not a very high-principled man, except, indeed, that the false position he is placed in may bias his mind, unknown to himself, and make him lean one way in order to avoid doing injustice by following the bent of his inclination. *Thirdly*, the plan proposed has a direct tendency to encourage lawyers in their course of making themselves politicians. It makes the parliamentary line more safe to take. Were they sure that getting a seat and serving a party would limit their chance of promotion to the great political places in the profession, and would exclude them from all chance of obtaining the inferior and more numerous prizes in the legal lottery, they would be more slow to enter the lists of party, and would prefer the vocation of law to that of politics. The scheme so much commended of taking puisné Judges from professional men without any regard to party increases their facility of combining politics with law. If all partisans were excluded from such promotions, we should have the best security against the evil of party judges. But next to absolute exclusion the course which tends most to shut the doors of Parliament against barristers is most certainly that very course which is so often blamed, namely, the making a man's politics work his exclusion when his party is out

of office. The course recommended removes a very great obstacle to lawyers becoming politicians. If every one who entered Parliament were assured that he never could be promoted to a puisne Judgeship by the party of his political admirers, he would feel what a precarious line he embarked in, what a perilous speculation he made in becoming a politician. The plan so much lauded, of ministers choosing Judges from the adverse party as well as from their own, renders the game much less precarious, and thus entices barristers to play it. Nothing, therefore, can be more contrary to the very object which these have in view, or at least profess to have in view, that of keeping the Bench free from party, than this very course which they recommend for that purpose. It tends, on the contrary, to make the Bar political, and so to make the Bench political, which for its supply can only look to the Bar.

We say "profess to have in view," for we feel well assured that in this, as in so many other cases, the *ratio justifica* and *ratio suasoria* do not at all coincide. They who laud appointments of Judges without regard to party, are the men in opposition: they profit by the policy which overlooks party claims. My supporters of the existing Government are far less loud in their praises of such impartial nominations. The Bar as a body may be, indeed naturally are, favourable to a plan which upon the whole works to its advantage, however much party men may in the particular instances dislike the acting upon such principles. This opinion is entirely grounded upon a regard for the purity of the Bench; I might add, for the dignity and respectability of the Profession. For surely nothing can tend less to its glory than the course which some, indeed many, of its members pursue of getting seats in Parliament, not in order to consult for the good of the commonwealth, *reipublicæ consulere*, but to further their own advancement by making themselves useful to one party or formidable to another; or, finally, by making their names known in the reported debates through the newspaper press, and so obtaining professional employment, instead of earning it by improving their opportunities of professional display, and qualifying themselves through close attendance on the courts and patient study in chambers. Can any one read such disclosures as the following passage gives, in a letter of Sir William Scott to his brother living at Newcastle, without a certain humiliation, to reflect that so eminent a man should have thought it expedient, or even becoming, when he quitted his office of college tutor and was entered an advocate in the Civil Law Courts, with a Doctor's degree, to look out at the same time for a seat in Parliament as all but necessary to his

success at the Bar? The letter begins with announcing his intention to become a Doctor of Laws, in order to practise in the Court of Admiralty, and then proceeds thus: "It is my wish and design, if I can manage so as not to spend too much money before, to get myself a seat in Parliament at the next general election. It will be of the utmost consequence to me, and without it I shall never be able to do anything to any great extent; so that every thing depends upon my affairs going well in the mean time" (that is, upon his saving money enough to do what is now a misdemeanor punishable by law, purchasing a seat). "This, however, I say to you in *perfect confidence. Mem. no curtain commentary.*" (Twiss's Life of Lord Eldon, i. 114.) By the *mem.* he refers to his alarm lest his brother should reveal to his wife this secret plan of professional advancement.

Proportioned to the zeal of the reasoners we are dealing with, in behalf of their favourite scheme, is their blame of all governments who pursue an opposite course, and select Judges from among their own partisans rather than their adversaries; provided always that it is the opposite party whom they think they can convict of this offence. Thus the Conservative party, which has recently done itself honour by appointing a *puisné* Judge, frequently attacks the Whigs for only making political appointments when in office. In the view which I have taken of this question, no great objection seems to lie against such a proceeding, were the charge well-founded in point of fact. But it is only fair to remark that if the last six or seven years of Whig rule were marked by the elevation to the Bench of Whig lawyers only, the administration of Earl Grey showed no such exclusive choice. The chief place in the Exchequer was given to a leading Conservative Lord, and inferior judicial places were given to members of the same party whose professional merits seemed to qualify them for office.

The great importance of keeping judicial appointments pure from party influence appears to be recognised by the practice of our Constitution. A puisné Judge on his creation goes once to Court to kiss hands; he never afterwards is to be seen within its precincts. This shows that he is understood to be removed from all political connexion whatever. The nomination is vested in the Chancellor; and in order that no political bias may interfere with his choice, the rule of office is, that he takes the King's pleasure without communicating the person he names to any of his colleagues, not even to the Prime Minister. So much is this understood to be the rule, that when Lord Eldon, for some reason, was desirous that the place of Chief Baron should not be given to one

whom he understood to be in the Chancellor's eye for the office, he made a communication to Lord Brougham, through Sir William Alexander, the Judge whose retirement created the vacancy, letting him know, and reminding him, that the Chancellor had nothing whatever to do with communicating this nomination to his colleagues, any more than if it were a puisné Judge's place which he was filling up, for that it was in the Chancellor's private gift as entirely as was a puisné Judgeship. Lord Eldon suspected, contrary to the facts, that Lord Grey was pressing upon the then Chancellor an appointment which he was himself not desirous of making. The reason of this rule is most important. It tends to exclude party and political influence from the selection of judicial functionaries; and though in this it is very far from always succeeding, it certainly does cast upon the Great Seal the undivided responsibility of that selection.

It remains to take notice of one objection which may be offered to our proposition of excluding parliamentary partisans from puisné Judgeships. It may be expected to prevent a due supply of lawyers in the House of Commons. Now I can see no real weight in this argument; for there will always be a sufficient number of professional men candidates for the higher places of Crown Lawyers, Chief Judgeships, and Masterships in Chancery. My proposal is confined to the important offices of puisne Judges — those in whose hands is placed the administration of criminal justice.

I am, Sir, your obedient servant,

R.

ON THE INFLUENCE OF POLITICAL MOTIVES ON JUDICIAL DECISIONS.

[We have also been favoured with the following communication bearing in a great degree on the same subject.]

THE unexpected termination of a recent state trial gives additional interest to this generally important subject. Men of all parties agree in the wish to keep the judicial ermine unsoiled by the plaudits of the mob, or the dust of the antechamber; but in practice the more popular the government, the more difficult it is to select Judges free from political bias. The chiefs of all the Common Law Courts, with a very few exceptions, have been in Parliament, and active politicians; many of the puisne Judges ascend the Bench by the same ladder. The Lord President of the Council, the Chancellor of the Exchequer, the Speakers of both Houses of Parliament, all

of whom have judicial duties to perform, are necessarily politicians; and the Lord Chancellor, under whose advice all judicial appointments are supposed to be made, depends upon the superiority of the party he espouses for the tenure of his office. The absence of political bias generally ascribed to the Judges of this country, does not arise from the nature or tenure of the office, but from the seclusion of their lives, the infrequency of the occurrence of political questions in the Courts, and the rigour with which the conduct of the Judges in such cases is watched by the by-standers, the bar, and the press.

Considering the judgments themselves, it is by no means clear that they are more free from party spirit than those of other countries. Lord Clarendon, who wrote the first part of his History with the feeling of a member of the Long Parliament, says, very unfairly, of the judgment in the case of ship-money, that it asserted that to be law which every one in the Hall knew to be not law. On the contrary, any one who will read through the arguments reported in the third volume of the State Trials, keeping in mind the principle up to that time acknowledged in all Courts, that the prerogative of the Crown could not be limited by Acts of Parliament, will find the opinion of the majority of the Judges the better one. But that opinion was supported by arguments of policy entitled to no respect, and the great majority of the nation then arrayed, under the designation of "the country," against that inconsiderable section of it called the Court, gave sentence in its own favour without hesitation. This shows the danger of resorting to arguments of policy, or, as Lord Clarendon calls them, arguments of state in any judicial decision. Justice is the same and unchangeable in every age; but the political expediency which appears unanswerable to Coke, Egerton or Finch, will not have the same weight with their successors at the present day.

The stream of judicial decisions has been tainted by political motives in the many cases in which Courts of Equity have relieved expectant heirs from improvident bargains. The landed gentry were in general, at least after the Restoration, supporters of the Court: the money-lenders, citizens, and presbyterians, and the courts set aside improvident bargains, turned sales into mortgages, and decreed repayment of money lost in wagers, as if they were bound to watch with parental care over all the spendthrifts in the kingdom. The policy of maintaining parental authority, if a parent's authority is only to be maintained by keeping the heir a dependant, the oppression of the rich lender over the necessitous borrower, and of holding in check the usurer, have established

doctrines difficult to reconcile with the free disposition of property by all persons of competent age. These decisions are all since the Restoration, and have been supposed to have been a resumption of the jurisdiction of the Star-Chamber. As a sample of political arguments in the times subsequent to the Restoration, in the case of Man v. Ballet, (1 Vern. 44) the Attorney-general, in arguing a case of charity, harped much upon it, that the lecturer appointed by the parishioners was a Presbyterian, and as soon as he had done in the church would run into a conventicle, was checked by the Lord Chancellor (North); but the argument would not have been used if it had not been on other occasions effective. So when a beneficed clergyman of the Church of England left a sum of money to be distributed by Mr. Baxter among sixty pious ejected ministers, adding, "I do not give it to them for the sake of their non-conformity, but because I know many of them to be pious and good men, and in great want," in the reign of the same monarch as passed the Act of Uniformity, the charity was adjudged to be void, and the money given applied for the maintenance of a chaplain in Chelsea College. (1 Vern. 248.) But in a subsequent reign, and after the Revolution, the charity was established in the terms of the will. (2 Vern. 105.) And in Harvey v. Harvey, (2 Ch. C. 180.) a settlement made to evade forfeiture for treason in the time of Cromwell was set aside, on parol evidence of the intention of the settlor under James II., the success of one party having put an end to the fears of the other. In our own time, when the hand of a great northern heiress was to be disposed of by the Court of Chancery, is it impossible that political considerations may have had their weight in awarding her great estates and consequent influence to a suitor of the same party as the then Lord Chancellor? Sometimes the influence of political motives is only perceptible in the leaning of the Judge to the opposite principles to those professed by his party and himself, as in Alexander v. D. Wellington (2 Russ. & M. 54.).

Sometimes political rivals, as Lord Mansfield and Lord Camden, have viewed the judgments of each other with microscopic eyes, and magnified accidental flaws to gain the temporary triumph of a reversal. Instances of such jealous scrutiny and overruling upon very nice points may be found in Meres v. Ansell, (3 Wils. 275. Almon's Anecdotes, vol. i. 324.); and Rolfe v. Peterson, (Almon's Anecdotes, i. 393. 2 Toml. P. C. 436.).

Sometimes political expediency has outweighed all the arguments arising from precedent and principle, as in Buckinghamshire v. Drury, (Wilmot, 177. 3 Toml. P. C. 492. 2 Eden, 60.); Ffytche v. Bishop of London, (3 Burn. Ecc. Law, 356. 2 Toml. P. C. 211.);

Attorney-General v. Brazennose College, (8 Bligh, N.S. 377.) Attorney-General v. Smythies (2 Russ. & M. 717.). In former times, when the current of decisions was full and uniform, such judgments would have been left in silence on the banks; but for the last century, they have been permitted to remain, and form part of the islands, shoals, and quicksands among which the litigant is to navigate. An unreversed judgment is regarded with a reverence and respect to which the reasons supporting it are not always entitled. *Religiosum est adeo, quod judices decreverunt;* that there is no refinement or hairsplitting that will not be resorted to to distinguish a new decision from an established case. In general the more the passions and feelings of the people accompany any decision, the more is the soundness of its principles to be questioned. Lawyers of the present day regard Wilkes and his case, (19 State Trials, 81. 2 Wils. 151.) with very different eyes from his contemporaries, and would not be disposed, as they were, to huzza at his discharge. (2 Wils. 160.) Even Lord Kenyon's judgments have been held too much heated by the times in which he lived to be safely relied on. See Rex v. Flower, (27 Howell's State Trials, 985. 8 T. R. 314. Romilly's Diary, vol. ii. 310.); Rex v. Wright (8 T. R. 293.), referred to in the Sheriff's case, Q. B. 1840.

As it is unquestionable that for the last century, the power of the people has been progressively advancing, and that a popular influence more or less direct may be perceived even in the appointment of the Judges, — as the Judges, in political questions, may be expected to be in some measure influenced by the passions of the people of whom they form a part, and as the court of ultimate resort is composed of legal peers, who have attained that dignity as politicians, and who cannot be expected to throw off the habits of a life in the few cases of political magnitude which come before them, —it is incumbent on those who hold the reins of empire to provide such a tribunal as may command the general respect. This has been done, in some degree, in the case of appeals from the decisions of revising barristers, by referring them to the Court of Common Pleas, and might be effected in the House of Peers, by raising to the peerage lawyers of eminence, who have not been political partisans.

SELECTION

OF

ADJUDGED POINTS

RECENTLY REPORTED.

TABLE OF CONTENTS.

THE QUEEN v. MILLIS. — (IRISH MARRIAGES CASE.) 10 Cla. & Fin. 534.

Bigamy — Marriage by a Presbyterian Minister.

THE account given of the decision in this important cause occupies 373 pages of Messrs. Clarke and Finnelly's Reports. An *abrégé*, therefore, of so voluminous a detail will, we trust, be acceptable. The result is now chiefly curious and interesting as matter of legal history; and the characteristic feature of the case is this, that the final decision of the House of Lords displaces an opinion first promulgated by Sir William Scott, and in deference to his great authority adopted by the legal profession in all parts of the island for more than thirty years past, namely, that as regards the constitution of the matrimonial contract, the law of England, before Lord Hardwicke's Act, was precisely the same as the general continental law before the Council of Trent[1]; — a theory which must now be regarded as entirely erroneous.

[1] The admirers of Sir William Scott's celebrated judgment in Dalrymple v. Dalrymple, (2 Hagg. Cons. Rep. p. 54.) will at once remember that this pro-

Prior to the Council of Trent marriage throughout the continent of Europe was looked upon as a purely consensual contract, capable of being completed by the parties without any interposition of ecclesiastical authority. It was, indeed, regarded as a sacrament; but that sacrament might be mutually administered by the contracting parties to each other; and neither the aid nor the presence of any one clothed in holy orders was required. But in the year 1563 the Council of Trent made a decree whereby, after admitting that clandestine marriages had previously been valid, they proceeded to enjoin that for the future no marriage should be effectual unless celebrated duly *in facie ecclesiæ*. This decree, be it observed, had authority only in those countries which acknowledged the papal supremacy. It had no reception in England, being dated nearly thirty years subsequent to the breach between Henry VIII. and the Pope. The matrimonial law of England, therefore, continued on its former footing. By that law clandestine marriages were allowed. But they were not attended with the same effects as marriages solemnised *in facie ecclesiæ*. And herein lies the peculiarity of English law, when viewed in contradistinction to the ancient continental law. By the continental law, prior to the Council of Trent, a private marriage was as good as a public one. By the law of England a private marriage, that is to say, a marriage not solemnised *in facie ecclesiæ*, was good only for certain purposes. Thus a private or clandestine marriage, or, as it was sometimes called, a verbal contract, (which might either be by words of present consent or by words of promise, followed by cohabitation,) was in the first place not sufficient to give the woman the right of a wife in respect to dower; nor, secondly, to give the man the right of a husband in respect of the woman's property; nor, thirdly, to render the issue begotten legitimate; nor, fourthly, to impose upon the woman the disabilities of coverture; nor, fifthly and lastly, to make the marriage of either of the parties, living the other, with a third person void:—all these consequences being confined exclusively to marriages solemnised *in facie ecclesiæ*.

Nevertheless, the effects of clandestine marriages were very remarkable, though falling greatly short of those which attached upon regular matrimony; for it is now agreed, and has, indeed, been decided, that before Lord Hardwicke's Act, a contract entered

position formed the staple of his whole argument. On looking again at that splendid (perhaps unrivalled) effort of judicial eloquence, we think some symptoms of misgiving and hesitation are here and there observable. The student will do well to read the Dalrymple case *first*, and then to peruse and study the elaborate report of the Queen v. Millis by Messrs. Clarke and Finnelly.

into between man and woman by words of present consent was indissoluble. The parties could not release each other from the obligation. Either party, too, might by a suit in the Spiritual Court compel the other to solemnise the marriage *in facie ecclesiæ.* It was so much a marriage that if they cohabited together before solemnisation they could not be proceeded against for fornication, but merely for contempt. If either of them cohabited with another person the parties might be proceeded against for adultery. The contract too was considered to be of the very essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium,* and sometimes *ipsum matrimonium.* Another, and a most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnising such marriage *in facie ecclesiæ,* the same might be set aside, even after cohabitation and after the birth of children; and the parties might be compelled to solemnise the first marriage *in facie ecclesiæ.*

So a contract of marriage *per verba de futuro,* followed by cohabitation, produced precisely the same consequences as a contract *per verba de præsenti.* For where a *copula* ensued upon the promise, the present consent essential to matrimony was supposed to be at that moment exchanged between the parties; a presumption which, though but slightly founded in reality, was held to be abundantly recommended by its equity, and the just check which it imposed on perfidy.

The ancient law of England, therefore, with respect to the constitution of marriage, was very peculiar, and no more to be understood by reference to the continental system than the law of real property or any other branch of our jurisprudence. And this we take to be the great point established in the above case by the court of last resort; which, though carried with infinite difficulty, and in spite of many strong and, as some may think, invincible arguments opposed to it, must henceforth be regarded as a point settled and concluded in all legal reasoning on the subject. The short general proposition derivable from the adjudication is, that by the ancient law of England, although a marriage by private contract was good for certain purposes, it could not be absolutely legitimate and perfect without the intervention of a person in holy orders — that is, orders conferred by episcopal ordination.

Lord Hardwicke's Act, the 26 Geo. 2. c. 33. "for the better preventing of clandestine marriages," enacted that no suit or proceeding should be had "in any ecclesiastical court to compel a celebration of any marriage *in facie ecclesiæ* by reason of any

contract, whether *per verba de præsenti* or *per verba de futuro*."[1] From this date therefore verbal contracts were no longer, as before, indissoluble. Solemnisation could not be enforced, and a subsequent marriage solemnised *in facie ecclesiæ* could not be set aside; but, on the contrary, would be valid and binding from the time of its celebration, and would be accompanied by all the civil consequences of a regular and perfect marriage.

This being so, let us see what were the circumstances of the case of the Queen v. Millis. A member of the Established Church enters into a present contract of marriage with A. in Ireland, before a *Presbyterian minister*, who performs a religious ceremony on the occasion according to the Presbyterian forms. After having lived with A. for some time as her husband, he during the life of A. marries in England another person, with due formality *in facie ecclesiæ*. The question then came to be, whether the first contract was sufficiently a marriage to support an indictment against this man for bigamy. The Lord Chancellor, Lord Cottenham, and Lord Abinger, held that it was *not*[2]: Lord Brougham, Lord Denman, and Lord Campbell held that it *was*. Judgment therefore passed for the defendant in error. In other words, the judgment of the court below was affirmed, and the result was, that Millis was acquitted.

LANE v. GOODWIN. 3 G. & D. 610.

Marriage Licence — False Name.

A marriage by licence under a false name is not void, unless perhaps (as was remarked by Sir W. Scott in Cope v. Burt[3]) some fraud was practised, which would entirely vary the question. The reason for this distinction between the case of a marriage by licence and a marriage by bans, which latter is made void by the use of a false name, is said by the same learned Judge[4] to be that, in publication by bans, it is essentially necessary that the publication should be in the true name, as it would otherwise be defective in substance, and no one would be put on their guard by such publication; whilst licence is not of the same notoriety, but is granted by the ordinary on the evidence which he is content to receive, the oath of the party, as required by the Canons of the Church.

[1] Extended to Ireland by the 58 Geo. 3. c. 81.

[2] That is to say, they held that what was done in Ireland was no more than a mere private contract which could ground no proceedings. They held likewise that a Presbyterian minister in no sense answered the description of a person in holy orders, *i. e.* orders of episcopal ordination.

[3] 1 Hagg. Cons. Rep. 134. S.C. (Sentence affirmed) 1 Phill. 224.

[4] In the same case of Cope v. Burt.

HORE v. BECHER. 12 Sim. 465.

Husband's Power over Wife's Annuity.

Robert Becher executed a bond to A. Frazer and J. Becher, for the purpose of securing an annuity of 100*l.* to Mary Anne Dickenson, spinster, during her life. Shortly thereafter this lady married John Turton. The annuity falling into arrear Mr. and Mrs. Turton threatened proceedings; but a compromise was effected, in pursuance of which Mr. and Mrs. Turton in consideration of 500*l.* released Frazer, J. Becher, and the obligor in the bond from all claims and demands in respect of the annuity and the securities for the same. Mr. Turton died, leaving his wife him surviving; whereupon, in the present suit, the question for determination came to be whether Turton had power to release his wife's annuity beyond the term of the coverture. The Vice Chancellor of England said, "If a man gives a bond, or a promissory note, to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note; and if he releases the security there is an end to the annuity."

This is an important decision, and well deserves the attention of the profession. In the first place, let us inquire how the case of a husband releasing an annuity, to which his wife was entitled *dum sola*, would stand at law. By the 8 & 9 W. 3. c. 11. s. 8. in all actions upon bond the jury are to assess the damages for breaches proved at the trial, and the judgment is to remain as a security to the plaintiff for such damages as he may sustain by any further breach. This act is held to be compulsory on the plaintiff, so that he *must* assign breaches and take out execution accordingly, and he cannot recover the entire penalty. A bond for payment of an annuity has been expressly held to be within the statute [1], and if any further breaches are committed, the Act directs that the plaintiff may *toties quoties* sue out a *scire facias* upon the judgment. Where therefore husband and wife bring an action on a bond to secure an annuity given to the wife *dum sola*, and the wife is joined, the action being in the name of both, the judgment must also be in the name of both. "A release of all manner of demands," says Littleton [2], "is the *best* release to him to whom the release is made." But the husband has no demand for any payments of the annuity, other than those that are due or may become due during his life. The statute prevents his recovering the entire penalty. The release of the husband, then, as it appears to us, can only release that for which

[1] Collins v. Collins, 2 Burr. 820.; Walcot v. Poulding, 8 T. R. 126.

[2] S. 508. Co. Litt. 291 b.

he can enforce a claim, namely, the arrears and accruing payments during his life. To say that the husband can release the bond itself, and not all claims merely, when another person besides himself, namely, the wife surviving, may, in a certain event, have an interest in it, which interest he cannot by any means reduce into possession, seems to us to assume the question. But there is an express decision on the point in the case of Thomson v. Butler[1], where it was held, to use the language of Lord Chief Baron Comyns, that "If the wife has an annuity for life, a release by the husband does not bind the wife if she survives."

Such being the case at law, the next question is, what equity had the plaintiff Hore (the executor of Frazer) to be relieved from his obligation to enforce the bond for the benefit of the wife? Even had she been the obligee, the release would not have bound the wife surviving. But in the case before us the wife was not the obligee; and *ex concessis* the legal obligation remained so far as the obligees were concerned. The release was not made *by* but *to* the obligees. Indeed, it was owing to this circumstance that the bill was filed; the very same reasons which would operate to prevent the obligor from taking advantage of the release, would surely prevail as regards the obligees when called upon by their *cestui que* trust to enforce the bond against the obligor.

It will be seen that our view of the Vice Chancellor's decision is wholly irrespective of the doctrine that he who asks for equity must do equity, a principle which was not adverted to in the case. According to our apprehension, neither the plaintiff nor the obligor had any equity. But at any rate, we cannot but think that the wife had at least an equal equity; and, if so, why did the Court interfere to prevent the enforcement of the bond?

FERGUSON v. CLAYWORTH AND WIFE. 13 L. J. (N. S.) Q. B. 329.

Liability of Married Women to be taken in Execution.

Under a writ against husband and wife, the wife had been taken in execution for damages and costs in the above action, which was for slanderous words uttered by the wife.

A rule was obtained to show cause why she should not be discharged on affidavits stating that she *was not possessed of, or in any way entitled either in possession, remainder, or reversion, to any property, estate, goods, chattels, or effects whatsoever*, and that she had no means or expectation whatsoever of being able to satisfy the damages and costs of the action, or any part thereof;

[1] Moore's Rep. 522., which case Lord Chief Baron Comyns, himself an authority, has entered in his Digest, tit. Baron & Feme, K.

and that for the last five years, during which she had been living apart from her husband, her son had wholly boarded and lodged her at his expense.

In answer to the above, affidavits were filed stating that the son had covenanted, by the deed of separation, to support her out of the proceeds of his father's business, which was at the separation made over to him ; and also showing grounds for believing that he held property in trust for her in the savings' bank.

The Court saying they had a discretion in the matter [1], and that the burthen of proof was sometimes [2] too much cast on the other side, decided that the affidavits of the plaintiff, by raising a presumption that there was property held in trust for Mrs. Clayworth, made it incumbent on her to show positively that she had no separate property, which she had not done, since, consistently with her affidavits, the presumption that there was property so held for her might be well founded.

The Court therefore refused Mrs. Clayworth's application for her discharge.

MARTIN v. TEMPERLEY. 3 G. & D. 497.

Liability of Master for Act of Servant.

Although the rule that a master is responsible for the acts of his servant does not apply where the employment of one particular individual is compulsory, or where the person employed is for the time invested with the superior control,—as in the case of a shipowner, who is not liable for the acts of a pilot, — the Pilot Acts compelling the master of the vessel to take on board the first qualified person who offers himself, and giving that person when on board the absolute management of the vessel [3]; yet where the legislature only confines the selection to a particular class, out of which the employer may choose any individual he pleases, and where, subject to existing regulations, he still has the control for all legal purposes, the relationship of master and servant is deemed to exist, and the general rule above-mentioned applies. Accordingly, where a coal agent who had hired a barge for the purposes of his trade, employed in the management of the barge two watermen of the class qualified by the Watermen's Act, out of which class he was by that Act obliged to make a selection [4], it was held that the watermen so employed by him were his servants, and that he was liable for injury done by his barge to the plaintiff's boat in consequence of their mismanagement.

[1] Chalk v. Deacon, 6 B. Mo. 128.

[2] Hoad v. Matthews, 2 Dowl. P. C. 149.

[3] Luny v. Ingram, 6 M. & W. 302.

[4] 7 & 8 Geo. 4. c. 75. See ss. 36, 37. 102, 103.

Evans v. Salt. 6 Beav. 266.

Heir — Personalty — Next of Kin.

The word *heir* has an ambiguous and flexible signification, varying with the nature of the property which forms the subject of gift. In the will which gave rise to the contest between the above parties, the ultimate limitation of personalty was "to the *heirs* of Sarah Evans." Lord Langdale M. R. held the next of kin entitled; because the "heirs" of personalty must mean such persons as the law points out to succeed to the personal estate. This judgment is supported by an *obiter dictum* of Lord Alvanley in Holloway v. Holloway, (5 Ves. 399.), by an actual decision of Sir W. Grant's in Vaux v. Henderson, (1 Jac. & Walk. 388. n.), and finally by the clear opinion of Lord Chancellor Brougham, affirming a decree of Sir John Leach in Gettings v. M'Dermott, (2 Myl. & K. 69).[1]

Withy v. Mangles. 10 Cla. & Fin. 215.

Next of Kin — Father, Mother, and Child.

Parents and children are in the same degree of propinquity to the *Propositus*. Therefore, where in a marriage settlement a sum of 10,000*l.* was, by the ultimate limitation, covenanted to be paid to such person or persons as at the lady's death "should be her next of kin;" and where she died, leaving a father, a mother, and a child, her surviving, it was held by the House of Lords (affirming a decree of Lord Langdale M.R.) that the three, being of equal proximity of kindred to the deceased, were entitled to the 10,000*l.* in joint tenancy.[2]

[1] The only case that we know of inconsistent with the above decision is that of Mounsey v. Blamire, at the Rolls, (4 Russ. 384.) where Sir John Leach in 1829 held it to be "by no means a necessary inferenc · that the ordinary sense of the word 'heir' was to be controlled by the nature of the property." But in 1834, when deciding the above case of Gettings v. M'Dermott, he expressed himself entirely in conformity with the opinions of Lord Alvanley, Sir William Grant, and Lord Brougham.

[2] Lord Campbell expressed great difficulty in concurring with Lord Cottenham, who moved the above judgment. It was putting a construction on the settlement which could never have entered into the contemplation of the parties. For, suppose the son to have died, and that there had been grand-children, they would have had no share, as being a degree further removed from the *Propositus* than the father and mother, who consequently would have taken the whole, merely because they answered the designation of "next of kin." However, after the decision of the Lords Commissioners in Elmsley v. Young (2 Myl. & Keen. 780.), to which the noble and learned Lord (Campbell) said he must adhere, although he did so with great reluctance, he held that the House had no alternative but to confirm the decree appealed from. Wherever, therefore, the expression "next of kin" is found *simpliciter*, it must be taken to mean "nearest

DOE DEM. YORK v. WALKER & ANOTHER. 12 M & W. 591.

Will — Republication.

J. N. in February, 1837, devised *all the lands of which he was seised* in possession or reversion to two trustees. In July, 1838, (the stat. 1 Vict. c. 26. having come into operation) he made a codicil by which, after reciting the devises in his will, he appointed an additional trustee, and directed that his will should be read in the same manner, and have the same operation and effect, as if he had been named a trustee with the others, and in all other respects he ratified and confirmed his said will. Held, that the codicil, being a republication of the will, passed real estates purchased by the testator after the date of the will and codicil.[1]

BRIDGE v. YATES. 12 Sim. 465.

Legacy — Children held Tenants in Common — Grandchildren Joint-Tenants.

The testator in this cause bequeathed a portion of his residuary estate in trust for his wife for life, with remainder upon trust *to be equally divided* amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the share which their deceased parent would have taken if living. At the widow's death there were two children living, and also two grand-children, the issue of a deceased child. It was not doubted that, under the words "to be equally divided," the two children became entitled to two-thirds of the fund as *tenants in common:* but a question arose whether the two grand-children took *inter se* their deceased parents share as joint-tenants or as tenants in common: and the Vice Chancellor of England held, that the words which created a tenancy in common with respect to shares taken by the children did not extend to the shares taken representatively by the grand-children *inter se*, and consequently that the grand-children took as joint-tenants.

of kin." The usual phrase, "next of kin according to the statute of Distributions," is inaccurate, and in fact contradictory; for the statute orders distribution among persons other than the next or nearest of kin. Conveyancers ought to invent a form of limitation which would apply exclusively to the *hæres in mobilibus*. The want of this was conspicuously apparent in Withy v. Mangles.

[1] 1 Vic. c. 26. s. 24. enacts "that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears:" s. 34. enacts that every will re-executed or republished or revived by any codicil shall, for the purposes of this Act, be deemed to have been made at the time when so re-executed, republished, or revived.

MASON v. FARNELL. 12 M. & W. 674.

Assent of Executor.

On the trial of this case at the assizes a question arose, whether, at a certain period of time, an executor had assented to a legacy of leasehold property bequeathed to himself in trust for others, and had thereby become possessed of such property as trustee, or whether he still held it in the character of executor. The rule laid down by Gibbs C. J.[1], seems to have been recognised without dispute, namely, "that if an executor, in his manner of administering the property, does any act which shows that he has assented to the legacy, that shall be taken as evidence of his assent to the legacy; but if his acts are referrible to his character of executor, they are not evidence of an assent." But Lord Denman C. J. at the trial having held that the fact of the executor's assent was a matter of law for the decision of the Judge alone, the Court of Exchequer expressed a decided opinion, that it was a question of fact which should be left by the Judge for the jury to decide.

IN RE UNIACKE. 1 Jones & Latouche, 1.

Appointment of New Trustee — Sir E. Sugden's Act — Presumption of Acceptance of Trust.

By a marriage settlement of 24th February, 1821, the sum of 2000*l.*, then secured upon a bond, was assigned to two trustees, Rochfort and Townsend: and all parties, except Townsend, executed the deed. The 2000*l.* was afterwards invested in government stock in the name of the two trustees. Rochfort subsequently died; and then Townsend, who had never acted in the trust, declined to interfere. A petition was therefore presented for the appointment of new trustees under the twenty-second section of the stat. 1 Will. 4. c. 60. But Lord Chancellor Sugden refused the application, observing, "It has been frequently decided, that a case does not fall within the twenty-second section, unless there be a disability such as is mentioned in the former sections of the Act. There is none such here. It is said that the trustee never executed the deed, never acted, and now refuses to act; but after the lapse of time which has occurred since the settlement was executed, this person must be considered to have accepted the trust. The petitioner must therefore procure a transfer from him of the trust funds by the ordinary means. It would be most mischievous to grant such applications as the present; it would enable parties, behind the backs of those entitled, to get a fund out of the possession of a trustee who did not choose to be a party to a breach of trust."

[1] Doe d Hayes v. Sturges, 7 Taunt 223. See too Com. Dig. Administration, (c. 6.)

IN RE NEEDHAM. 1 Jones & Latouche, 34.

Appointment of New Trustees — Sir E. Sugden's Act — Presumption of Acceptance of Trust.

Andrew Moller bequeathed a leasehold estate and the sum of 1500*l.* to Catherine Moller, William Curry, John Hall, and Ann Champion, and the survivor of them, and the executors and administrators of the survivor, upon certain trusts, for the benefit of Ann Needhame and her issue, and appointed the four trustees to be executors of the will. The testator died in January, 1810: and the will was proved by all the executors except Hall, who declined to act, and never did in fact act in the trusts. He was resident in England, and was now the only surviving executor and trustee. The 1500*l.* had been invested in government stock in the names of the other three trustees, of whom William Curry became the survivor: and he died in January, 1843, having made a will appointing his wife Elizabeth his executrix. She declined in any manner to interfere in the affairs of her husband, or to act in the trusts of Andrew Moller's will; and thereupon a petition was presented by the committee of Anne Needham (who had become a lunatic), praying the appointment of new trustees. Lord Chancellor Sugden granted the petition, and ordered that the new trustees should obtain special administration to William Curry, the surviving trustee, for the purpose of procuring a transfer of the stock to themselves. His Lordship also said, "Mr. Hall must assign the term of years to the new trustees; for after the lapse of such a number of years since the death of the testator, without a disclaimer by him, I must presume that he accepted the trust."

IN RE WAKEFORD. 1 Jones & Latouche, 2.

Appointment of New Trustees — Imbecile Trustee — Sir E. Sugden's Act.

A petition was presented under the Act 1 Will. 4. c. 60. for the appointment of two new trustees in place of the trustees named in Wakeford's marriage settlement of 9th July, 1830. The power contained in the settlement authorised the appointment of new trustees in the event of death, and in that event alone. One trustee had died; and the affidavits showed that the other, who was within the jurisdiction, was of infirm and bad health, and incapable of executing a deed assigning the property to a new trustee and himself jointly, or to act in any manner in the execution of the trusts. There was also medical evidence showing that the surviving trustee was incapable of managing his own affairs, but his incapacity did not amount to lunacy. Under these circumstances, Lord Chancellor Sugden said, "I am not aware that I have any power to grant the prayer of this petition."

EXPARTE HUGHES. 1 Jones & Latouche, 32.

Trustee out of Jurisdiction — Sir E. Sugden's Act — Evidence.

This was a petition under the Act 1 Will. 4. c. 60. for the appointment of a new trustee in the place of one who was out of the jurisdiction; and we notice the case merely for the purpose of calling attention to Lord Chancellor Sugden's declaration, "that in future he should not make orders of this nature where the trustee out of the jurisdiction is *resident in England*, unless upon an affidavit of service of notice of the application upon him."

WHITWORTH v. GAUGAIN. 3 Hare, 417.

Equitable Mortgage — Elegit — Preference.

The plaintiffs, bankers at Northampton, were equitable mortgagees of George Cooke, a solicitor of that place, who stood largely indebted to them upon his banking account. On the 22d April, 1839, he deposited with them his title-deeds, with a memorandum signed by him, declaring that such deposit was made to secure repayment to the house of the sums then lent to him, with interest, "as also of all sums which they shall hereafter advance to me, the said George Cooke," &c. So that the deposit was to secure a then existing debt and future advances. The memorandum further stipulated that Cooke should if required execute a *legal* mortgage to the Messrs. Whitworth.

The defendants were two judgment creditors of George Cooke, whose actions were commenced on the 16th of November, 1840. To these creditors Cooke signed two several cognovits; and writs of elegit being sued out by them thereon, it appeared that on the 30th of December, 1840, the sheriff's officer delivered to them legal seisin of the very premises which were comprised in the equitable mortgage to the bankers. On the 3rd February, 1841, a fiat of bankruptcy issued against Cooke; and, upon a bill filed by the bankers to claim the benefit of their security, the question arose whether they, as equitable mortgagees, or the defendants, as tenants actually in possession by elegit without notice of the plaintiffs' claim, should in equity have the preference.

The plaintiffs contended that by virtue of the equitable mortgage Cooke became trustee for them, and from thenceforth held the lands only as *legal* owner thereof. The equitable and beneficial interest was no longer *his*, and therefore the fact that the defendants had acquired possession by elegit was immaterial in equity. For this was not the case of contesting parties who had both relied on the security of the same estate; but it was the case of a creditor who, originally confiding in the personal solvency of his debtor, attempts afterwards to enforce his demand against his estate, and

whose remedy therefore must be affected by the situation of that estate at the time when his right is made to attach upon it; according to the familiar principle that creditors can only take what their debtor has to give them. If they come into his shoes, they must stand in them subject to his responsibilities.

On the other hand, the defendants maintained, that as in equity both parties stood on equal ground, the defendants, who had got the legal title, ought to be preferred. Cooke contracted to execute a legal mortgage to the plaintiffs. They never called for that mortgage; but went on from day to day, dealing with him and varying the amount of their debt. In the meantime the defendants (having no notice of the plaintiffs' claim), by due course of law, converted their equitable charge into a legal one. Why deprive them of an advantage which their prudence had secured to them? Why disregard the maxim, *vigilantibus non dormientibus jura subveniunt?*

Upon an appeal motion for a Receiver before Lord Chancellor Cottenham (2nd June, 1841), his Lordship took occasion to observe that "he should have required a great deal more to satisfy him of the validity of the plaintiffs' claim before he could have interfered by interlocutory order; because, he found these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which, under the authority of an Act of Parliament, they had a right to hold, the elegit being the creature of an Act of Parliament; and therefore they had a parliamentary title to hold the land as against all persons, unless an equitable case could be made out to induce that Court to interfere." [1]

In March, 1844, the cause having been very copiously argued before Vice Chancellor Wigram, his Honor pronounced an elaborate decree; holding that the plaintiffs had a right to the payment of their demand out of the estate in priority to the defendants. The learned Judge, in stating the grounds upon which he arrived at this result, expressed himself as follows[2]: — "I am satisfied that Lord Cottenham did not intend by what he said finally to decide the point now before me. However strong the leaning of his mind may have been in favour of the judgment creditors, he not only did not intend to decide it, but he intended that it should be reserved. And I therefore consider myself not only at liberty but bound to decide the cause according to my own understanding of the law.

Now, if the question be not decided by that judgment, I have

[1] Whitworth v. Gaugain, Cr. & Phil. 330.

[2] We give the learned Judge's speech at more than ordinary length, on account of the great difficulty and importance of the question.

certainly a very strong opinion upon it. The more I consider the case the more satisfied I feel that I stated the general principle correctly in Langton v. Horton [1] when I said that a creditor might, under his judgment, take in execution all that belonged to his debtor, and nothing more. He stands in the place of his debtor. He only takes the property of his debtor subject to every liability under which the debtor himself held it. First, take the case of an ordinary trust. It could not for a moment be contended that this Court would not protect the cestui que trust against the judgment creditor of the trustee. The judgment of Lord Cottenham in Newlands v. Paynter [2] is decisive upon that point, and the other cases cited at the bar prove the same thing. Secondly, take the case of a purchaser for value before conveyance. Lodge v. Lyesley[3] is an authority, if authority could be wanting, to show that the equitable interest of such a party will be preferred in equity to the claim of the judgment-creditor of the vendor. Again, take the case of an equitable charge to pay debts or legacies, or any other equitable interest, except that of an equitable mortgagee, and I apprehend the right of the equitable incumbrancer to be preferred to the judgment-creditor of the debtor, in whom the legal estate in the property charged might be, will be, as indeed it properly was, admitted. And if such equitable interests are thus protected, upon what principle is the equitable mortgagee to be excluded from the like protection? Unless I misunderstand the report of the case of Williams v. Craddock [4], the counsel as well as the Court were of opinion that an interest by way of equitable mortgage was entitled in this Court to the same protection against judgments as other equitable claimants.

In the argument of this case both parties referred to, and drew conclusions from, the proposition that, in a court of equity, a purchaser for value who obtains a conveyance of the legal interest without notice of an equity affecting the specific subject of his purchase, will in equity, as at law, have a better title to that subject than the mere equitable claimant. The proposition thus admitted, and necessarily admitted, by both parties, is pregnant with consequences which go a great way towards deciding the question now before me. If the tenant by elegit is, as was argued, to be considered as a purchaser for value without notice under a conveyance, all trusts, and all equitable interests of every description, must be subject to the judgment against the trustee. For a purchaser for value without notice from a fraudulent trustee, having got the legal estate, will unquestionably be preferred in

[1] 1 Hare, 549.
[2] 4 Myl. & Cr. 408.
[3] 4 Sim. 70.
[4] 4 Sim. 316.

equity to the cestui que trust; and it appears to me to be impossible, except by a merely arbitrary decision, to distinguish the case of an ordinary trust or other equitable interest from the present, in considering merely the effect of a judgment upon it, unless it can be shown that the interest of the equitable mortgagee is, for the present purpose, distinguishable from that of an ordinary cestui que trust. Again, it follows conversely, that if the equitable interest of an ordinary cestui que trust, or any other equitable interest, is not subject to judgment against the trustee, though executed, then those judgments, though executed, are not analogous to purchases for value. In other words, the judgment creditor of a trustee is not a purchaser for value in the contemplation of a court of equity. The proposition that a judgment creditor is a purchaser for value would prove too much for the defendant's purpose. It would affect all equitable interests alike.

But it was said that the interest of an equitable mortgagee was distinguishable from that of an ordinary cestui que trust, and other equitable interests (charges, for example, to pay debts and legacies paramount the title of the debtor), which it was admitted would be preferred in equity, — that the interest of the equitable mortgagee was imperfect, — that of the cestui que trust perfect. In what respect is the interest of the equitable mortgagee imperfect? As between the mortgagor and mortgagee it is absolute and complete. In what respect is it imperfect as between the mortgagee and those who claim under the mortgagee, as his creditors by judgment? The interest of the equitable mortgagee is liable to be defeated by a fraudulent dealing with the legal estate, and in that respect, no doubt, it is imperfect. But that is an infirmity to which all equitable interests are subject; and if other equitable interests are to be protected against judgments obtained against the trustee, or other party in whom the legal estate may be, why is the interest of the equitable mortgagee to be unprotected? The debt was no more contracted upon the view of the land (if that were material, which I think it is not) in the one case than in the other.

The most plausible way of stating the case in favour of the judgment is by supposing his right to be founded in contract, and not to be the result of a proceeding *in invitum;* and this, no doubt, may be the truth of the case, when the judgment is voluntarily confessed; and I paid the greatest attention to the arguments of counsel upon that point. But, admitting that view to be correct, how does it alter the case? The question remains, — what was the contract? It was the general contract for a judgment, and the fruits of a judgment; and the original question, therefore, —

what right does a judgment confer? — remains wholly untouched by the concession. If a party contracts specifically for a given property, pays the purchase money, and obtains the legal title, without notice up to the time of obtaining the conveyance, as well as of paying his money, that may give him a right to be preferred to an equitable claim which is prior in point of time. But there is no principle upon which a Court of Justice can be required to imply that a general contract to give a judgment is a contract to give that which does not belong to the debtor. If the trustee were to confess a judgment, am I to imply that it amounts to a specific contract to give the creditor an interest in that which belongs to the cestui que trust? That appears to me to be the true distinction. In one case the party contracts for a specific thing; in the other he merely takes a judgment; that gives him nothing more than a right to that which belongs to his debtor.

The above propositions, which, separately taken, I believe to be unimpeachable, will be found to meet every argument that was addressed to me in support of the defendant's case, independently of the late statutes.

I am clear that the late statutes make no difference in the case. So far as the judgment creditor claims to be a mortgagee in writing under the statute, he is posterior, in point of time, to the plaintiffs. But it was said that the equity of the judgment creditor was equal to that of the equitable mortgagee, and that he has, by the force of the elegit executed, an estate at law in addition to his equitable interest, and therefore is to be preferred.

I need not, after what I have already said, proceed to expose the fallacy of this argument; it takes for granted the whole question in dispute. That the tenant by elegit has an estate in that which he may lawfully take (that which belongs to his debtor), I do not deny; but to say that by force of the elegit he acquires a rightful interest in this Court in that which in equity does not belong to his debtor, is taking the whole matter in contest for granted; the whole question being what he may take.

I can only repeat that it appears to me impossible, except upon the most arbitrary distinction, to say that the interests of an equitable mortgagee are not to be protected, and yet that protection is to be afforded to the interests of an ordinary cestui que trust and other equitable interests. I do not go into the reasonings of the cases which have been cited; all of them, however, appear to me to support the view I have taken. If my judgment cannot be supported upon propositions which are indisputable in themselves, —

whether properly applicable to the case or not, — no explanations I can give of the cases will at all strengthen the foundation of that judgment."

PAGE v. ADAM. 4 Beav. 269.

FORBES v. PEACOCK. 12 Sim. 528.

Vendor & Purchaser — Application of Purchase Money — Conflict of Judicial Opinion.

Where by deed or will a trust for sale is raised without declaring that the trustees' receipts shall be valid discharges to purchasers, Equity will in some cases bind the purchasers to see the money applied according to the trust. This rule, though salutary in principle and intention, has very often been productive of inconvenient effects; and various eminent Judges have discouraged its extension. Thus in Belfour v. Welland [1], Sir W. Grant expressed his dissatisfaction with the doctrine in the following terms: — "The objection," said that great master of Equity, "is, that if the trustees misemploy the price, the purchaser may be called upon to pay the money over again. In other words, the purchaser is bound to see to the application of the purchase-money. I think the doctrine upon that point has been carried further than any sound equitable principle will warrant. Where indeed the act is a breach of duty in the trustees, it is very fit that those who deal with them should be affected by an act tending to defeat the trust of which they have notice. But where the sale is made by the trustees in performance of their duty, it seems extraordinary that they should not be able to do what one would think incidental to the right exercise of their power, that is, to give a valid discharge for the purchase-money." In Page v. Adam, which came before Lord Langdale M. R., the question turned upon the will of Mr. Adam, the late Accountant-General, whereby the testator charged his whole estate with the payment of his debts, and also with the payment of certain annuities. Upon a sale by the executor, the purchaser filed a bill against him demanding a specific performance of the contract by executing a conveyance, and also by procuring the execution of a deed releasing the annuities. The answer admitted that the debts were then paid; but asserted that they had not been paid at the time of the sale. In course of the argument the Master of the Rolls said, "The plaintiff has now notice that the debts have been paid. And he has not yet paid the purchase-money: would he not be liable to the annuitants if he were now to pay to the defendant?" However, his Lordship, in ultimately deciding the case, came to the

[1] 16 Ves. 156.

conclusion that, under the circumstances, it was not necessary for the purchaser to see to the application of the price, and consequently that he had no right to insist on a release from the annuitants. "It is admitted," the noble and learned Judge observed, "that if the will had charged the real estate with the payment of the testator's debts and pecuniary legacies only, the purchaser would have been exonerated from liability: but it is said, first, that there are special circumstances tending to show that a sale of the estate was not required for the payment of the debts; and secondly, that annuity-legacies are different from others, and that, being intended to continue a charge on the estate, the lands must be liable in the hands of a purchaser. I do not think there are in this case any circumstances to take it out of the common rule. That rule was stated by Lord Lyndhurst [1] to be applicable to the state of things at the testator's death. And Lord Eldon said it had been long settled that where a man by deed or will charges or orders an estate to be sold for payment of debts generally, and then makes specific dispositions, the purchaser is not bound to see to the application of the purchase-money. It is just the same as if the specific bequests were out of the will." Seeing no reason to differ from this opinion, I do not think that the rule ought to be departed from by reason of the nature of the legacy. The charge of debts is general; the amount is indefinite — and may exceed the whole value of the estate. It is the first duty of the executor to pay the debts; and for that purpose he is entitled to sell: and if he sells, something or nothing may be left to secure payment of the annuities. The purchaser seems to have nothing to do with this: he cannot know or ascertain the amount of debts, and cannot, if he would, protect the annuitants. His title is derived under an authority or right to sell for payment of debts, — a purpose paramount to the payment of annuities; and in respect of debts he is not bound to inquire."

Let us now direct attention to Peacock v. Forbes, decided by the Vice Chancellor of England about a year after the case of Page v. Adam. In Peacock v. Forbes the testator had charged his real estate with his debts; and the executor proceeded to sell. The Vice Chancellor said, "My notion of the law is that, where a testator has directed all his debts to be paid, and then appoints certain persons his executors and trustees, — if at any time after his death those who have the power, sell any part of the testator's real estates, and nothing is said about the matter, the purchaser will have a good title; because upon the face of the will there is a

[1] 3 M. & K. 631. [2] 6 Ves. 654. n.

charge of debts, and *non constat* that all the debts have been paid." Having said this his Honour then proceeded to deal with the case in hand, in which the purchaser had actually put the question to the vendor whether "any of the testator's debts remained unpaid at the date of the sale." To which question the vendor declined to make any answer. Now the Vice Chancellor appears to have held that the purchaser had a right not only to put this question, but also to demand an answer to it. And he was further of opinion that the purchaser, under such circumstances receiving no answer, should be held to have had notice that the debts were paid, and that the sale consequently was unnecessary and improper; from all which the inevitable conclusion seemed to be, as his Honour indeed ultimately decided, that the purchaser was answerable for the application of the purchase money. In Page v. Adams we have seen that the facts in one material respect were different. There, although it was admitted that all the debts were paid at the time of filing the answer, it was denied that they were paid at the time of the sale. There was nothing therefore to suggest that the sale was beyond the scope of the trust. So that upon the whole it would rather appear that the decision of the Vice Chancellor may be supported without calling in question the determination pronounced, under a distinguishable state of circumstances, by the Master of the Rolls. Our readers, however, will attach but little weight to our opinion when they have perused the following commentary by the Vice Chancellor on the case of Page v. Adam:—"Now no case has been produced in which it has been decided that the purchaser, knowing that the debts have been paid, is exempt from the necessity of seeing to the application of the purchase-money, except this case of Page v. Adam. I have the greatest possible respect for my Lord Langdale's opinion; but I do not imagine I am at liberty to think that the law is made so clear by this single decision in Page v. Adam that I am justified in saying that this purchaser has got a good title. [Mr. Bethell:—In Page v. Adam the debts were not all paid at the time of the sale.] I observed that: but it does not appear to me to make a substantial difference. My notion is, that the law upon the point must at least be considered as unsettled; and my own personal opinion, as a Judge, is that the decision in Page v. Adam is contrary to the current of authority; and I am bound by my duty as a Judge, to say to the purchaser that, in my opinion, if he takes this title he will take a bad one."[1]

[1] The decision in Forbes v. Peacock is under appeal to the Lord Chancellor.

LORD DOWN v. MORRIS. 3 Hare, 394.

Escheat—Lord's Equity of Redemption.

A tenant of a manor dies intestate, and without heirs. His land being subject to a mortgage term of 1000 years, the lord, to whom the reversion had escheated, files a bill against the mortgagee for redemption. Under the circumstances of the case, it was at once evident that, unless the lord had the equity of redemption, he could gain no essential benefit by the escheat: for the mortgagee, having a term of 1000 years, would be in effect absolute owner of the premises — the only drawback being the lord's reversionary right in the fee; which, however, could not come into operation till the close of ten centuries. Vice Chancellor Wigram, after much deliberation, decided that the equity of redemption, which had remained in the tenant after executing the mortgage, passed to the lord as incident to the reversion.[1]

IN RE CHINNERY'S, Lunatics. 1 Jones & Latouche, 86.

Injunction in Lunacy — Waste — Jurisdiction.

In this case the receiver applied by petition for an injunction in the nature of a writ of *estrepement*[2], to restrain the *tenants* of the estate from burning, or turning up for burning, any part of the surface of Coachmare Meadows in the County of Cork; and from removing or selling any of the surface soil of those lands, and

[1] The only direct authority for this determination appears to be Thruxton's case, 1 Vern. 340., which, however, is liable to this observation, that it was decided by Lord Jefferies; in favour of the Crown; and at a period when he was "new in the court." The Vice Chancellor, in giving judgment, represents Sir Edward Sugden, (3 Vend. & Pur. p. 92.) as expressing "a clear and decided opinion in accordance with Thruxton's case." The passage cited, however, seems to us scarcely to warrant so strong an expression. And we venture humbly to suggest that much might have been urged in favour of the right of the mortgagor's personal representative to redeem that which certainly was a part of his testator's property, in preference to the lord's claim; — an argument entitled to the more attention, since it has the support of Sir Thomas Clarke's suggestion, (Burgess v. Wheate, 1 Black. 123.), as to the title of a personal representative to redeem even a mortgage *in fee*, a case infinitely more difficult, as it appears to us, than that now under consideration, which, we may further remark, with the utmost deference, ought, perhaps, scarcely to have been gone into without having the personal representative before the Court, and duly weighing the points which it was his interest to have discussed. Besides, in allowing the lord to redeem, is it quite clear that the case admitted of a reciprocity of remedy? The decision, we understand, is appealed to the Lords.

[2] "Estrepement is a writ that lies where one is impleaded by a *præcipe quod reddat* for certain land: if the demandant suppose that the tenant will do waste depending the plea, we shall have against him this writ, which is a prohibition commanding him to do no waste, depending the plea." (*Termes de la Ley.*) Estrepement seems to be a *legal* injunction.

from committing any waste or destruction thereon. The Lord Chancellor Sugden at first doubted the jurisdiction to make such an order *in lunacy;* but granted the injunction upon the authority of a precedent made by Lord Redesdale, *in re* Creagh.[1] The principle of the decision seems to be, that though the Chancellor, as *Custos* of lunatics, sits merely *in foro domestico,* and not *in foro civili,* yet the tenants, by attorning to the receiver, had submitted themselves to the jurisdiction in lunacy. It does not follow therefore, that a similar order would be made against a stranger without a bill being filed. However, the whole matter is obscure. The same causes have probably given rise to injunctions in lunacy and in bankruptcy. A *writ* of injunction does not, we believe, issue in bankruptcy: but an order is made *in the nature of a writ of injunction.* It is perhaps the same in lunacy, although the reports do not enable us to ascertain the fact. The Chancellor, sitting in the exercise of a threefold jurisdiction, seems to render the authority and machinery of the Great Seal subservient to the business of lunacy and bankruptcy. Lord Redesdale, if we do not misapprehend his reasoning, had some notion of this sort. See Exparte Fitzgerald, (2 Sch. & Lef. 432. 438.)[3]. See also Exparte Cutts (3 Deac. 242.). Not only the judgment, but the argument of Sir C. Wetherall and Mr. Lee in this last mentioned case, are deserving of careful examination.

Curling v. Mills. 7 Scott, N. S. 709.

Demise — Agreement.

The only general rule to be followed in determining whether an instrument amounts to a present demise, or merely to an agreement for a future lease, is to ascertain the intention of the parties as it is to be collected from the instrument[2]; and where, on reading through the whole of an instrument under seal, it is clear beyond doubt that one party intended to deprive himself of the possession of the premises described, and that the other was to hold them for the whole term, the instrument will be held to be a present demise, although it may commence with the words, "Memorandum of

[1] In the matter of Creagh, a lunatic, Feb. 1. 1809, Mr. T. Dickson, on behalf of the committee of the lunatic, by petition, moved for an order to restrain tenants upon the lunatic's estate from committing waste by turning up pasture lands for grass potatoes, there being no bill filed, and relied on an order pronounced in this matter by Lord Redesdale to the same effect.

The Lord Chancellor (Manners). "Under the authority of that order pronounced by Lord Redesdale, I will grant this motion." 1 Ball & B. 108.

[2] Morgan d. Dowding v. Bissell, 3 Taunt. 65.

Agreement," and though it may contain stipulations for the future grant of a more formal lease.[1]

FELLOWES v. CLAY. 3 G. & D. 407.

Exemption from Tithes— Lord Tenterden's Act.

The Court of Queen's Bench were equally divided in opinion as to the proof required since Lord Tenterden's Act [2] to establish a claim of exemption from tithes.

Patteson and Coleridge JJ., agreeing with the decision of Rolfe B. at the trial of the case at Nisi Prius, held that proof of the mere fact of nonpayment for the period mentioned in the Act (two incumbencies, not being less than sixty years and three years afterwards,) was not in itself sufficient to establish the plaintiff's claim to exemption, but that it was still necessary, as before the Act, to give evidence of some ground of exemption to which the fact of nonpayment might be referred, and they insisted, in support of their opinion, on the words of the preamble, as well as of the enacting clause, as showing that the legislature merely intended (for the ease of claimants) to shorten the time during which it was formerly necessary, in support of such claim, to prove nonpayment; but not to set up a new ground of exemption, such as the mere fact of nonpayment, independent of and unconnected with any circumstances before recognised as a legal ground of exemption, and to which such nonpayment might be referred.

On the other hand, Lord Denman C. J. and Williams J. held that the mere nonpayment during the statutory period was in itself a discharge from tithes; and they argued from the history of the different Acts for shortening the time of prescriptions, and the recommendation of the Commissioners on which these Acts were founded, as well as from the words of the preamble and enacting clauses of Lord Tenterden's Act, that the general intention of the legislature was to legalise possession after a certain length of enjoyment, in all cases, including those of nonpayment of tithes, where such relief from the grievances and insecurity occasioned by the old law was eminently beneficial and needful.

The difference of opinion expressed in the above case must of course throw doubt upon the decision of Vice Chancellor Wigram in Salkeld v. Johnston [3], as well as upon the general law on this subject. For although Lord Denman and the Vice Chancellor each carefully drew a distinction between the two cases, with a

[1] See Poole v. Bentley, 12 East, 168. and other cases cited. See also 7 & 8 Vict. c. 76. s. 4.

[2] 2 & 3 W. 4. c. 100.

[3] 1 Hare, 196. See *antè*, p. 211.

view of avoiding a direct contradiction of the law laid down by the other, it cannot be denied that the Vice Chancellor expressly decided, in conformity with the opinion of Patteson and Coleridge JJ., that Lord Tenterden's Act does not destroy a vicar's right to tithes upon mere proof of nonpayment during the statutory period, but merely has the effect of bringing down the first year of Richard I. to the commencement of the period named in the Act, saying that it was much more reasonable to ascribe to the legislature an intention only to introduce the important amendments which by such construction of the statute would be introduced, than to ascribe to them the intention of indirectly introducing by an Act (limited as this one is by its preamble) a general right in laymen of setting up an exemption from tithes by the mere length of time during which they have not been paid.

This important question cannot therefore well be settled till some case on the point is taken by appeal to a superior tribunal, and Coleridge J., in the present case, withdrew his judgment, for the express purpose of enabling the parties to pursue that course.

REGINA v. THOMAS. 3 G. & D. 485.

Church Rate.

A monition having issued from the Consistory Court of York, commanding the parishioners to take steps for repairing the parish church, a vestry meeting was accordingly convened. The majority refused to make a rate. Whereupon the churchwardens and the minority proceeded to make one, upon the principle thrown out by Tindal C. J., who in his judgment in Veley v. Burder[1] suggested (without, however, giving any opinion upon the subject) that perhaps, where the majority in vestry assembled have refused to make a church rate, (under circumstances which made such a refusal a breach of duty,) they might be held to have thrown away their votes; and the churchwardens and minority together, as representing the whole meeting, might then proceed to make the rate. But the Court of Queen's Bench refused to enforce by mandamus the collection of the rate so made; on the ground that the Consistory Court of London had in the case of Veley v. Gosling[2] declared such a rate to be illegal, and that they felt themselves bound by such decision[3], so long as it was not reversed upon appeal or otherwise.

[1] 12 A. & E. 309. (Exch. Ch.)

[2] 3 Curt. Eccl. Rep. 253.

[3] *Sed vide* Burder v. Veley, (12 A. & E. 253.) where Lord Denman C. J. declares that a decision even by the Court of Arches, (at least, if insulated and recent,) is not binding in Westminster Hall.

CLIFTON v. HOOPER & ANOTHER. 14 Law J. (N. S.) Q. B. 1.

Sheriff — Negligence in Arrest — Damages.

When the sheriff has negligently omitted to arrest on a *ca. sa.* the plaintiff has in all cases a right of action[1] against him. In this respect there is no distinction between a case where the sheriff has *neglected* to arrest in execution, and one where there has been an *escape after* arrest in execution. But as to the amount of damages there is a material difference: for in the case of an escape after arrest, the party cannot be again taken, and therefore the whole debt may be lost; whereas, when there has been no arrest, he may be taken the next day, and consequently, if the jury find that the plaintiff has sustained no actual loss, he is entitled only to nominal damages.[2]

JACOBSON v. BLAKE & ANOTHER. 7 Scott, N. S. 773.

Trespass against Officers in Execution of Duty.

Two custom-house officers (a landing surveyor and landing waiter), conceiving certain goods of plaintiff, landed at the Custom-house, to be prohibited, refused to pass them, and placed them under stop; whereupon the owner memorialised the Commissioners of Customs and the Board of Trade; and it being ultimately decided that the goods were not liable to forfeiture, they were, in consequence of such decision, released.

It was held by the Court of Common Pleas that as the defendants detained the goods under a real and honest doubt as to the propriety of passing them, and as they afterwards placed them out of their control by referring the matter to their superiors, (with the assent, as it appeared, of the plaintiff himself,) there had been no abuse of authority in law, and no action of trespass lay against the defendants.

KEIR v. LEEMAN. 13 Law J. (N. S.) Q. B. 359.

Compromise of Offences.

A party may compromise an offence, even though an indictment has been preferred, provided such offence be of a private nature, and one for which he might recover damages. But if the offence be of a public nature, it is illegal to compromise it (even under the sanction of a Judge), or to stifle a prosecution for it.

Lord Denman C. J., in delivering the opinion of the Court of Queen's Bench, said, "We shall probably be safe in laying it down

[1] See too Jones v. Pope, 1 W. Saund. 38. n. (2.), and per Buller J. in Planck v. Anderson, 5 T. R. 40.

[2] No action can be maintained either for neglect to arrest or escape after arrest on mesne process, unless actual damage be proved. Williams v. Mostyn, 4 M. & W. 145. Planck v. Anderson, 5 T. R. 40.

that the law will permit a compromise of all offences, although made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action; and it often is the only manner in which he can obtain redress. In the present instance, however, the offence is not confined to the personal injury, but is accompanied with riot, and the obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise. The approbation of a Judge, whether necessary or not, may properly be asked on all occasions when the indictment is compromised on the trial. But it cannot make that lawful which the law prevents."

ELWOOD v. BULLOCK. 13 Law J. (N. S.) Q. B. 330.

Obstruction of Highway.

A custom to set up a booth during fair or market upon a public highway (sufficient space being left for the public to pass) is good, since a fair and a market are just as much public rights as a highway; and this custom of setting up a booth being pleaded as immemorial, may well have existed as a right of the mayor, aldermen, and burgesses previously to the formation of the highway, which then would have been dedicated to the public, subject to this partial obstruction.

DOBSON, Appellant, v. JONES, Respondent. 8 Scott, N. S. 80.

Voter — Occupation of Government Premises.

The appellant, who nineteen years ago was appointed during good behaviour surgeon of Greenwich Hospital, had, during the whole of that period, occupied a house worth 10*l.* per annum, which he was *required* to occupy with a view to the performance of his duties. His name was on the rate books, but the rates and window tax had always been paid by the Commissioners of the Hospital, in whom the property is vested, and had never been tendered by or demanded of the appellant. Held, that a distinction was to be drawn between cases where government officers or servants are *permitted* to occupy a government house [1], and those where they are *required* to occupy it for the performance of their duty. That in the latter case, since the appropriation of the residence is made with a view to the interest of the employer, the officer or servant must be deemed to occupy, not in the character of a tenant, but as a servant, whose occupation was therefore that of the master, and could confer upon him no right to vote: and since it appeared clear from the evidence that the Commissioners

[1] Hughes, appellant, v. Overseers of Chatham, respondents, 7 Scott.

of the Admiralty were the owners, the appellant could not claim a vote as owner under the twenty-seventh section of 2 Will. 4. c. 45.

REGINA v. CHURCHWARDENS AND OVERSEERS OF CHELMSFORD. 3 G. & D. 357.

Costs of Apprehension of Vagrants.

A constable appointed under 2 & 3 Vict. c. 93. for a division of a county, can demand from each parish within his division the reimbursement of fees paid by him to a justice's clerk, on account of proceedings against vagrants and drunkards apprehended within the parish; at least, where it appears that such expenses have always been allowed by the parish to the parish constables.

The eighth section of the Act puts the new constables in the same position as the old parish constables; and these sums are not extraordinary expenses within the eighteenth section, but are incurred in doing the business of the parish.[1]

QUEEN v. MILLIS. 10 Cla. & Fin. 534.

Practice in Dom. Proc. — Effect of an Equality of Votes.

The rule of the House of Lords is, that where there is an equality of votes, the motion is lost, whatever be the question, whether legislative, judicial, or simply deliberative. In the above case, on the question being put, "whether it was their Lordships' pleasure that the judgment be reversed," the six Law Peers were divided, three to three; the Lord Chancellor, Lord Cottenham, and Lord Abinger, being for an affirmance, and Lord Brougham, Lord Denman, and Lord Campbell, for a reversal. The motion to reverse consequently was negatived, and as a consequence the judgment was affirmed; the maxim of the House, as well as of the common law being *semper præsumitur pro negante*.[2]

WITHY v. MANGLES. 10 Cla. & Fin. 215.

Practice in Dom. Proc. — New Point raised on an Appeal.

In the argument upon this appeal at the bar of the House of

[1] Rex v. Bird, 2 B. & A. 522. and Rex v. Seville, 5 B. & A. 180., are distinguished as being cases of voluntary disbursements.

[2] In the Scotch case of Alexander v. Montgomery, 19 Feb. 1773, after debate, the question was put "whether the orders complained of should be reversed." The Earl of Abercorn and the Earl of Marchmont were appointed to tell the number of the votes, and upon the report thereof to the House, it appeared that the votes were *equal*; four for reversing and four for affirming. It was thereupon determined in the *negative*, and judgment was given, dismissing the appeal, and affirming the orders of the Court below. This case shows that the decision was not (as in the Irish marriages' case and in Mr. O'Connell's case) confined to the Law Peers. We rather incline to think that there were only two Law Peers in 1773, Lord Mansfield and Lord Camden. At any rate, there were not *eight*, which was the number of those who voted in giving judgment on the appeal of Alexander v. Montgomery.

Lords the respondent's counsel proposed to enter upon a point not raised in the Court below. The appellant's counsel objected, contending that appeals differ from rehearings in this respect, that the object in appeals is merely to see whether the Court below has rightly decided the points there raised.

The respondent's counsel said the point was noticed in their printed case.

Lord Cottenham, after conferring with the Law Lords, said it was their opinion that the point might be made available on the appeal. The bill was dismissed below; and the respondents, anxious to uphold the decree, were for that purpose entitled to urge this point in their argument.[1]

QUEEN v. MILLIS. 10 Cla. & Fin. 536.

Practice in Dom. Proc. — Number of Counsel allowed.

In opening this case the Attorney-General (Pollock) made the following proposal: that after his own speech and that of Mr. Waddington on behalf of the Crown, and after the counsel for the defendant in error had been heard, the Solicitor-General (Follett) should be allowed to reply.

The Lord Chancellor. — "We cannot do that. It is against our rule. The House can hear only two counsel on each side."

The consequence was, that the Attorney-General opened, and was followed by the Solicitor-General on behalf of the plaintiff in error. Mr. Pemberton Leigh and Mr. Kindersley then addressed the House for the defendant in error, and Mr. Attorney-General replied.[2]

COOK v. TURNER, 12 Sim. 649.

Practice in Equity — Number of Counsel in Equity.

In this case the taxing master had disallowed the fees paid to a junior counsel employed with a Queen's counsel to oppose a motion for further time to answer. The Vice Chancellor of England held that there was a miscarriage on the part of the taxing officer; and that though the sums in question were small, the thing, as matter

[1] It would be a harsh rule to exclude parties in the last resort from the benefit of new arguments. The course of the House is not to exclude these in any case; but if it should appear that a point of real consequence has not been brought under the notice of the Court below, or has not been sufficiently adverted to there, the House would, in such a case, sent the cause back for reconsideration.

[2] The proposal of the Attorney-General, if acceded to, would have given an undue advantage to the plaintiff in error; for the defendant in error is only allowed two speeches, while the plaintiff may have three; but it was never meant that each of those three speeches should be by distinct counsel. The rule is the same in appeals.

of principle, was very important. His Honor remembered perfectly well a case in which Sir Anthony Hart refused to take a brief merely because there was no junior counsel with him.[1] "And I recollect," his Honor proceeded, "that Lord Eldon said in the House of Lords, (when there was some objection made to the fact of two counsel appearing,) that it was of extreme importance to the public at large that there should be a successive body of gentlemen brought up, who should understand their profession by knowing it from the beginning: and, in my opinion, it would be most injurious, not merely to the gentlemen who compose the Bar at the particular time, but to the public at large, if the supply of able men were to be cut off by preventing the younger branches from learning their profession. The consequence of which would be that it would be a matter of chance whether, when the gentlemen who are within the Bar drop off, their places would be supplied by persons of sufficient learning and ability. I shall therefore refer it back to the Master to review his taxation; and the costs of the petition must be costs in the cause."

ABRAHAM v. NEWCOME. 12 Sim. 566.

Practice in Equity — Feme-covert — Infant — Consent.

In this case an *infant* feme covert was entitled to a fund in court, and was desirous of giving her consent in the usual way to the payment of the money to her husband. But the Vice Chancellor of England held, that *during the infancy* of a married woman she is incompetent to consent to the payment to her husband of money in the hands of the Court. His Honor thus departed from his former decision in Gullin v. Gullin[2], and concurred with the opinion of Lord Langdale, M. R. in Stubbs v. Sargon[3]; so that it may now be considered as the settled practice in Chancery that a married woman's fund in Court stands, in this respect, upon the same footing as the fund of a feme sole, and cannot be withdrawn from the jurisdiction during her infancy.

RAND v. MACMAHON. 12 Sim. 553.

Practice in Equity — Colonial Will and Probate — Evidence.

The Vice Chancellor of England has here decided a point of great importance in the present extended state of our colonial possessions. Samuel Long, of St. Christopher's, made his will conformably to the Statute of Frauds, which was in force in that

[1] Mr. Bethell, Q. C., at this stage interposed to mention that the rule, as his Honor stated it, was still uniformly followed. "None of us," said Mr. Bethell, "take a brief in any cause without a junior." See also in Bankruptcy, Ex parte Ellis, 3 M. D. & De Gex, 600.

[2] 7 Sim. 236. [3] 2 Beav. 496.

island. The will was proved in the Colonial Court; and an authenticated copy was afterwards proved in the Prerogative Court of the Archbishop of Canterbury. A suit to establish the will having been instituted in the Court of Chancery, the copy of the will was produced at the hearing, and the Court was asked to establish the will, upon the evidence of an affidavit sworn in the Colonial Court by one of the attesting witnesses at the time when the colonial probate was granted. The affidavit clearly showed that the will had been executed and attested in the manner required by the statute. But the Vice Chancellor refused to proceed upon such evidence; and held that the will must be proved by evidence *taken in the cause.* A commission was therefore issued for the examination of the witnesses to the will in St. Christopher's.

It should be noticed also that his Honor deemed the colonial evidence insufficient, even if it had been admissible; for that one only of the attesting witnesses had sworn to the will in St. Christopher's; so that if what had been done there had been done in England, and in the cause, the Court could not have established the will.

FITZPATRICK v. MAHONY. 1 Jones & Latouche, 84.

Practice in Equity — Account stated.

In this case, which was a suit for redemption, the defendant set up a settled account, but did not prove it, and the plaintiff did not amend his bill to impeach it. The parties took, by consent, a decree for the common account of all sums received by the defendant, or which but for his wilful default might have been received in respect of the rents, &c. of the mortgaged estate; *but the decree took no notice of the settled account.* The Master, nevertheless, in his report, adopted this settled account; but on exceptions to the report, the Lord Chancellor held that the Master was not at liberty to act upon any document as a stated or settled account, unless referred to as such by the decree. If the parties had taken the proper decree, they would, on the one hand, have given the defendant the benefit of the settled account, if it should appear that such existed; and on the other hand, they would have given to the plaintiff liberty to surcharge and falsify. In the absence, however, of such directions, the Master had no authority to act upon that account.

COWPER v. GARBETT. 13 Law J. (N. S.) Exch. 355.

Practice at Common Law — Pleading — De Injuriâ in Debt.

Very soon after the promulgation of the New Rules of H. T. 4 W. 4., which limited the operation of the pleas of the general

issue, the Courts found it expedient to sanction the use of the replication of *de injuriâ* in actions of assumpsit.[1]

Some doubt has been entertained whether the same replication would be good in actions of debt, and the Court of Queen's Bench having, on a recent occasion[2], held that it was allowable, the Court of Exchequer Chamber declined giving any opinion on the point.[3]

The Court of Exchequer now held that the same principle applies equally to actions of debt and assumpsit, and accordingly in an action of debt by the payee against the maker of a promissory note, to a plea that the note was procured by fraud and without consideration, a replication of *de injuriâ* was allowed.

MASON v. FARNALL. 12 M. & W. 674.
BARNEWALL v. WILLIAMS. 8 Scott, N. S. 120.

Practice at Common Law — Pleading in — Detinue.

In detinue the plea of *non detinet* only denies the fact of the detainer[4], which may be lawful or unlawful: the plea of *not possessed* only puts in issue the property of the plaintiff[5]; that is, denies that he has such a property as will enable him to maintain detinue (for which purpose a share in a chattel would suffice), but does not put in issue the right of plaintiff to the immediate possession of the goods.[6] Consequently, under neither of these pleas can the defendant set up as a defence that he has a joint interest with the plaintiff in the subject-matter of dispute, or that he has a lien upon it, by virtue of which he is entitled to keep possession.

DEERE v. IVEY. 4 Q. B. 379. 3 G. & D. 470.

Practice at Common Law — Pleading — Several Counts on one Subject Matter.

Assumpsit. The first count stated that plaintiff had purchased of defendant a horse warranted sound. Breach, that it was unsound. 2d count, that plaintiff purchased a *certain other* horse warranted quiet. Breach, that it was not quiet. It appearing on the trial that there was only one contract for one horse, it was held, that the case fell within the rule 7 of H. T. 4 W. 4.[7], and that plaintiff could not recover on both counts.[8]

[1] 2 C. M. & R. 362.; 1 M. & W. 65.; 1 Dowl. N. S. 54.; 2 Bing. N. C. 579.; 5 A. & E. 237.; 4 M. & G. 336.

[2] Purchell v. Salter, 1 Q. B. 197. [3] Salter v. Purchell, 1 Q. B. 209.

[4] Richards v. Frankum, 6 M. & W. 420.

[5] In trover Not possessed denies the right to immediate possession as well as the property in the goods, and therefore under it, defendant may give evidence of a lien. Owen v. Knight, 4 B. & C. 54.; White v. Teal, 12 A. & E. 114.

[6] Lane v. Tewson, *secus*, 12 A. & E. 116.

[7] Subjecting a party to loss of verdict and costs on each count, plea, &c., in respect of which he shall have failed to establish a distinct subject-matter of complaint or ground of defence.

[8] Holford v. Dunnet, 7 M. & W. 348.

STANDEWICK v. HOPKINS. 14 Law J. (N. S.) Q. B. 16. Bail Court.

Practice C. L. — Affidavit of Jurors.

Where on an application for a new trial, affidavits had been used setting forth gross misconduct committed by the jury, Patteson J. admitted affidavits of the jury denying such misconduct; holding that, although the affidavits of jurymen cannot generally be received, to support or to assail their own verdict, it would be contrary to natural justice not to allow them to answer affidavits casting imputations upon them.

EXPARTE VEYSEY, IN RE VEYSEY. 3 Mont. Deac. & De Gex, 420.

Practice in Bankruptcy — Joint Fiat — Petition to annul.

One of the bankrupts against whom a *joint* fiat had issued, petitioned the Court of Review to annul the fiat, as against the petitioner alone. The Chief Judge held that he could not decide such a question in the absence of the other bankrupt, upon whom no notice of the petition had been served.

EXPARTE FELL, IN RE FELL. 3 Mont. Deac. & De Gex, 472.

Practice in Bankruptcy — Vivâ voce Examination.

The petitioner had filed his affidavits. The respondents moved for a *vivâ voce* examination at the hearing of the petition, on the ground that one of the witnesses would not make an affidavit. The Chief Judge granted the application, saying, "There is nothing in the Act to prevent the two modes of examination from being blended; the Act empowers the Court to take the whole or any part of the evidence *vivâ voce*.[1]

EXPARTE ASHMORE, IN RE LUCAS. 3 Mont. Deac. & De Gex, 461

Practice in Bankruptcy — Removal of Assignee.

A creditor petitioned for the removal of the sole assignee. It appeared that since his appointment the assignee had become, and continued to be, the managing clerk of a country solicitor. It further appeared that this solicitor, upon the bankrupt's interest in certain lands being put up to sale, became the highest bidder. It was alleged in the petition that the solicitor accompanied his clerk, the assignee, to the sale; that the price bid for the property was inadequate; that the purchaser neglected to complete his contract; that the assignee took no steps either to compel the specific performance, or to obtain a dissolution of it; and that the assignee, as clerk of the purchaser, was entirely under his influence. Fi-

[1] 1 & 2 Will. 4. c. 56. s. 38. And see Exparte Palmer, 1 D. & C. 341.

nally, it was asserted that the assignee's duty and interest were clearly in opposition to each other.

The Chief Judge said, "Under the peculiar circumstances of this case, I think it the most convenient course to discharge the present assignee from the duties of his office, without however casting any reflection upon him. The Court merely expresses an opinion, on the undisputed facts of the case, that it is most advisable that the assignee should retire from the duties of his office."

LIST OF CASES.

INDEX TO ADJUDGED POINTS.

POSTSCRIPT.

THE approaching Session will, if we mistake not, be an important one for the cause in which we are more particularly embarked — the practical amendment of the law. Party feeling is at present languid, chiefly from the want of real and substantial food to keep the flame alive. Partisans whose interests are concerned in the matter are forced to hunt up for stimulating topics, and are hard put to it to find them. This then is the time, if ever it existed, when the Legislature may apply itself with advantage to the long-neglected duty of the systematic amelioration of the law. We have endeavoured in this Volume, and more especially in the present Number, to bring before our readers most of the leading subjects which now stand for discussion, and to state their present position. It will be seen what a considerable budget is presented.

The matter which perhaps presses first for attention is the Act which was passed in the last Session abolishing Imprisonment for debt for debts under 20*l.* Our readers are already in possession of our views as to this.[1] It must not be forgotten that the principle of the late Act has been assented to (with scarcely an exception) by all who, of late years, have either deliberately examined it or legislated with respect to it. It cannot therefore, we conceive, be displaced: but undoubtedly the Act must be materially amended; and we think a measure may be devised which on the one hand shall give all proper protection to the debtor, finding means both to investigate and punish fraud on his part, and on the other may put the creditor in the complete and ready possession of all the debtor's property. There has of course been much controversy on this subject, not unmixed with clamour; and we are quite satisfied that much temporary hardship has been inflicted on many creditors and others by the Act. But as yet the real facts of the case are not before the public. In the mean time we have been greatly pleased with a series of letters on Imprisonment for Debt which have appeared in the *Morning Chronicle*, which need not the initials [B. M.] to trace them to a pen which has been employed again and again in the cause of sound humanity, which, with all the experience of age, has all the freshness and vigour of youth. We would also direct attention to the Ninth Report of the Inspectors of Prisons, comprising the northern and eastern district of England, which has just been issued, from which it appears that the total

[1] See Art. XIV. in No. I.

number of prisoners discharged under 7 & 8 Vict. c. 96. was in the district mentioned 386, and that the number of debtors in custody on the 1st of November last, in the various prisons in the same district, was only 190. The inspector, Captain Williams, in his report states, "that a very considerable portion of the plaints in the Small Debt Courts are for public-house scores, transactions with tally-men, some few for rent and for small articles for domestic consumption. In the two first items, any abridgement of credit must be a positive benefit, and enable the parties better to meet the demands of the two last. * * * I am satisfied that no further restriction in the granting of credit to the humbler classes may be apprehended beyond the withdrawal of temptations to incur debts which honest prudence would never have held out to them, and that independent of its rescuing a number of the people from the pollution of a debtors' gaol, it will make the small master more scrupulously exact in the payment of weekly wages; will tend by money payments to lessen the prices of the necessaries of life to those most in want of them; and that although it may abridge the profits of the publican and tally-man, it will afford protection to the honest tradesman by its increasing lien upon all accruing property in satisfaction of debt, and will deter the fraudulent by the wholesome severity of its penal clauses." This, we need not say, is highly important and disinterested testimony as to the working of the late Act.

An interesting return has been made to the House of Commons, at the instance of Mr. Elphinstone, as to taxes on Succession to Property in foreign countries. It seems that the distinction in this respect as to the succession to real and personal property which obtains in this country exists in no other. The whole Stamp Laws require revision, and some attempt to revise them will probably be made in the ensuing Session.

We have to notice that the Judicial Committee of the Privy Council is still without a permanent President. Is it fair to the suitors of the second appellate court of this country to trust entirely to eleemosynary assistance for its Judges: or if it be fair to them, is it fair to the suitors of other Courts to take their Judges away, who are paid for their services to the latter?

The Eighth Report of the Criminal Law Commissioners, which relates to *Procedure*, is in a forward state, and will be presented at the commencement of the Session.

The cases of improper conduct by Barristers, which we stated in our last Number to be under the consideration of the Benchers, have continued to engage much of their attention. One barrister

has been disbarred, who has appealed to the Judges. The proof against another has failed. But these cases, and some others of which we have heard, justify, in our opinion, some step for the better control of the Bar. On the Circuits the Bar mess affords some protection, but there is no general supervision. The task of a prosecutor on such occasions is a very odious one, and the ends of justice and propriety may thus be defeated.

We have reason to believe that the Lord Chancellor will, early in the next Session, re-introduce his Bill for securing the due administration of Charitable Trusts in England and Wales, — a measure very reluctantly abandoned by the Noble and Learned Lord towards the end of July last, on the old ground — the lateness of the Session.

Mr. Baron Gurney has resigned his seat in the Court of Exchequer in consequence of ill health. His eminent ability as a Criminal Judge will be long remembered: he has been succeeded by Mr. Platt. This is a proper and judicious appointment.

We much regret to state the death of Sir C. F. Williams, the Senior Commissioner of the Court of Bankruptcy. Mr. H. J. Shepherd has been appointed to the vacancy thus created.

In Paris a useful and well-conducted work, a *pendant* to ours, has for some years been published under the title of *Revue de Droit Français et Etrangere.* It is under the management of three able and learned men, Advocates — Dr. Fœlix and Messrs. Duvergier and Valette. It has translated one of our late articles. The number just published contains a letter from Lord Brougham to the Procureur-General on the difference between our judicial system and that of France. It would be lamentable if the present factious clamour about English influence should keep the French from profiting by the lessons which our system is calculated to teach.

Another able and learned work, *Revue de Législation,* is also conducted at Paris by lawyers of eminence.

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ERRATA.

Page 12. line 13 from bottom, for "matters on a procedure" read "matters or procedure."

27. l. 10 from bottom,
for "Ære cornipedum et pulsu simularet equorum,"
read "Ære et cornipedum cursu simularet equorum."

277. l. 5. dele "long";
l. 6. insert "long" before "speech."

A Title-page, Index, &c. to Vol. I. will be published with the next Number.

INDEX.

END OF THE FIRST VOLUME.

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