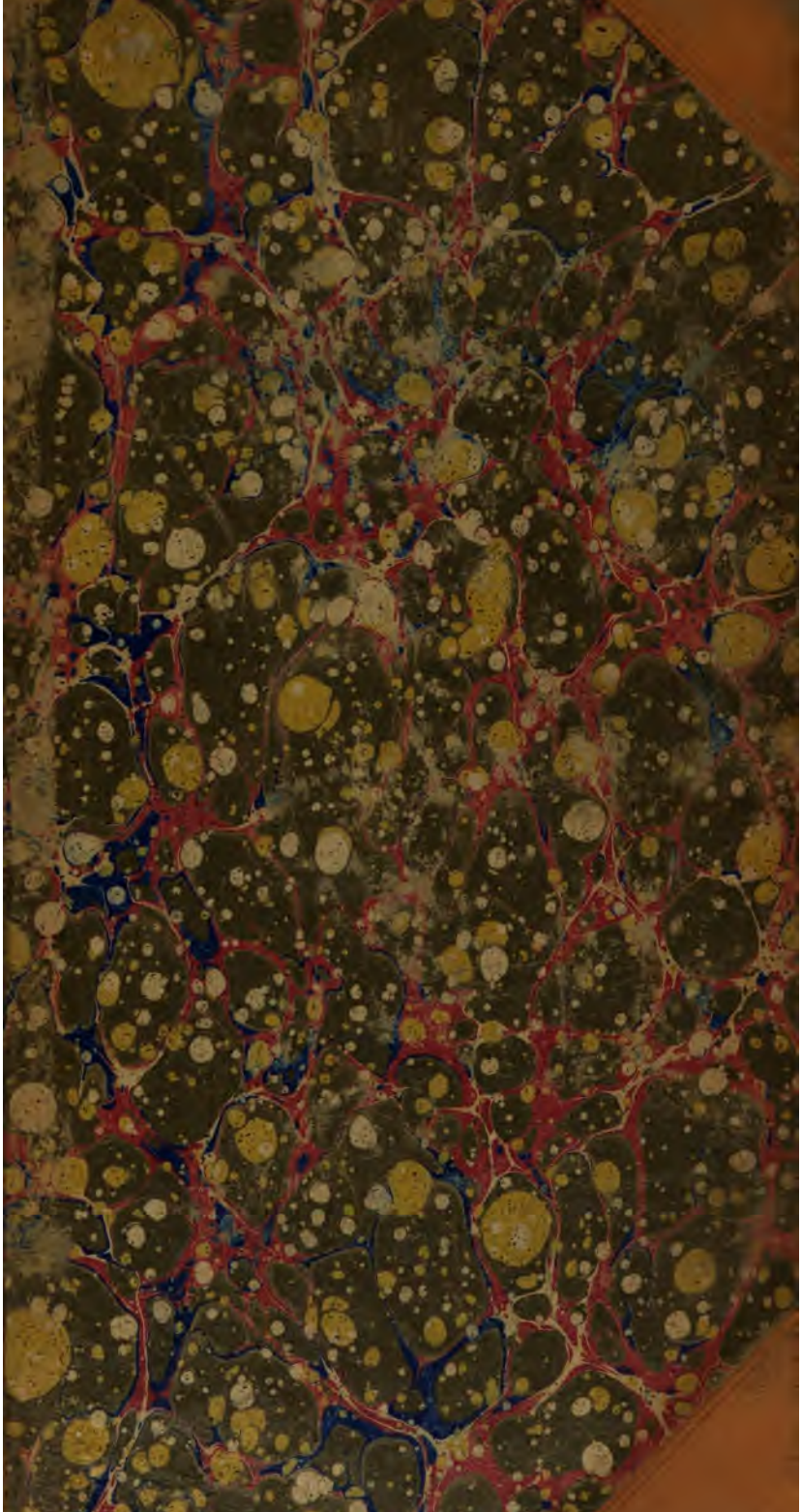

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ART. I.—ON TAXATION OF PERMANENT AND PRECARIOUS INCOMES.

THE question whether all income, from whatever source derived, and whatever be its probable permanence, should be equally taxed, has excited of late years much attention. The popular opinion, or at least the opinion expressed by the greater portion of the press, is in favour of the imposition of a higher tax in proportion to the probable duration of the income; for example, that a man who has £500 a year, derived from real estates or funded property, should be taxed on a higher scale than the man who has the same income derived from the exercise of a profession or a trade, these being liable to the casualties of life or health, the fluctuations and uncertainties attending commercial transactions, &c. The arguments in favour of this view are, 1st, The hardship attendant on obliging the man whose income is so uncertain that he cannot calculate on its duration for any long period, to bear the same burden of taxation as the man the duration of whose income is so assured that he can count on its continuance as a certainty, and could sell it in the market for a sum equivalent to its value, either as recurring in perpetuity or being definitely secured for a given time. It is said that in the for-

mer case, the recipient of the income should have an opportunity of annually laying by for his old age, or for his family, a sum out of his income, without which he or they must become paupers at its cessation, while in the latter case this is unnecessary, the perpetuity being secured. It is said moreover, that as there is more expense incurred by the Government in permanently or for a long time protecting durable property than temporary earnings, more should be paid to Government by the owner of the former than by the recipient of the latter. Ability to pay on the part of the taxed, and consideration rendered by the State for the payment, are the two heads into which, it is believed, the varied arguments in favour of this view will be found to range themselves, and that they are at first sight plausible is proved by the many who are conscientiously convinced of their soundness. That these are fallacious, and that a graduated taxation of income, dependent upon the ratio of its presumed duration, is unjust and unpolitic and would be ultimately injurious to the best interests of the State, is sought to be proved in this paper.

In this country it is probably unnecessary to argue that the institution of property is a good one, and that from whatever source property be legally derived, whether from industry, the most honourable source, or from successful speculation, gift, devise, or any other source sanctioned by law, it is desirable that the ownership of it should be protected, and that a definite mode of transmission, whether by hereditary, by corporate, or by official succession, by gift, by sale, by will, or by any other modes, should also be protected, that the prevention of disturbance of the quiet possession of property by force or fraud should, as far as it is possible, be legally secured.

Without contending that our particular institutions are the best that can be devised, without for instance entering on the question of whether the laws of primogeniture, of mortmain, &c., might or might not be altered or improved, extended or contracted, it will be assumed that it is expedient and politic to

protect the legal ownership of property by individuals or corporate bodies. To argue out this question would lead us too far from the subject, and it has been better done by others. It is only, therefore, necessary to say that to those who advocate communism, or doctrines favouring the taking from the rich to give to the poor, these pages are not addressed.

It must be admitted that property is not capable of paying a tax until it is reduced into money, or until there is some perception of profits. Thus, if a man's property, whether in lands or funds, or the earnings of any profession, be equal to £500 a year, it is out of this £500 that he must pay the tax for the year. It will hardly be contended that a man is to mortgage his next year's income for the payment of this year's taxes.

Assuming the income tax to be 5 per cent. and not to be graduated, the recipient of the precarious income will pay this year £25 on his income of £500, the holder of the permanent income will pay also £25, each will have received £500 in money, or in profits equal to £500 in money, and each will have taken out of that sum one twentieth to pay to the State.

The next year the professional man, from a falling off in his business, will have made, say only £300, while the owner of the permanent income will have received £500; the former will pay £15 the latter £25. Each will still have to deduct one twentieth from the amount he receives. The third year the professional man receives £400, the holder of property £500; they will pay respectively £20 and £25, or one twentieth. In the three years, the one will have received £1,200 and paid £60, the other £1,500 and paid £75, and so on, each paying in the exact ratio of what he receives. But it is said, after a certain time the professional man receives nothing, while the holder of property continues to receive his income. True, but then the former ceases to pay any tax while the latter continues to pay out of his receipts. Each pays and is protected in the quiet enjoyment of his profession or property exactly in proportion to the receipt of profits

from that source. If the one cease to require protection he ceases to pay, while he who continues to require protection continues to pay.

Let us now suppose that the owner of permanent property is taxed in a greater ratio with regard to his annual income than the recipient of a precarious income. Suppose them to be taxed respectively at 7 and 5 per cent., and, to simplify the figures, let each be assumed to receive the same income for ten years; the former will now have paid £350, the latter £250. The one has paid out of his profits £100 more than the other. For what has he paid it—not for more permanent protection, for they have each had ten years' protection; not for future protection for his property, because he will again have to pay for that in the eleventh and subsequent years. He has, therefore, paid £100 for nothing. The protection has been assumed to be equal for equal incomes, and this, though not capable of accurate numerical expression, will be found to be substantially true. The lawyer, the physician, the clergyman cannot practise their respective professions unless the peace be preserved, unless their dwelling-houses, their offices, their bankers' safes, their butchers' and bakers' shops, &c., be protected from violence. The merchant must have a navy to protect his ships at sea, police to protect them in harbour. The wholesale manufacturer or dealer must have his factories or warehouses protected, and, in the latter case, the expense of protection to the Government would seem to be greater than that required for an equal value in land, and funded property would seem to require still less expense in reference to its amount, but as the quiet enjoyment of all these sources of income depends upon the general good government of the realm, the impartial administration of justice, defence from foreign foes, &c., it is difficult to say that protection does not generally permeate the community, as water does sand, and adapt itself to the relative necessities of the individuals composing the public. The village receives a smaller income than the town, the town than the city, each in the ratio of their magnitude; and the expense of protection is correlative.

But it is said that the man who has permanent property is better able to pay taxes, because his property can be capitalized and will sell for a greater price than the earnings of a trade or of a profession. A perpetuity, for instance, is worth, say thirty times the rent it produces, or thirty years' purchase, while the profits of a profession or trade would not be worth above eight or ten times their annual income. A man having £500 a year in the funds, or in land, could part with it for £15,000, while a professional man, or a tradesman receiving the same income, could his respective business be transferred, would not realize more than £5,000. Let us apply this principle of capitalization to direct taxation.

If a man sell an estate, the price is computed upon the rent it produces and its probable duration. Other circumstances affecting the value may be thrown out of consideration here. An estate in fee simple, or a funded property in perpetuity, is worth, say thirty times its annual income. Suppose the property to yield net £100 a year, the seller who parts with it gets £3,000 and loses all control over the estate; he may again want the income, and if the value be properly calculated so that no one loses or gains by the sale, he will again get his £100 a year in perpetuity. Conversely, if one purchase an exemption, the same rule will apply. Suppose a man to have £100 a year to pay in perpetuity, and that he is anxious to relieve himself of this burden by a compensation or payment down of the full value, or, what amounts to the same thing, to pay some one else a sum in consideration of the latter undertaking the burden of paying the £100 a year in perpetuity. The former would have to pay for this, say thirty years' purchase, or £3,000. Having paid it he would be exempt for the future. It cannot be contended that it would be a fair bargain that he should pay the capitalized value and then continue to pay any part of the perpetual annuity.

Apply this to taxes; if, as many contend, a tax ought to be paid on the capitalized value of incomes, with reference to their duration, then the payer having paid his tax with reference to

future acquisitions, ought to be free from taxation in future. Suppose the owner of an income of £500 a year in perpetuity to pay taxes at the rate of 5 per cent., his capitalized tax at thirty years' purchase would be £25 × 30 or £750. Having paid this £750, he should be exempt from future taxation; for he has paid a tax equal to 5 per cent. per annum for ever.

If it be asserted that it is not desired to go so far, but that the owner of permanent should pay something more than the owner of precarious income—still the same principle applies. If he pay £50 a year, instead of £25, he will have paid the extra £25 for a future benefit in reference to his future income, and yet, when his next year's income is received, he will have again to pay £25 for that, and £25 extra; so that in ten years the recipient of permanent income will have paid £500, while the recipient of precarious income will have paid £250, and yet in the eleventh year the former gets no benefit or remission for the £250 extra which he has paid, but, on the contrary, has still to pay his £50; in plain language, he has had in the ten years £250 of his estate confiscated.

Let the reader put any other cases or devise other plans by which permanent is assessed higher than precarious income, and he will find the same result, and if it be assumed that the income tax upon the precarious income is as high a deduction as can be borne by the subjects of a State, then the additional tax upon the permanent incomes would in a greater or less number of years, depending upon the extent of the tax, swallow up the whole capital of the property. Assume taxes to be paid in kind, the result will be still more clear. An estate of arable land produces an annual average crop of, say 10,000 bushels of corn; the owner has to give out of these, say 5 per cent., or 500 bushels, but because he may expect a similar crop next year, he is required to pay some greater number of bushels, say 500 more, where is he to get these?—He cannot get them out of the next year's crop, because that does not exist, he must therefore take it out of this year's crop, and pay 1,000 bushels out of it, and yet next year, instead of a remission in considera-

tion of this increased payment, he has again to deduct his 1,000 bushels when his next year's crop is harvested.

People can only pay taxes out of receipts, not out of expectations; they may mortgage the latter, but it will hardly be contended that taxation is to be based on the principle of mortgaging future interests—the taxed would thus have to borrow money to pay his taxes and interest on the loan, and in this way again his capital would, in a greater or less number of years, be swallowed up.

In paying an increased rate of tax, not because the annual income is greater, but because it is expected to be permanent, income to accrue *in futuro* is necessarily taxed. If then a person has no income this year, but has a reversion the first annual income of which will fall due next year, he should, upon the same principle, pay taxes this year in respect of his future income, all the arguments in favour of an increased tax or permanent income apply to this—the owner expectant can sell it in the market; he need not save, he has a greater certainty for the future, &c., he should therefore be taxed; and if for a reversion expectant next year, the same principle will apply to a reversion expectant in ten or twenty years time: thus a pauper should be obliged to pay income tax if it can be shown that ten or twenty years hence he has a reversion expectant. If applied to vested reversions, it should also, by the same argument, be applied to contingent ones, only assessing them upon the probability of their contingency, so that not only should a father pay increased income tax because his income is permanent, but his sons should also pay income tax because they have reversions expectant, either vested or contingent, and upon the same principle it may be extended to nephews or grandchildren.

Apply this principle of taxation to property let for definite terms. If a man have a beneficial lease or rent for fifty years, he will have to pay more than the man who has the same rent for twenty-five years, because his income is more durable; so that if the same person makes a lease of Whiteacre to A for

fifty years, and another lease of Blackacre to B for twenty-five years, and from the expiration of that lease to C for another twenty-five years, the rents and profits being exactly the same, A would have to pay a higher tax than B or C, because his income, arising from the beneficial occupation, is more permanent; so that in the same fifty years the produce of Whiteacre will have been subjected to a heavier tax than the produce of Blackacre, because the former is let to one tenant for that term, the other to two in succession—so that the amount of taxation will depend, not upon the profits out of which the tax is to be paid, but upon the number of times the property changes hands.

It seems hardly necessary to multiply instances of the class given above. Another branch of argument will now be followed, which seems to tend inevitably to the same conclusion; it is that the so-called precarious incomes are, in fact, as permanent as the so-called permanent incomes. A town can support, say three medical men, yielding them each, say £500 a year; if one of them gives up practice, or dies, his business is either shared by the other two or falls to a new aspirant who succeeds to it, or is divided between him and the other two, and so on; but whatever way it be viewed, the total medical business of the town is worth £1,500 a year. With the permanent income the holder dies, and the income passes to his son or his nephew, or his devizee or devizees; where is the greater permanence in the one case than in the other? Each pass by succession but in different channels. A bishop dies, his successor takes his income; so with a parson, so with a curate, a judge, a barrister, &c. A trade or manufactory is now, in many instances, as completely hereditary as a landed estate; but when not so it passes into other channels, and the income is permanent; but if a factory be burned and the owners ruined, still other rival factories benefit *pro tanto*, and the gross income derived from all the factories of that particular class is *ceteris paribus* the same. So that in professions and trades, as in landed or funded property, the income is perma-

nent, though it changes hands in a different order. But it may be said trades and professions are themselves more precarious than land or funds; not much so, supposing we apply ourselves to the average trade profits of a large community, but if it does vary, the tax, when an equal per centage on all incomes, varies with it; in the more successful years a higher tax is paid, in the less successful a lower tax. The tax follows the receipts *pari pàssu*, and the annual tax or income of the State follows accurately the annual returns.

Tax must and can only, when viewed on the large scale, be paid out of receipts; the principle of mortgaging future expectancies to pay present taxes would inevitably confiscate property.

If individual hardship be looked on as a criterion for taxation, as strong instances could be advanced on one view as on the other. Is it not hard for the reversioner expectant to pay taxes for what he has not or may never live to receive? Is it not hard for the widow, who has a small pittance for herself and family, earned by the savings of her husband, to pay an increased tax, when she has not her husband to support her, because her income is permanent? Is it not hard that the single man or woman, who by industry has realized a provision for old age, should have that taxed extra because it is permanent? Would not such a principle discourage economy, and lead people to say, let us eat and drink, for if we save we pay increased taxes. Cases of individual hardship are, however, a very fallacious guide. A man is not to pay less tax because he has a wooden leg; the principle here advocated, and it is hoped proved, is, that if the idea of property is to be sustained, the only proper mode of direct taxation is to tax income in the exact ratio of its annual amount; that without confiscating property taxes can only be paid out of receipts; and that to say it is hard that the recipient of precarious income should pay an equal proportion of his annual income with the recipient of permanent income, is only, in fact, saying that it is hard that one man should be rich and another poor; that one should be

clever and another stupid, that one man should suffer because he or his fathers have been extravagant, and that another man should reap the benefit of his own, his father's, or his testator's industry.

An increased ratio of income tax upon permanent incomes has hitherto been considered as affecting individuals, and tending more or less to confiscate the property from which this recurring income arises; but if we apply the same reasoning to the whole property of a country, all but those who receive incomes untaxed or taxed in a smaller rate, will in a greater or less number of years be ruined; i. e., divested of all their permanent property, the profits of which will have been gradually absorbed, and have passed through the hands of the Government into those of its employés. It is difficult to foretel the consequences of such a state of things; it would seem, at all events, to conflict with all received ideas of political economy. There would be little or no encouragement to care in the management of property; no incentive to individual exertion for improving the cultivation of the earth and increasing its produce. None of those greatest stimula to persevering exertion, which flow from the desire to perpetuate in the hands of children the position acquired by talent and industry on the part of the parent. It would tend to generate a reckless hand-to-mouth sort of existence, which could hardly be expected to promote the best interests of the community.

There remains one other argument to notice. It may be said, True, an equal per centage upon all income is fair, if the income tax be a permanent tax, but it is not so if it is applied from time to time in case of urgency. Those who happen then to have income, however precarious, pay the tax equally with the holders of permanent property, and when it is remitted neither pay any direct tax, so that the former have paid more tax for a given time, if you include within this time a portion of time when there is no direct taxation.

It is difficult to argue on any principle of taxation if the tax be occasional and variable. Any change, though good in

itself, may be injurious as affecting existing interests. But if there is an unfair inequality produced by the temporary imposition of an income tax, this unfairness is due to the indirect and not to the direct taxation, assuming the latter to be, as it ought to be, such as would, through indirect channels, affect *pro rata* the income of the consumer. Thus, suppose an income tax of five per cent. for five years, the precarious and permanent income holders each pay for, say, £100 a year held for five years, i. e., £25. The income tax is now removed, but if the indirect taxation is properly calculated, each will continue to pay in the ratio of their income. According to the manner in which indirect taxes are, in fact, imposed, the probability is that the rich pay more in proportion than the poor, the mass of such taxation falling on luxuries and not on prime necessities.

To argue this point would be not to support or oppose any principle of direct taxation, but would be an inquiry as to how far any given system of indirect taxation operates unequally or unfairly. The principle of an income tax is not to compensate for unfairness in indirect taxation, for this should, if it exist, be itself amended, and in discussing the principles of direct taxation it must be assumed that the indirect taxation is fairly assessed; if it be so, then there is no more hardship in a temporary than in a permanent imposition of the income tax; if it be not so, the system of indirect taxation is the one at fault, and the one that should be amended.

If, indeed, there were no indirect taxation, and a tax was paid once for all upon capitalized income, then an unequal tax should be paid in direct proportion to the capital, and a tax upon the mere income would be unfair, unless permanent. As the holders of permanent incomes generally spend annually more in proportion than those who have precarious incomes, they would, of course, by paying more indirect taxes, besides paying income tax, pay more than their fair share. They pay not only on their income, but on that which they receive in exchange for it; but as, if they lay by money instead of spending it, they would have to pay again on the interest of their savings, the result comes out nearly the same.

Nothing has here been said as to the mode of levying an income tax, as what has been discussed has been the principle and not any particular mode of securing the due payment of the tax, but practically the recipient of precarious income has the advantage by the present mode, and possibly by any mode that can be devised. As the amount of tax is based on the tax payer's returns, he will take care, as a rule, not to make an over return. Very little doubt exists that in practice the returns are much under the mark. On the other hand the holder of property has no choice; his tax is deducted before he receives his income, and he cannot, even if so disposed, reduce his tax. It is, however, unnecessary further to enlarge upon these and similar topics, as they do not affect the main argument. Taxation is not the administration of charity, but a perception of some of the produce of a country to meet the expenses of its government.

Art. II.—QUESTIONS FOR A REFORMED PARLIAMENT.

By B. T. Williams, Esq.

Questions for a Reformed Parliament. London: Macmillan and Co. 1867.

The Amalgamated Society of Carpenters and Joiners. By Edward Spencer Beesley, Professor of History in the University College, London. London: Kenny, 40, Parker Street, Little Queen Street. 1867.

Shooting Niagara; and After? By Thomas Carlyle. Chapman and Hall, 193, Picadilly.

THE "great apostle of brute force" tells us, with his own peculiar eloquence, that democracy appears to be completing itself—to be going "the full length of its course towards the Bottomless, or into it." All do not read such

bad omens in the signs of the times. The authors of the "Questions for a Reformed Parliament," see in the passing of the Reform Act, and in the increased power of the people, new hope for the settlement of some of our greatest social difficulties, and for the general prosperity of the country. It is satisfactory at all events that men of education, distinguished in our national universities, in the learned professions, and in literature, are taking the lead in the popular movement of our times. If there are dangers in the course upon which we, as a nation, have now entered, that danger is the more likely to be avoided by the people accepting as their leaders the learned and the thoughtful among them. It was with considerable interest that we opened the book which is first on our list. It is composed of essays on the leading topics of the day, by men most of whose names are familiar to the intelligent reader. Three or four of them only come within the usual scope of this Magazine, and to these, perhaps the most able in the book, we now desire to draw attention.

The essay by Mr. W. L. Newman, on the "Land Laws," is well worthy of careful study. However much we may develop the principles of free trade, and import the produce of all the countries of the world, our vast and swarming cities look in the main to the farmers of England to be fed. The rise and fall in the price of food is regulated by the character of our harvests and the degree of our agricultural prosperity. Nothing but increased home produce can fill the gap in the production of animal food. There is, therefore, a most intimate connection between the food supplies of the great cities and the culture and freedom of the land. In whatever degree our landed system checks the outlay of capital, or militates against the security of tenure, it tends to diminish the productions of agriculture and to raise the price of food in towns. The cause of the tenant-farmer is essentially the cause of our swarming manufacturing districts. The greater the facilities that he enjoys for the safe and profitable investment of his labour and capital, the more cheaply can the

workmen of the towns obtain their necessaries of life from him. But against the preservation of all the traditions of the feudal proprietors of the land the interests of the towns are set in direct antagonism. Those traditions have the effect of converting land into a monopoly, of checking its full and free development, and of applying it to other purposes than that of supplying the people of this country with good and cheap food. It is really a grave question how far proprietorship in land ought to be fixed with a trust for the general public good. It is true that the old feudal notion under which we have grown, is that every man is king and master over his own freehold, and that he may do with his own as he please. But this country, with its teeming and hungry populations, cannot afford waste, cannot stand by and see thriving farms devastated by over-stocked game, and cannot allow the uncertain tenure of the tenant-farmer and the poverty of a tenant-for-life proprietor to interfere with the full development and culture of large tracts of some of our best land. The law is now fixed; but time may modify it to the extent of declaring that those restrictions and traditions which produce these results shall be declared void as being against public policy and the general good of the State. With regard to proprietorship in land at present, there are two principles which underlie our law and practice. One is the traditionary legislation of families by means of which estates are settled upon the father as tenant for life, with remainder to the eldest son as tenant in tail. The other is a part of the law of the land, and provides that the whole of the real estate of an intestate shall devolve upon his heir at law, irrespectively of all other claims of his children or of those that are dependent upon him. The general effect of the family custom of settlement is that an owner of land, by his settlement or will may bind up his estate so that it cannot be sold, in many cases for even sixty, seventy, or one hundred years after the making of the settlement or will. The law of primogeniture, with regard to the landed property of intestates, adheres more strictly to

the traditions of feudal proprietorship than does the practice of the feudal families. Few settlements omit to charge portions for younger children. The law, however, perpetuates a hardship which even the families have been obliged to recognize and modify. It will be difficult to intrude upon the arrangements of families and to interfere with powers of settlement which our countrymen cherish among their dearest privileges. But in our first attempts to reform the land laws we should begin with the abolition of that rough old feudal law which transfers the whole of an intestate's heritable property to his heir-at-law. The justice of the case would require that it should go equally between his next of kin. As long as the law holds out a rigid principle of this kind we cannot expect our feudal families to abandon those habits of settlement which are now held by many to be contrary to the general well-being of the people.

Family settlements, however, which owe their origin to the traditions and customs of great houses, do more to check the disposition of land and its full development and cultivation, than any law. If we look at the frame of a common marriage settlement, we shall find the following arrangements:—

"The estate," says Lord St. Leonards, "is limited to the husband for life; then the wife if she survive him, is to have a rent-charge for life; and, subject to that, the estate is to go to the first and other sons successively in tail male, with remainders to the first and other sons in tail general." "It thus happens," says Mr. Cliffe Leslie, "that before the future owner of land has come into possession, before he has any experience of his property or of what is best to do, or what he can do in regard of it, before the exigencies of the future or his own real position are known to him—before the character, number, and wants of his children are learned, or the claims of parental affection and duty can make themselves felt, and while still very much at the mercy of a predecessor desirous of posthumous greatness and power, he enters into an irrevocable disposition by which he parts with the rights of a proprietor over his future property for ever, and settles its devolution, burdened with charges,

upon an unborn heir, who may be the very person least fitted or deserving to take it."

In process of time the owner feels that there are other claims upon him than those of his eldest son. He makes no investment upon the land, because such a course would enrich still more the child who is even now provided with a fortune greater than that which he can give to all the rest of his family.

"The owner" says Mr. Fawcett, "though possessing a large income, must be considered a poor man, because since all his property is settled upon his heir, he is able to make no adequate provision for his other children. A poor landowner has not the requisite capital to carry out improvements on his estate; and even if he has the capital, he has every inducement not to spend it, because by so doing, he enriches his eldest son who will be wealthy, at the expense of his younger children, who will be comparatively poor."

Family settlements therefore produce the results of checking the free disposition and sale of land, and also its development and full agricultural cultivation. Another extraneous element interferes with the good farming of the land. One of the chief reasons why proprietorship in land is sought is the political power which it gives. The tenant farmer holds most commonly no lease. A political proprietary, which holds land for influence, has thrown away its money if it grants security of tenure. The absence of the lease is in fact the pivot of the rural balance of power. And with a tenancy that hangs upon the good-will of any man, the tenant farmers would be lost to a due regard to all business rules if they invested their capital upon their farms. They manage their business therefore in a hand-to-mouth fashion, doing no more upon their farms than is safe to bring them a return within a year. The results of our family settlements and of the tenant farmers having no lease, are that the land remains in the hands of a proprietor-tenant for life, who, often enough, neither can nor does improve, and of a tenant-at-will, who has but small

security in doing so. Underlying these relations there is a wasteful net-work of game law.

"There is something," says the *Times*, "almost ridiculous in allowing wild and wasteful animals, such as hares and rabbits, to over-run and devastate a district possessing high cultivation, expensively manured, ploughed, harrowed, and harvested with costly machinery, studded with fine farm buildings, and with the steam-engine rendering its multifarious assistance."

Even if the farmer receives compensation for his loss, the consumer receives none; and the consumer means England—the whole kingdom. The present operation of our land laws is towards a contracting of the land market. The numbers of our landed proprietors are becoming fewer. Great estates and large farms are extending over the country, and are driving out of existence the old English yeoman and the small farmer. These are results which are to be deplored.

We doubt much whether easy and ready remedies for the evils that we have pointed out will be within reasonable time provided by the Legislature.

The House of Commons shrinks from the mere threshold of social reform. All the ability of Lord Westbury was required to carry a permissive Act for the registration of title, which has hitherto proved but little better than a nullity. Mr. Locke King's Real Intestacy Bill appears at long intervals on the horizon of Parliament, and vanishes quicker than it comes. Majority after majority affirms that the State ought to make a will for the intestate proprietor, which each individual of the majority would deem it an insult to be accused of making himself. We cannot expect the landowners or the farmers to give much assistance in the reform of our land-laws. We wish we could hope that the stolid farmer and the oppressed agricultural labourer were to take up their own cause. Farmers' trades' unions, and agricultural labourers' trades' unions would do good. With action, bold and resolute, agriculture could be deprived of its present political servility,

and be placed on the same footing as other profit and loss occupations in this country. We must, however, in the main, look to the towns to bring about those reforms in the landed interest which are required by the times.

From Parliament we require the abolition of our present rule with regard to succession to land in case of intestacy, a revision of the powers of settlement, and a liberal alteration in favour of the farmers of our destructive game laws.

"There is one way," says Mr. Cliffe Leslie, "to remedy the old and new evils together and at once—to purge our jurisprudence, and to emancipate land from its trammels and burdens; and that is, to extinguish the force of settlements as binding and irrevocable instruments, save so far as a provision for a wife is concerned; to put family settlements, save as to a wife, on the same footing as wills, *ipso facto*, void upon marriage and revocable by any subsequent conveyance or will; to enact that each successive proprietor shall take the lands he succeeds to, free from any restriction on his right of proprietorship; and further, to make provision that all lands left burdened with any charges shall be sold immediately on the death of the owner to pay off incumbrances."

Without adopting the suggestions of this writer, we would venture to think that he indicates the direction that legislation is likely to take with reference to this subject.

We have thus followed Mr. Newman's train of reasoning through his essay. Its ability and deep thought no reader can fail to appreciate; and his powerful and classic diction gives a charm to what in some hands would probably have been to many a dry subject.

The relations of capital and labour—the social movement of the working classes and trade unions could not be passed over in a book that proposed to discuss the questions which are likely to occupy the time of the Reformed Parliament. We have accordingly two long essays bearing upon these subjects; one on "Workmen and Trade Unions," by Mr. Godfrey Lushington, and the other by Mr. J. M. Ludlow and Mr. Lloyd Jones, on "The Progress of the Working Classes."

Trade Societies are the most prominent subject of discussion with reference to working men at present. In 1832 their chief objects were to keep up wages and limit the influx of apprentices. Now, however, they are in addition general benefit societies. In Great Britain, at present, the number of persons who belong to these bodies may be stated at 400,000; the largest individual body being that of the "Amalgamated Society of Engineers," founded in 1851. Last year this society numbered nearly 31,000 members, with an income of £75,632, and a clear balance in hand of £115,357. The Amalgamated Society of Carpenters and Joiners, of which Professor Beesley has written an interesting account, is another instance of a successful and increasing trade organization. It was established in 1860, and by February, 1867, it had 190 branches, and 8,191 members. This society is the best specimen of a trade union with which we are acquainted. Its secretary, Mr. Applegarth, is a gentleman of ability and honour, whose life is influenced by principles of an enlightened benevolence, and whose moderation has often been blamed by others, who are more ready than he is to resort to violent measures. A member of the Amalgamated Society of Carpenters losing his tools by fire, water, or theft, receives their full value. If sick, he receives twelve shillings a week for twenty-six weeks, and after that six shillings a week as long as the illness continues. He has also the benefit of a burial fund. If he sustains an accident incapacitating him permanently from following his trade, he receives £100 to set him up in some business. When fifty years old, if through failing strength he is unable to make full time or wages at his trade, he is entitled to a superannuation allowance, eight shillings a week, if he has been twenty-five years a member, and five shillings if twelve years. Any member who has been out of work more than three days, under circumstances satisfactory to his branch, is entitled to ten shillings a week, for the first twelve weeks, and to six shillings for twelve weeks more. He may not draw more than £9 12s.

in this way in any one year. There are two classes of members; those who are entitled to all benefits, and those who are entitled to all except sick benefit. The former pays one shilling a week, the latter nine-pence. All pay three-pence a quarter to a contingent fund. It is the business of the secretary of every branch to know if any work is to be had in the neighbourhood, and to send to it members on donation.

"Similarly," says Professor Beesley, "the branch-secretary has to inform the general secretary in London whether employment is brisk or slack in his district. If the Manchester secretary informs the general secretary that he can place a dozen carpenters in his town, the latter glances over his reports and writes (say) to Birmingham and Worcester, where work is slack, and there are consequently several members on donation, and desires them to send so many men to Manchester."

The only rule of this society which applies to strikes is the following:—

"Any member or members leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of fifteen shillings per week."

Whenever a branch desires to resist an innovation on the part of the employers, or to make a demand upon them, it is required before taking any step whatever, to submit its case to the executive in London. When the men are not resisting an innovation, but are preferring a new claim, the executive requires the branch to give at least three months' notice; for the society discountenances all attempts to take the employers by surprise. Its aim is to introduce everywhere a "code of working rules," signed by the representatives of masters and men—and not to be altered without three or six months' notice on either side. So far, this society has done nothing to cast discredit upon the rules and principles by which it professes to be governed. On the contrary, many cases might be mentioned in which it has interfered between masters and men with advantage to both of them.

The recent disclosures of cruel outrages, and of arbitrary interference with individual liberty on the part of some members of trade unions, have induced many to come to the conclusion that the societies are altogether bad, and can only exist for illegal purposes. But surely a candid reader would come to the conclusion that a society such as that of the Amalgamated Joiners, acting up honestly to its rules, need not exist for bad purposes at all, but, on the contrary, for purposes of great benefit, not only to the members themselves but also to the State. The rules provide that only those that are sober, of good character, and skilled in their trade shall be members at all. Membership in such a society promotes sobriety, industry, economy, and providence. The man who knows that the evil day is provided for, if he is careful and industrious, has strong inducements to lead a proper and useful life. And besides, it is necessary that men who cannot individually compete with wealth and social power, should combine to protect, and by all legitimate means to enforce their own rights. The Bar is in its very life a trade union. Members of the Bar, it is true, when any of their professional rules are violated, do not punish the delinquent in an illegal manner; but they do punish him, and often, we are bound to say, with more severity than mercy. We must take it, therefore, notwithstanding what we now hear to the contrary, that a trade union, if carefully and honourably keeping within the law, if acting with moderation, and with an honest desire to promote the well-being of its members, need not necessarily be an instrument of tyranny and of evil, but may, on the contrary, be an instrument of general good to the whole country.

The law on the subject of trade unions is thus summarised by Mr. Godfrey Lushington:—

"Further, I see your trade union is a means of developing trade; the judges, however, consider it a restraint of trade, and if they have the chance, will certainly designate your union as contrary to public policy, and as illegal in this sense, that your rules are not enforceable in a court of law. Perhaps you think that this makes no matter;

that you can do without the law; but you are mistaken. If your treasurer embezzles your strike funds, the law will decline either to punish him or protect you. Your union is illegal, and therefore may be robbed. In the eyes of the law the trade union element poisons the benefit society element, and taints it with illegality, and your treasurer may rob you of your benefit fund, as he may of your trade fund, with impunity." *

All men seem now to be agreed that some legislation with regard to trade unions is necessary, though they hold widely different opinions as to the course that such legislation ought to take. Trade unions are at present without the protection of of the law, and to visit them with further disabilities, or to attempt to suppress them altogether, would be unwise and dangerous. Trade unions must exist in this country, and the law is powerless to prevent their existing. No legislature and no government would adopt such a perilous course as to convert the four or five hundred thousand men—strong, intelligent, banded firmly together by the closest ties of self-interest and fellowship—who are now members of those societies, into determined enemies of the State. The only legislation possible, as it appears to us, is such as would confer upon trade unions the privileges of possessing property, and of protecting themselves by the law so long as they abstained from violence, illegal interference with the liberties of others, intimidation, or any wrongful act. The new privileges thus conferred might be accompanied with requirements of registration, and other responsibilities. It is by making these societies respect the law, and value the protection that it holds out to them as to all other societies in the kingdom, that we are more likely to secure the best guarantee of their good conduct in the future. We do not know what other result than this the report of the Royal Commission now sitting on this subject can recommend to us. We have ourselves attended the sittings of the Assistant-Commissioners in the country, and we were struck with the unsatisfactory method enforced upon them for the

* *See* Hornby *v.* Close, 2 L. R., Q. B.

ascertaining of the truth with regard to the conduct of the unionists. It is altogether wrong to affirm that trades' unions are upon their trial before these gentlemen. Their side of the question is scarcely heard at all. Counsel are not permitted the privilege of direct cross-examination in their interest. The Assistant-Commissioners themselves, gentlemen of honour and ability, do the best they can; but they have had no experience of the internal workings of the trade union, and they hear much of what they do not understand, or upon which they place a wrong interpretation. We regret that the societies were not permitted to appear before them by a certain number of counsel, empowered to cross-examine and to call witnesses in reply, or in explanation. But whatever the Report of the Royal Commission may be, we are convinced that the legislation which is to follow it, cannot in safety or in justice be other than such as by conferring new privileges upon trades' unions, would lead them to respect and obey that law by which they were themselves protected.

Mr. J. B. Kinnear in his able paper on "Law Reform' advocates the codification of our law, the establishment throughout the country of public prosecutors, the fusion of law and equity, and other reforms in our jurisprudence and administration to which attention has frequently been directed in the *Law Magazine.* We think that he is rather too hard upon the profession when he says that its members are the chief obstruction in the way of Law Reform.

"The cause of this scandalous position" he remarks, "lies in the fact that no considerable part of the representatives of the nation have yet thought it worth remedy and it has therefore, been left very much in the hands of lawyers themselves. Now, there are inherent peculiarities in that profession which make it impossible that any rapid improvement of the law should come from within. Beyond all others it worships success; and the barrister who gets business is influential, the barrister who has no business is powerless. But success does not always come from real ability and public spirit. Success is often due to the possession of qualities or connexions that

have no tendency to create or strengthen a desire to promote a reform of the law. And in all cases when business does come, it is so engrossing as to leave scarcely the leisure to consider, far less to originate schemes of improvement. Moreover the minds are very rare that see the need for improvement in arrangements under which they personally thrive. And rarest of all is the disposition to undergo a labour which seems invidious and which far from bringing gain to the reformer, will only impose upon him the difficult task of unlearning the lore of a life-time and beginning at the same point as the youthful student. Some few such minds have been in the past, and some there are in the present generation and to none can higher honour be due. But they are too scarce to make much advance against the dead inertia of disinclination which the mass of the profession opposes to their efforts."

We close with regret this able and interesting book. There are hope and bright promise in its pages. Its authors lead us to abandon all fear with regard to the new future to which we are awakening. The people under the guidance of such men as these will rise equal to the demands of their country, and will settle questions upon the discussion of which their predecessors were afraid to enter. We are convinced that every member of the Reformed Parliament will be the better prepared to discharge his duties and to assist in legislating on the great subjects that will be brought under his notice if he carefully and well studies every page of the book to which we have invited the attention of our readers.

From a work of such promise and hope we turn with regret to the lamentations of one who was long believed to be a great prophet, but who now in his latter days gives utterances that but few of his most admiring followers would be prepared to accept. It is hard to believe that the Carlyle who taught this generation to appreciate the great struggle for constitutional privileges of our Puritan forefathers, and to accord their just meed of praise to Cromwell, the uncrowned king of the people, is the man who penned this unreasoning and futile rhapsody now before us. And yet no one can say that

the master mind is passing into nature's second childhood; for even here we have that powerful eloquence and wit which have held us captive for many years. It is patent now to nearly all thinkers of the present time that Carlyle has utterly mistaken the character and tendencies of the age in which he lives. Instead of regarding with satisfaction the spread of education among the people, the unprecedented development of our national wealth, and the equal distribution of power which is producing beneficent results in this country, he talks of the Norman Conquest which guided it into "higher and wider regions", of Frederick William, and of aristocratic squires spread over the land with despotic rule over all those who had the misfortune of being subject to their sway. Now, as a matter of fact, every development of Mr. Carlyle's scheme of government has been fairly tried in this country some time or other during the last nine hundred years. We have had the rule of irresponsible kings and lords and squires, of men who with the strong and red hand of authority held all around them in fear—and what was the result? Simply this, that the mass of the people lived in degradation and misery to gratify the whims and passions of the few, by their sweat, by their blood, by their wives and their daughters. The energy of this nation brought it through all that, and now, after it has struggled successfully into the broad light of day, we hear the great prophet of our times proclaim to us our duty of throwing away all our liberties, of giving up our knowledge, of dispensing with most of what we chiefly value in these days, and of going back, back to the Norman invasion and the red handed barons. He objects to our "divine commandment to vote" apparently because he thinks it is based upon the "equality of men," and he urges, what is palpable enough, that Quashee Nigger is not equal to Socrates or Shakspeare. But the principle even of universal suffrage rests upon no hypothesis of the kind. Even the most radical reformer desires that the government should be conducted by the ablest men in the land—by the heroes of the

people. But how are these men, these heroes, whether after Mr. Carlyle's fashion or not, to be discovered? They do not necessarily come to us by inheritance, or come endowed with wealth. They are the more likely to take the lead in this country by giving numbers the power of discovering and electing them, and by according to the heroes themselves the opportunity of achieving success and winning position through appealing to an intelligent and educated people. But to mention the grievances and proposed remedies of this great man is sufficient.

1. Popular government is a mistake in England and America, and instead we must have the despotic rule of kings, and lords, and squires.
2. Free labour is a failure, and instead we must have a species of slavery, a servantship, which must become a "contract of permanency; a contract for life, if you can manage it."
3. "Nigger" emancipation is a dismal fact, to be lamented over and to be punished for by and bye.
4. The chief hope of England at present is in her aristocracy by title, and in the drill sergeant.

Mr. Carlyle thus alludes to Lord Chief Justice Cockburn's charge to the Grand Jury, in the case of Reg. *v.* Brand and Nelson:—

"In the same direction we have also our remarkable 'Jamaica Committee,' and a Lord Chief Justice 'speaking six hours' (with such 'eloquence,' such, &c., &c., as takes with ravishment the general editorial ear, penny and threepenny), to prove that there is no such thing, nor ever was, as martial law; and that any governor, commanded soldier, or official person, putting down the frightfullest mob-insurrection, black or white, shall do it with the rope round *his* neck by way of encouragement to him. Nobody answers this remarkable Lord Chief Justice: 'Lordship, if you were to speak for six hundred years instead of six hours, you would only prove the more to us that—unwritten if you will, but real and fundamental, anterior to all written laws, and first making written laws *possible*—there must have

been, and is, and will be, coeval with human society, from its first beginnings to its ultimate end, an actual *martial law*, of more validity than any other law whatever. Lordship, if there is no written law that three and three shall be six, do you wonder at the statute book for that omission? You may shut those eloquent lips, and go home to dinner. May your shadow never be less; greater it, perhaps, has little chance of being.'"

Perhaps, to all persons who have taken the trouble to examine facts, there appears in England at present no greater and better result to our national effort and enlightened civilisation than the Court of Queen's Bench, with the distinguished ability and learning that characterise its judges, with its traditions of eight hundred years, its impartiality and independence, its equal distribution of justice between crown and subject, gentle and simple, rich and poor. And though in that court Mr. Justice Blackburn is second to none in his knowledge of the law and in his ready grasp of legal principle, still the Lord Chief Justice is acknowledged by all to combine in himself to a greater degree than any judge in that court, or in any other court in Westminster Hall, those attributes that make a great judge. He is deservedly one of the most popular Chief Justices of modern times, and is distinguished alike by his eloquence, his lucidity of thought, his knowledge, his courtliness, and his independence. And yet it is of this honoured man that Mr. Carlyle speaks contemptuously, and it is towards him that he uses language which, coming even from a prophet, we must pronounce to be insolent. But also with reference to this charge to the Grand Jury Mr. Carlyle is mistaken. He seems to argue that there is a principle of self-defence which underlies all law, and the law of England in common with that of other countries. The Lord Chief Justice expressly lays this down in the charge which we must assume that Mr. Carlyle has read.

No man can separate himself from his fellows with impunity or keep his mind healthy and true as a hermit. If Mr. Carlyle had gone into the world as others do, with the wonderful

mind that he possesses he would have become one of the most influential and useful men of our times. But how stands it now?—The idol that so many of us worshipped is shattered; the prophet whose utterances we caught and treasured talks rabid nonsense that is not worth notice. We listen still with some pleasure to Carlyle's eloquent words, but we find it impossible to look to him for guidance after this. The Genius Diogenes who thinks it wise to live in a tub and mock at the world may be still an object of curiosity to us, but he can be nothing more.

Art. III.—REPORT OF THE RITUAL COMMISSION.

THE present internal condition of the Church of England, and the danger which in consequence threatens one of the great institutions of this country, must form our excuse for having recurred so frequently of late to questions connected with ecclesiastical polity and law, and for again bringing the subject of ritualism before our readers. Whatever estimate may be formed of the first report of the Commissioners appointed to inquire into this matter, no one who is able to read the signs of the times will be sanguine enough to suppose that the recommendations which it contains will, if carried into effect, bring back a state of peace and unity. The feelings which have been excited on both sides are too strong, and the opposing principles at work are too radical, to warrant the hope that the existing commotion will be put an end to by a simple measure of restraint, and still less that it will cease in consequence of any *pulveris exigui jactus*, like that lately performed by the Pan-Anglican Synod. Undoubtedly the Commissioners acted from the best of motives in putting out this obviously premature report. The spread of ritualism had

caused great disgust in many quarters, while generally it was felt to be a serious matter, and some alarm had been excited by the composition of the Commission itself as representing in too preponderating a manner the party in the Church supposed to be favourable to the new practices. Legislation also had been threatened on the subject without previous inquiry or investigation of any sort; and it was widely felt that something must be authoritatively said or done in order to relieve the public mind, and to make it known what the watch-word of the Church of England was and under what banner she really fought.

Under these circumstances it was not to be wondered at that the Commissioners, both to vindicate themselves and to allay the public apprehensions, should resolve on presenting a report at the earliest possible opportunity. As to the Commissioners themselves, the report has completely dissipated any anxiety that may have existed in the public mind with respect to the bias of a majority of their number. If any of the High Church members of the Commission had any leaning towards the ritualistic practices, the first witness called on that side must have opened their eyes to the unsubstantial and unsatisfactory nature of the whole system, and convinced them that it would be impossible to concede the principles which the ritualists had assumed. Bishops who had been supposed to be rather inclined to dally with ritualism, drew back from what they must soon have perceived to be a bottomless pit, which would be likely enough, if fairly opened, to engulph the whole Church of England; and the only clerical member of the Commission who fought the battle out resolutely and unflinchingly on the losing side was the Rev. T. W. Perry of Brighton, who had been appointed on the Commission as the leading exponent of the views of the new party. The only lay member who took up the cause with anything like corresponding zeal was Earl Beauchamp. Sir. R. Phillimore obviously fought rather shy of the whole concern.

With respect to public apprehension on the subject of ritua-

lism, sufficient information had oozed out from an early period of the sittings of the Commission to give hopes to the most timid that the Church of England was not to be surrendered into the hands of the Philistines. It was speedily reported that the case of the ritualists had entirely broken down, and that the most competent witnesses they could put forward had been able to give only the most lame and impotent reasons in support of these practices. The feeling of relief and satisfaction which thus arose was of course rendered stronger when the report actually appeared. We know no report of any Commission of late years which has been so generally accepted as sound and reasonable in its recommendations, and which, comparing it with the evidence on which it was founded, has been considered so satisfactory in its leading principle. A danger of the most formidable character, that seemed imminent, had disappeared like a cloud, and the Church had resumed her old condition of quietness and confidence.

A careful consideration, however, of the report, and of the evidence on which it is founded, has raised some doubts in our minds as to whether there was any sufficient ground for the satisfactory feeling which had been produced in the public mind by the conclusions at which the Commissioners had arrived on the subject which first occupied their attention. We had all along questioned the expediency of issuing a Commission to inquire into a matter involving many doubtful points of law, with respect to which proceedings had been taken, or were likely to be taken, in the Ecclesiastical courts. On the famous Rubric prefixed to the Prayer Book different opinions had been given by different lawyers of equal eminence and ability. The determination of the meaning of this obscure document was vital to the whole question, and the only way in which this could be effected was by a judicial decision. The Knightsbridge case had settled the question with regard to what are the legal ornaments of the Church; and it was to be presumed that any case which involved the question of what are the legal ornaments of the minister, would lead to a judg-

ment equally explicit and equally satisfactory to sound lawyers. After the law had been thus determined a Commission might have been properly issued, to inquire into the expediency of maintaining the law as found, however that might be. That this prudent and regular course was not followed must be ascribed to the general excitement and apprehension which prevailed on the subject, into which the Commissioners were primarily appointed to inquire. With respect, however, to the satisfactory settlement of the matter, it is to be regretted that a Commission was issued to inquire into the law relating to this subject, and to suggest any alterations or amendments respecting it, until such law, confessedly obscure, had been determined by the proper tribunals.

With respect to the report itself, we must consider it unfortunate that the Commissioners have not stated explicitly the grounds on which they arrived at their conclusions, and the reasons which led them to propose the course which they recommend. To say that the vestments were regarded by none of the witnesses as essential does not contradict the mere words used by any of the witnesses, but it scarcely states exactly the real views expressed by several of the supporters of ritualism who were examined. On a question of a public nature, involving the interests and feelings of large portions of the community, it is desirable that a report, whether of a Royal Commission or of a Select Committee of either House of Parliament, should not be confined to bare recommendations, or a few laconic statements. It is always better to avoid prolixity in such documents, but this can be no excuse for not giving reasons, where conclusions, apparently of wide application and serious moment, are arrived at in such inquiries. It might be very sound advice which was given by Lord Mansfield to the Colonial Governor who had judicial functions to perform but who was not a lawyer, to give his judgments without stating his reasons, but it is scarcely applicable to a Commission consisting of men who were appointed on account of their special qualifications, and containing so many lumi-

naries both of the Church and of the law, as well as distinguished members of the legislature.

But our primary objection to the report of the Commissioners is, that it does not seem to be founded on a thorough investigation of the matter into which they were appointed to inquire. The ritualistic divines who were examined could give very little account of the grounds of their system, and seemed to have the most hazy notions of the law of the Church of England. The only basis on which they seemed to proceed was, that any ceremony in religious worship which is not prohibited, explicitly or implicitly, by the Prayer Book, may be adopted if it was used in England before the Reformation. Now this is an astounding postulate for men to make who are subject to the stringent provisions of the Act of Uniformity; and it was extremely desirable to have an intelligible exposition of their reasons for so summarily setting aside some of the most clear and distinct enactments to be found in the statutes at large. But the witnesses of whom we are speaking all disclaim any critical or historical knowledge on this subject, and seem to found their practice on some superficial notions which they have taken up without any real inquiry into the constitution of the Church of England. To show the manner in which some of these divines proceed, take the answers given by the Rev. H. W. Beadon to the Regius Professor of Divinity at Oxford:—

"3549. You have twice given a very strong opinion that a distinct vestment has always been in use; have you considered that question much?—I believe it to be so, but I cannot say more than that; I have no doubt about it."

"3550. You have not taken much trouble in forming that opinion?—I am not very learned in these matters."

"3551. You have a strong opinion, but have taken little trouble in forming that opinion?—I have a strong opinion.—[*Minutes of Evidence, p.* 99.]"

This short extract fairly represents the general tone of the witnesses who were examined on the ritualistic side. What

we now complain of is, that the Commissioners do not seem to have taken pains to call before them witnesses who could give a tolerably reasonable account of the matter. We presume, of course, that such were to be found, because many clergymen have written on the subject with at least a show of learning; and we can scarcely suppose that a system which is said to be extensively prevalent can be without anything resembling a more solid foundation than what was stated by the witnesses who were actually examined.

But whatever may be thought on this point by those who have taken up either side of the question, there is one important branch of information bearing on the matter, which the Commissioners have entirely failed to elucidate. We allude to the statistics of the subject. What the ritualistic practices are is generally well known. How far they are consistent with the highest conception of Christianity is a matter on which the examination of witnesses can throw no light, and how far they are consistent with the law of the Church of England involves questions which the Ecclesiastical courts are alone competent to decide. But the extent to which the system prevails in the Church, and the effect it has produced on the lower classes in localities where religion had before been neglected, are points on which it is essential that trustworthy and accurate information should be obtained, if we are to deal wisely and prudently with the state of matters which has now arisen. If ritualism has been found to be practically efficient in reclaiming the lower classes from vice and irreligion, it will do far more to conciliate the public mind towards the system than the most exalted notions with respect to Catholic practice which ever passed through the brain of the most superfine and full-blown of ritualistic divines.

We read a great deal in the organs of the party of the wonderful effects which have been produced by ritualism; of the hold which it has established on the minds of persons of education and refinement; of the multitudes of dissenters whom it has drawn into the Church of England; of the crowds

of working men who frequent the churches where it prevails. It is continually vaunted that ritualism has shown its capacity for regenerating the social condition of the lower classes by the results which have already taken place, and that while all other systems have failed to enlist the masses on the side of religion, the ritualistic system has had triumphant success wherever it has been fairly tried—even in the worst localities. Whether the statements commonly made on this matter are merely the boastings of zealous partizans, or are the words of truth and soberness, becomes a question of vast importance, if we would arrive at a correct estimate of the ritualistic system, and of its bearing on the present religious wants of society. Orthodox theologians may disown it, men of the world may deride it, and philosophers may turn away from it, but a system which can root out vice and immorality from the most debased classes in the community, will be welcomed by many thoughtful and earnest persons for the value of the good which it can do, whatever they may think of the theory on which it is founded. Such an instrument would be too precious to neglect, far less to injure or destroy. This, we are sure, would be a pretty general feeling in the public mind, if it were found that the representations which have been so commonly made are founded on truth. All this, however, has been left by the Commissioners in as vague a state as they found it. The ritualistic clergymen who were examined gave no precise and definite information on the subject; and we can lay hold of nothing in their evidence to give us any assurance that their ministrations are attended with any more abundant success than what attends those of their non-ritualistic brethren, who enter on the field with equal energy and zeal. The Commissioners did not probe the matter very deeply, and on this important point, therefore, we can scarcely say that we are much wiser than we were before the inquiry took place.

One witness, we ought to state, Mr. Spiller, churchwarden of St. Alban's, Holborn, gives evidence as to the effects produced by the services in that church: and in a pamphlet

written by him, which he handed to the Commissioners, he states the number of communicants, the amount of the offertory, the number of baptisms in that parish, together with some other information, mixed up with a good deal of theological acerbity. But when asked what proportion of the poor of the parish came to the communion, his answer was, "I cannot tell you that, but I know a great many come" (Minutes of Evidence, p. 104, question 3625). This is rather indistinct, we must say, and not the sort of evidence which the nature of the case requires; and it is rendered of still less effect by the opposing statements of Mr. Martin, a solicitor, who has for many years taken much interest in the spiritual condition of this parish. The parish, it appears, is divided into four districts for the purposes of a society with which Mr. Martin is connected, and he has received information which he regards as trustworthy, that not more than about 8 or 10 in each district attend the services of the church. Mr. Martin makes other statements also, which do not quite agree with those of Mr. Spiller; and on the whole it must be considered that the results of the system adopted in St. Alban's church on the locality it was intended to benefit have not been very clearly ascertained.

Again, we have the evidence of Mr. H. R. Droop, a member of the bar, with respect to the church of St. Thomas, Stamford Hill, where ritualism, in a modified form, has been introduced within the last few years. He states that under the old system the church was well filled, and the communicants were numerous, but that since the innovations were introduced, the congregation has been reduced to one fourth. With respect to the attendance of the poor, the following are Mr. Droop's answers to questions put by the Archbishop of Canterbury :—

"3810. From your own knowledge, do the poor attend the church or do they go elsewhere?—A great many go elsewhere. I believe only a few of the poor do attend this church now."

"3811. Did many of the poor attend it before?—The free seats were very full before, and now they are very empty."

Mr. Droop may no doubt be reckoned by some as a partizan, and his evidence on this point may not be considered as very distinct, but still his statements are as satisfactory as those on the other side, and are at least entitled to as much weight.

The truth is we require accurate statistical information on this matter, and this is not to be obtained from witnesses who seem to have been taken very much at random, and who only came prepared to give their views and opinions according to whatever bias they might labour under. It will be necessary, if the Commissioners wish to conduct the inquiry in a satisfactory manner, to obtain evidence of a very different character from that which has hitherto been laid before them. To do so may be a matter of some difficulty, but still it is essential that something should be attempted in this way. The first point to be ascertained would be the number of churches in which ritualism has been introduced, classifying them according to the different phases of the system which have been adopted. Then it would be necessary to obtain information as to the numbers of persons who attend these churches, and as to the condition in life to which such persons belong. It would be necessary also to have accurate statements as to what proportion of the congregation attending a church of this description are inhabitants of the parish in which it is situated, especially with reference to the poor. This part of the inquiry would be of essential importance, and we do not think it would necessarily require any very elaborate machinery. At all events, until some such inquiry is made, we doubt whether it would be wise to attempt to restrain a system which, if it is extensively prevalent and beneficial in its results, it might be disastrous to check in too stringent a manner, and, if it is limited and unsatisfactory in its operation, might be safely dealt with by lenient measures.

Our own opinion, as stated in a former number of this

Journal,* is in favour of allowing some latitude to the ritualistic party, and the facts, as they dimly appear in the evidence taken by the Commissioners, rather go to strengthen this view. If the law is in favour of the vestments, as we think on the whole it is, this would certainly give a *locus standi* to the ritualists, although it would be very far from affording support to all their principles and practices. But waiving any legal question, and looking merely to grounds of policy, we think that enough appears on the evidence at the present stage of the inquiry to entitle the ritualists to more consideration than they have received at the hands of the Commissioners. Their general views on religion, allowing for mere exaggeration, do not appear to us to differ substantially from those which are held by large numbers in the Church of England who regard themselves as the most orthodox of its members, and a great part at least of their practices may be justly considered as merely ancillary to the main principles of their theology. The clergy who have adopted these peculiarities are willing to work with the utmost assiduity among the poor; and we fear that it may still be said, with reference to all parties in the Church that "the harvest truly is great, but the labourers are few." For many among the upper classes the services now in question have considerable attraction. It is in vain to deny that ritualism has attained a certain degree of popularity, and is strongly upheld by many persons as the most suitable mode of public worship.

If ritualism is a fashion, and if, like other fashions, it is destined to pass away, it must run its course, and any force used against it would produce little or no effect. If, on the other hand, it is founded on convictions likely to be permanent, the application to it of any strong coercive measures might be attended with serious dangers to the Church. The wisest course would be to give the ritualists some amount of liberty, without conceding to them the irregular and unrestrained freedom which they claim. But the nature of the policy

* *Law Magazine and Review*, February, 1866.

which it would be proper to adopt must depend in a great measure on facts which have not yet been properly ascertained. Should it be found that ritualism thrives only in peculiar situations, and that the churches where it is adopted draw their congregations from the surrounding parishes rather than from those in which they are placed, the plan of licensing chapels where a more ornate mode of worship might be adopted than that which ordinarily prevails, might meet all the wants of the case. But should it be ascertained that in many instances the great bulk of the inhabitants of parishes approve of the system, and that it is really producing a powerful impression on the lower classes, provision might be made that, when the wishes of the parishioners had been properly ascertained, the ritualistic practices might be adopted in parish churches. In both cases it would be necessary that certain limitations and conditions should be made, though, for obvious reasons, it would not be necessary that these should be so precise and so stringent in the former case as in the latter. In parish churches we think that it would be better to require the consent of a certain proportion of the inhabitants before introducing ritualism, than to provide for putting an end to it on the complaint of any number of parishioners after being once introduced; to make the consent, if we may so express it, a condition precedent, not a condition subsequent. Whatever difficulties there may be in adopting such a plan, they are far less, we think, than would be likely to arise from carrying into effect the recommendations of the Commissioners, in so far as the peace and quietness of the Church are concernced. Our national Church has always been distinguished for its comprehensive character; and although we have no sympathy with the pretentious claims of the ritualists to sacerdotal authority, we cannot see how assumptions of this nature, which, however stated, are altogether founded on opinion, put them under a different category from other parties who find a place within the Church of England.

With respect to the legal questions which ritualism involves,

we have stated our views on two former occasions;* and these views have only been confirmed by subsequent consideration. It would be absurd to say that the subject is not one of an obscure and difficult character; but still, looking at all the facts that have been ascertained, and all the documents that have been appealed to, we cannot read the present rubric relating to vestments in any other sense than as sanctioning those which were prescribed by the First Prayer Book of Edward VI.

When the legislature has used plain and explicit language, neither "contemporaneous exposition" nor the supposed views of the framers of a statute can override such language; and as the Act of Uniformity incorporates the Prayer Book with itself, the latter must be interpreted precisely as if it formed part of the statute, and according to the ordinary rules. In this the nine counsel who were consulted by the ritualists in 1866 agree with us, although only two of them—the then Solicitor General and Mr. J. D. Coleridge, Q. C.,—take the same views as we had expressed with respect to the other matters submitted to them, such as incense, lighted candles, wafers, &c. But on these matters the other counsel were not at all agreed, some allowing one thing and some another, but none holding that all these things were legal, the result being as curious a piece of tesselated work as we have ever had the pleasure of seeing in any product of men's hands or heads.

We have read with much care the statement by Sir R. Palmer, of the reasons which led to the opinion given by the counsel to whom a case was submitted on behalf of the Archbishops and Bishops, and also the ingenious explanations given by Mr. Barrow of the same opinion. However able these statements may be they fail to convince us that the rubric ought to be interpreted so as to convey a different meaning from that which its language obviously bears. They amount to nothing more than a mere speculation as to what the motive may have

* *Law Magazine and Review*, February, 1866, and August, 1866.

been in introducing a rubric which was intended, it is thought, to mean, by words singularly inapt, that certain of the vestments sanctioned by the First Prayer Book of Edward VI. were not to be used, but that others were. But the real question is, whether the words have the meaning sought to be put upon them, and we are constrained, however unwillingly, to answer that in our opinion they have not. Sir R. Palmer thinks that as the rubric uses the language of the 1 Elizabeth, c. 2, s. 25, with respect to vestments, and, as that section gave legislative authority to the Crown to abolish the vestments, which was done by the advertisements, the rubric must have the same legal effect as that section after such authority had been exercised. But the present rubric is a distinct, substantive enactment, and neither contains any clause like that in the section of the Act of Elizabeth, about further order being taken, nor refers in any way to that section. Sir R. Palmer would surely not mean to say that if a statute has been amended by a subsequent statute, and then a third enacts *simpliciter* the provisions of the first, the amending statute will control this last enactment. But it is impossible to put the advertisements higher than an amending statute; and we are therefore unable to see the force of his argument drawn from the exercise by Queen Elizabeth of the legislative authority given to her by the original statute. The advertisements could only amend the statute to which they were intended to be applied, and could have no application to a subsequent enactment which contained no reference to them, express or implied. As to the argument drawn from the word "retained," as inapplicable to anything not then in use, we do not think it is of much avail. If the word is struck out, the meaning of the rubric is still complete, and it is possible that the older use of the term may not have been so strict as the present. We know that in our own profession this very word is used in a sense different from that which it ordinarily has, since to "retain" counsel does not imply any previous or continuous user, but points entirely to a future state of things;

and when an executor "retains" assets of his testator for the purpose of satisfying a debt due to himself, such assets may be applied by him in this way at the very instant they come to his hands.

One word in conclusion as to the view propounded by Mr. Barrow in his note, which we have read with great interest, although unable to agree with the conclusions at which he has arrived. Mr. Barrow mentions the objections to the Book of Common Prayer brought forward at the Savoy Conference by the Non-conformists, and the spirit in which those objections were dealt with by the Church party. The former objected to the surplice, but this the latter were determined to keep, and, desiring to avoid even the appearance of concession to their opponents, would not agree to alter the rubric as it then stood, so as to get rid of the objection that it seemed to bring back the vestments, but devised the plan of substituting for it the words of the statute of Elizabeth, under which vestments could not be "retained" which were not in existence. In this way they could at once say that they had conceded nothing, and yet that they had not refused to make any alteration. Whether those venerable personages consciously framed any such notable device we are unable to say; but if they did so, they were certainly as unfortunate in the means they adopted as in the temper they displayed. To put forth a rubric which, in the sense in which they are said to have intended it to be taken, could not even to themselves carry its meaning on the face of it, for the purpose of not appearing to concede anything to the Non-conformists, was certainly not a wise course. They little knew the trouble they were preparing for a future generation of Churchmen. In this rubric they were laying the foundation of evils to the Church of which they were such rigid guardians, which, unless checked by greater wisdom and prudence than are generally brought to bear on such matters, may amply avenge all the wrongs inflicted on the Non-conformists by the Act of Uniformity, and add another instance to the many which prove how sure, though long delayed, is the operation of Nemesis.

Art. IV.—FRENCH CODES, AND ENGLISH DIGESTS.

NOW that a Royal Commission is about to work,* the time seems appropriate for stating shortly how the French have *codified*, and how the English have at different intervals, and with varying success, *digested* their laws.

The French operation began with the abolition of feudalities at the earliest stage of the Revolution, on the 4th of April, 1789. Next came the extinction of the law of primogeniture, and the adoption of natural equity and presumed affection as the basis for succession. These changes were effected under the superintendence of Merlin, well known to us as the author of the *Répertoire* and of the *Questions de Droit.*

The ground being much cleared by these advances, it seemed to those in authority that the time had arrived for a wider undertaking, that of digesting and arranging all the Civil laws of France into one body, introducing also the required alterations, these last having been demanded chiefly by the conflict of local and provincial customs. To execute this great undertaking, Merlin was associated with a lawyer greater than himself, the celebrated Cambacères, afterwards one of the Consuls. These two men, Cambacères and Merlin, were charged by the Assembly to prepare a sketch of the proposed classification. On the 11th of August, 1793, having performed the task assigned to them, they made their report to the Convention. It is stated that the work had fallen principally upon Cambacères. In the year 1794 that remarkable man published a separate report *sur le Code Civil*, the original, or at all events, the germ of the *Code Napoléon.* For ten years his labours in improving and maturing this production are said

* A working staff is soon to be put in harness.

to have been incessant. Its merits and defects were discussed from time to time at no less than sixty sittings of the Convention. It was strongly opposed; the chief objection being, that it savoured too much of the practitioner; for Cambacères, though an advocate of improvement, was not an innovator. His project was referred to a committee, who lost themselves in the discussion of first principles, and in empty declamation. Much time was thus wasted; nor was the matter mended by the Council of 500, who ordered the judges of the Superior Courts to deliver their opinions. The judges obeyed, but, as might have been expected, their criticisms increased rather than diminished the existing perplexities; and the codification of the French law would have been postponed indefinitely, had not a strong hand at this period interposed.

After the battle of Marengo the First Consul issued a commission to examine the work of Cambacères, choosing for this purpose, without reference to political opinion, four lawyers of the highest reputation; Tronchet, the defender of Louis XVI.; Portalis, a philosophic priest of conservative leanings;—and Maleville and Preameneu; all chosen, not only for their learning and experience, but for their judgment and moderation. These were the Rédacteurs of the *Code Civil*, of which, however, it is always to be remembered that Cambacères was the parent. The revised version, as corrected by the Rédacteurs, and as criticised by the legal profession (among whom it had been circulated), was submitted formally to the *Conseil d'État*, whose committee of legislation framed a new draft from the materials before them. The new draft, thus prepared and thus matured, was discussed article by article in the *Conseil d'État*; the First Consul, as M. Thiers informs us, descending from his war horse and not only attending every meeting, but astonishing "the whole world by the novelty and profundity of his suggestions."

In this way, after having received the sanction of the legislative body, a Code of Civil Law was, on the 3rd of March,

1803, presented to the French nation, and it has governed them ever since. The Code of Procedure, principally the work of Cambacères, appeared in 1806; the Code of Commerce in 1807; the *Code Pénal*, the *Code d'Instruction Criminelle*, and the *Code Forestier* at subsequent periods. These, the result of twenty years' thought and labour, form now the pocket volume known as the *Code Napoléon*. We have said enough to show that it did not originate with the extraordinary man whose name it bears, although it became his glory and his chief boast in after life that he had given it consummation.

The object of the preceding sketch is to show how cautiously the French went to work in framing their code, and how signal is the delusion of those (and they are many) who fancy that it was dictated by Napoleon. The radical alterations were not great. To be satisfied of this we have only to examine the old French treatises; but it seems enough to cite the notorious fact that more than three fourths of the *Code Civil* are extracted from or built upon Pothier.

To the power of seeing everything beforehand, the faculty of legislating *ab ante*, the gift of prescience in fact, the jurists employed by Napoleon made no pretension; "thanks," says the Baron de Locré (their editor), "to that admirable good sense which pervades their whole performance."

To turn from France to England, we find that the illustrious Bacon had long meditated what he called "a particular digest or compilement of the laws of his own country." In his latter day of disgrace and depression he actually commenced this arduous undertaking; but he was obliged "to lay it aside" from inability "to muster his pen and forces," and from the want of hands to help him in a work which he truly termed one peculiarly "of assistance." Caution and moderation were the characteristics of his scheme, and order was the object of it. He suggested no startling or abstract innovations. His biographer, Lord Campbell, commends the prudence and sagacity which forbade his attempting a code. What Bacon proposed was "to compile a method and digest of the

King's laws ;'" and the argument he addressed to the regal pedant was, that " great good would come from bringing cases to a text law, and setting them down in method and by titles." He knew that this operation, as it advanced, would necessarily beget substantive improvements; but these, he wisely held, must be left to the legislature. We cannot otherwise understand him, when he says that those employed " should not be with a precedent power to conclude, but only to prepare, and propound to Parliament." And we are confirmed in this construction by the report of Lord Colchester, who as chairman of the Commons' committee in 1796, describing the overture of Bacon to King James, states that its end was " to prepare a digested result for Parliamentary consideration." The immediate effect, however, would have been to unfold the law as it stood, so that all should not only obey, but, by an exercise of reasonable intelligence, understand it.

The formidable task which proved too much for Bacon, was accomplished about a century afterwards (at the suggestion apparently of Burnet), by an obscure and unassisted hard-working barrister of Lincoln's Inn; for such, we believe, was Lord Chief Baron Comyn, when he compiled in Norman French the greater part, if not the whole, of his well known " Digest of the Laws of England;" embracing our entire jurisprudence, civil, criminal, ecclesiastical, and constitutional. This elaborate compilation, though prepared so early, did not see the light till 1762,* more than twenty years after the learned judge's death, and probably not less than forty after the date of the original composition, which, moreover, was published under the disadvantage of a translation by unknown editors, who seem to have been strangers to the author. Much of the law contained in this work had of course become stale. Its arrangement, too, was not always happy. The book as a whole was repulsive; but its matter was good; its law was safe. Its propositions were terse, and its references

* Comyn flourished as a reporter in the reigns of King William, Queen Anne, and the first two Georges. His reports begin in 1695.

convenient and copious. In a word, it saved the painful drudgery of constantly hunting up old and scattered authorities. We therefore cannot wonder that the profession received the Chief Baron's performance as a boon, for it is certain that they still look back upon the donor with gratitude and reverence.

If success, so signal and so marvellous, attended the efforts of a single individual in delineating, unaided, the entire body of English jurisprudence, what ought we reasonably to expect from the labours of a Royal Commission engaged in a similar operation—remembering, as we must, that the compilation of Comyn has become a thing of the past, and that—as Sir James Wilde says—"the structure of our existing law has been raised chiefly within the last century and a half." It is rumoured that Lord Cranworth and his colleagues contemplate the nomination of a phalanx of jurists to work the Commission; an operative staff, composed, not of Ulpians or Tribonians, but of industrious lawyers, reasonably skilled in their profession, reasonably addicted to labour, and—what is not less material—reasonably trained to the austerities of legal composition. These, acting in concert, but with a distribution of duty appropriate to each, will be subject to the direction, supervision, and correction of a board, having in its number some of the first lawyers that England can produce. We feel quite confident that a work prepared under such auspices *must* succeed; and if we had any doubts on the subject, the admirable report already issued would have dispelled them. This Commission will, in fact, realize the dream of Bacon. It will, as he proposed, frame a digest—not a code; although a code may be its fruit when the digest is complete.

In the posthumous continuation of Austin's Jurisprudence (ably edited by his lamented widow, who has recently followed her distinguished husband), what he contemplated and advocated at the outset was "merely a re-expression of existing law, with apt divisions and sub-divisions;" in fact neither more nor less than a digest, which, however, he thinks "will prepare

the way for a code." He proposes to extend the work to Scotland and to Ireland. To overlook these countries, he conceives, would be a slight upon both. And we quite agree.

A systematic digest drawn up after profound deliberation, though not binding, would be of instant value to the practising lawyer, and even to the judges. It would give confidence to legal opinions, and prevent litigation in many cases where counsel, after balancing discordant authorities, advise dubiously a suit, or a defence.

The digest would address itself to all classes. It might even be sold at a moderate profit, which would contribute to defray the expense of the Commission; a consideration not undeserving of attention in this age of economy. The publication would be by instalments, to give evidence of progress and quality; each branch of the law being easily capable of severance from the rest. Every professional person, and we incline to think, a large portion of the educated community, would desire to possess themselves of an exposition, revised, corrected and sanctioned by the first legal intellects of the country; setting forth, in a readable form, the rights and liabilities of the people, and enabling them to comprehend that which, whether they comprehend or not, they are bound to obey.

We have said nothing of Cruise's admirable digest, because it is confined to real property. We have also been silent as to the *Law Journal* digest, which, commencing in 1820, and continued quinquennially, has proved of the greatest use to the profession. Its birth put an end to all renewals of Comyn. It will be of the greatest service to the Royal Commission.

Three months before his death, Lord Lyndhurst, in a letter to the writer of this article (written in his Lordship's beautiful hand), says, "I have never publicly expressed an opinion upon the subject of codification; but I think the utmost that can be done is to form a digest."

Lincoln's Inn, October, 1867.

Art. V.—CONSTRUCTIVE CRIMINALITY IN CONTRACTS.

EX *dolo malo non oritur actio,* is a legal maxim of which lawyers are not a little proud. Reproached with or without good cause or excuse, by successless suitors with failure to secure complete justice, barristers and solicitors alike are wont to fall back upon the above and kindred axioms, as showing the fundamental soundness of the principles on which the law rests, and the earnest desire for the triumph of truth and righteousness by which its sages have been, and still are actuated. Nor can it be denied that the public are tolerably well satisfied with the accuracy of these representations. They know that with whatever faults the practical working of the law is chargeable, in purpose and intent it aims at regulating the relations between man and man in accordance with "judgment, justice, equity, and every good path." Therefore, though they have as little as they can help to do with law in the concrete, they regard it with great respect and, in some sort, with affection in the abstract, and, are frequently as lavish of encomium upon it, as they are unsparing of satire upon its practitioners.

It may sound something like heresy to utter a word against a sentiment so greatly hallowed by popular reverence, and so repeatedly endorsed by judicial authority. Students who have pored over Collins v. Blantern,* and who have imbibed the rule therein laid down as part of their (legal) mother's milk, will remember the feelings of admiring awe with which they read the well rounded periods of Chief Justice Wilmot, when denouncing "the manner of the transactions" as calculated "to gild over and conceal the truth." They have warmed with generous enthusiasm towards the calling of their choice,

* Wilson, 341. 1 Smith's L.C., 5th edit., 310.

as they found that, after all the hard things said of the common law, its highest judicial officer emphatically declared his determination "to brush away the cobweb varnish, and show an iniquitous transaction in its true light." Pursuing the subject, they have deemed still finer his Lordship's severity when speaking of the enormity of tempting a man to transgress, have been awed by the solemnity with which he warns you that "you shall not stipulate for iniquity;" have stood as it were transfixed by the seer-like enthusiasm with which he declares that "no polluted hand shall touch the pure fountains of public justice," and have gazed admiringly at the dramatic action with which, before stooping to discuss a point of pleading, he concludes his judgment on the broad principle involved, with "*Procul, O! procul este profani.*" Really, after mentally catching his Lordship's eye, like the poet's, "in fine frenzy rolling," it goes against us to maintain that this very maxim has ever been made an instrument of injustice, through a seemingly logical adaptation of the rule which it embodies, and that in several reported cases the courts have given the name and punishment of *dolus*, to acts and omissions falling a long way short of *crassa negligentia.*

We may say at once that these remarks are directed exclusively to cases in which the rule laid down in *Collins* v. *Blantern* has been applied to illegality by statute. As to bargains in furtherance of fraudful stipulations, in suppression of proper prosecutions, and in reward for knavish services, the judgments of the courts are in perfect harmony with the common sense and common conscience of mankind. But it is widely different when a plaintiff who comes into court with perfect moral *bona fides*, is scouted out of it because he has contravened or failed to fulfil some statutory requirement, as effectually as if he had been guilty of the most flagrant offences against all laws, divine and human. Mr. John William Smith, and his successive editors, have collected in their notes to *Collins* v. *Blantern* a number of examples of this kind, in which plaintiffs have been sent away remediless, because,

wittingly or unwittingly, they had done something which a statute had forbidden, or failed to do something which a statute enjoined. We are far from saying that in every instance hardship or injustice was wrought by adhering to the rule, nor are we about to argue that if a man openly and intentionally breaks the law, he ought to be allowed to claim its assistance in order to obtain the reward of his wrong doing. But we do say that when a plaintiff prefers a claim otherwise well founded, and the enforcement of which involves no violation of the *primary* object of the legislature in passing a particular Act, the right to recover ought not to be barred by an innocent or even by a negligent infringement of a law purely positive, and the breaking of which is, at the worst, *malum prohibitum*.

A few examples will illustrate our meaning. Certain Acts have been passed in order to suppress or discourage gaming, simony, and usury; thus putting all such dealings under a legislative ban, and treating those who engage in them as outlaws *quoad hoc*. The whole scope of these Acts, and, in many cases, their express words, show that Parliament meant altogether to discourage particular practices, as injurious to individuals and mischievous to the State, and that therefore it has resolved to leave parties entering into such contracts to square accounts among themselves, and to make any money claim arising out of them a mere "debt of honour." In such cases therefore no doubt whatever can exist about the propriety of the most stringent enforcement of the above rule, if a plaintiff whose claim is based upon a forbidden bargain should come into court, practically asking the law to stultify itself. So, also, when licences, or other taxes, are imposed for the protection of the revenue, a person suing who ought to be a licencee but is not, should be prevented from recovering, on the double ground, that by evading the tax he has defrauded the State whose help he is invoking, and has put his more scrupulous competitors at a disadvantage, by escaping a burden to which they are subjected. Of other contracts made in

deliberate defiance and determinate breach of law, as for smuggling, adulteration, and similar mal-practices, it is unnecessary to speak, as they are too manifestly opposed to public policy to give the parties to them any rights in a court of justice. To them the maxim with which the present paper commences may fairly enough be applied—and no one will feel any pity for those who, "having stipulated for iniquity," find that the law will not help them to enforce their stipulations.

Had the courts stopped here, we should have had no fault to find with their decisions. But unfortunately, as we think, they have carried the doctrine very much further. Our complaint is based upon what we deem an undue extension of the doctrine laid down in *Bartlett* v. *Vinor*,* where Chief Justice Holt held that every contract was void which an Act of Parliament made unlawful, even though it did not expressly invalidate such contract, but subjected those who made them to a penalty, on the principle that penalty implies prohibition. This reasoning was recognized and approved by Chief Justice Tindal in *De Begnis* v. *Armistead*,† when the plaintiff unsuccessfully sued on a bill given him by a co-adventurer for balance of losses in keeping an unlicensed theatre, and where, from the language of the partnership agreement, the court thought both parties knew they were breaking the law. Shortly after this came the King's Bench case of *Forster* v. *Taylor*,‡ where, in an action for the value of fifteen firkins of butter, the defendant pleaded that certain requirements of 36 Geo. III, cap. 86, secs. 2 and 3, as to the packing and branding of the butter had not been complied with. In this case, stress was laid upon the fact that the Act was passed for the prevention of fraud, and that, therefore, it ought to be strictly enforced, although we may observe, the actual scienter on which Chief Justice Tindal insisted in *De Begnis* v. *Armistead*,§ does not appear to have been proved. Still, there is some consistency in saying that a vendor who fails to give the vendee the bene-

* Carth., 252. † 10 Bing., 110. ‡ 5 B & Ad., 887.
§ 10 Bing., 110.

fit of a security to which he is entitled by Act of Parliament, ought not to have the same rights against the vendee as if he had done all that was required of him. On this ground the plaintiff failed in *Law* v. *Hodson.** He had made bricks below the statutable size as defined by 17 Geo. III., cap. 42, and this was considered a fraud on the buyer, whom the legislature meant to protect from the seller, who, therefore, could not recover the price of goods not made as the statute provided. On somewhat similar grounds also went the judgment in *Fergusson (Assignee)* v. *Norman.*† Defendant, a pawnbroker, had advanced money on goods pledged by a bankrupt on 142 different occasions prior to his bankruptcy. The assignees brought trover, and the matter was referred to an arbitrator, who found that in various ways the pawnbroker had failed to comply with the rules laid down for the conduct of his business by 39 & 40 Geo. III., cap. 99. Thereupon the court unanimously held that he had acquired no right whatever in, or lien over, the property pawned, and must pay to the assignees the full value of the pledges, a sum considerably in excess of the amount for which the unredeemed portion of them had been sold.

It will be observed that all the cases above described or cited fall within the principle of *Collins* v. *Blantern*, either because of some moral defect inherent in the contract, or of some direct contravention of the primary object of a statute, or of some tendency in the act done or omitted to afford facilities for the commission of fraud, or to evade securities provided against its prevention. Still, we confess we do not exactly see why a man who buys butter should be allowed to cheat the seller out of it because certain marks were not upon the firkins, or why a builder who chose to use bricks of an unusual size should have been, on that account, relieved from all obligation to pay for them. But a still harder class of cases, more particularly affecting printers and publishers, may be mentioned, in which

* 2 Campb., 147.

† 5 Bing., N.C., 76. 6 Scott, 794. 3 Jur., 10.

plaintiffs have failed to recover their due in actions of contract, simply because they had omitted to perform certain formalities. By 39 Geo. 3, cap. 79, sec. 27, printers are bound to print their names and abodes on every book and paper printed by them, under a penalty of £20 for every book or paper so printed.* In *Bensley* v. *Bignold* † the plaintiffs, who were printers, sued to recover £92 5s. for printing a pamphlet on Fire Insurance, which purported to be printed by Pinnock & Maunder, 267, Strand, who were, we suppose, the publishers, but on which the names of the plaintiffs as printers did not appear. The case was argued for the plaintiffs by Lord Abinger, with Sir F. Pollock as his junior; but the court (Abbott C. J., Bayley, Holroyd, and Best, J. J.) gave judgment against them, holding that, "where a statute directs a particular thing to be done, it must be done;" adding, "if there be an omission to do the thing required, it is not any excuse that the party did not mean to commit a fraud;" a ruling scarcely consistent with the importance attached by Tindal, C. J., in *De Begnis* v. *Armistead*, to the fact that the plaintiff and defendant had engaged in a common undertaking, with a determinate purpose to violate the law. This case of *Bensley* v. *Bignold*, it may be observed, not only followed, but went beyond the Common Pleas case of *Marchant* v. *Evans*, ‡ where the plaintiff sued for £48 for printing a newspaper which had not been registered as required by 38 Geo. 3 cap. 78. § This Act positively prohibited any such publication, whereas the 39 Geo. 3 cap. 79 only imposed a penalty, a distinction which was treated as one not involving a difference in *Bensley* v. *Bignold*, but which seems to have been regarded as of substance by Chief Justice Tindal, in *Fergusson* v. *Norman*.

A distinction may easily be drawn as to those duties imposed

* Now limited to twenty-five forfeitures in respect of the same work, by 2 & 3 Vict., cap. 12.

† 5 B & Ald. 335. ‡ 2 Moore, 14.

§ For which 60 Geo. 3, and 1 Geo. 4, cap. 9, is now substituted.

on the pawnbroker, which are *entirely collateral to the individual contract,* and it would be too much to say, because he had not observed the enactment of the statute in such matters, that therefore the contract made by him should be void. Suppose his name was required to be put up over the door,* and some mistake had been made. A penalty is given for not putting up the name; but it would not follow that contracts entered into by an individual whose name had been incorrectly spelled, would be therefore void.

In the hypothetical case put by the Chief Justice it might indeed be contended that there was a substantial compliance with the Act, but there seems to us much force in the remarks about giving undue effect to requirements "*entirely collateral to the individual contract,*" the omission of which can do the contractee no harm, not even by exposing him to the risk of fraud, as in *Forster* v. *Taylor.* Now as *Marchant* v. *Evans* was decided in 1818, *Bensley* v. *Bignold* in 1822, and *Fergusson* v. *Norman* in 1838, it would seem only in accordance with the ordinary way of estimating judicial deliverances, to deem the latest as the most binding authority. The question has not, however, subsequently arisen in direct reference to the particular trades and statutes affected by the two former decisions, and even if it did, the Courts would probably feel themselves bound by judgments which are precisely in point, and whose authority has never been positively and unmistakably assailed. In *Day* v. *Heming,*† indeed, a very similar question was raised but not determined. The plaintiff, a printer, sued the defendant for a large sum of money due for work and labour, use and occupation of premises, and on accounts stated. The defendant, besides the common traverse, pleaded two elaborate special pleas, setting forth the fact that the plaintiff's printing office, types, and presses were not registered with the Clerk of the Peace, as required by 39 George III., cap. 79, sec. 23, which imposed a penalty for omitting to register. The

* As it is by 39 and 40 George III., cap. 99, sec. 23.

† 4 L. T. N. S. 443, 9 W. R. 703.

Queen's Bench, on demurrer, thought the Defendant must succeed, on the authority of cases already cited, and were about giving judgment in his favour, when a happy thought seems to have struck Mr. Streeten, the Plaintiff's counsel, who showed that by 7 and 8 Victoria, cap. 71, the Plaintiff, from the position of his office, might have registered either with the Clerk of the Peace for the city of Westminster, or with the same officer for the county of Middlesex, and that as one plea negatived registration in the city, but said nothing about the county, while the other denied registration in the county, but said nothing about the city, it was consistent with either that the registration had really taken place in the office of that particular Clerk of the Peace which the plea did not mention. This is, of course, very fine hair splitting, which would satisfy no one who was not willing, nay anxious, to be deceived. The way in which the judges jumped at it showed how little they loved the law which their predecessors had made for them. They told the defendant's counsel that one plea could not help the other, flatly refused his application to amend, characterized his pleas as iniquitous, and finally laughed him out of court, saying that the defendant in such a case should have the law in Portia fashion, but not one atom more, their Lordships reminding him with evident gusto of the engineer who was "hoist with his own petard." So far as we are aware, we have had no reported case on these Acts since *Day* v. *Heming* was decided. But it must not be supposed that on this account the older decisions remain forgotten or inoperative. In how many instances the plaintiff abandons his suit because he finds it hopeless to go on with it we can never know, and how often the point is taken before inferior tribunals we can but vaguely guess. Only a few weeks ago, *Colnaghi* v. *Robertson* was heard by the Judge of the City Small Debts Court. The plaint was for advertisements inserted in a London newspaper, which, it appeared, had not been registered in accordance with the Act. Thereupon the Judge felt himself bound by previous decisions, and at once

nonsuited the plaintiff, who, we may be sure, would have been very much surprised to hear that the law thus lent its aid to a defendant with an indisposition to pay a debt, from the scrupulosity with which it guards against any violation of a legal principle which directly discountenances any departure from rectitude, but which, in some instances of its practical application, has been found to give no little encouragement to many doubtful defences.

The question is, how we may best prevent a recurrence of similar scandals, for such we must take leave to consider them. That they are looked upon in very much the same light by the occupants of the bench, no one can doubt who has read the reports of what took place when *Day* v. *Heming* was argued, though it is hard to say whether the law is more discredited by the existence of the rule from which their Lordships were so anxious to escape, than by the ingenious subterfuges to which they were driven, in order to evade a doctrine by which, as lawyers, they were bound, but from which, as men, they revolted. Every one rejoices to find that the plaintiff succeeded, and yet, if *Marchant* v. *Evans*, and *Bensley* v. *Bignold* are good law, he ought to have failed. Either alternative is unpalatable to those who would have the law not only obeyed, but respected. If the ruling which makes implicit obedience to the statutes a condition precedent of the right to recover, be founded on sound notions of public policy, the Judges of the Queen's Bench ought not to have looked with such eagle eyes for the means of defeating it. If, as they evidently thought, to apply the rule in such a case was inequitable, it is a reproach to our jurisprudence that regard for precedent should constrain our highest judicial dignitaries to give decisions which their inmost hearts disapprove. The latter, we venture to believe, is the view which will most readily commend itself to minds not spoiled "by a superabundance of technical learning," but that is precisely the view which the bench may hold heartily, but which it will hesitate to express authoritatively, because its members could not do that without over-

ruling prior decisions. And yet it is greatly to be desired that in some way they should be relieved from the necessity of giving an undeserved success to the wrong side. No two opinions can be entertained about the nature of pleas which the Queen's Bench denounced as "iniquitous;" nor will any one, technicalities apart, gravely maintain that it is right to run in a man's debt for work done and materials supplied, and then to evade payment, because he has omitted to print his name at the bottom of a bill, or to register his office with the Clerk of the Peace. That the law should countenance this at all is quite bad enough, but to do so from professed hatred of *dolus malus*, savours strongly of satire upon the system and unfeeling irony towards the sufferers. When the Acts of 39 Geo. 3, cap. 78 & 79, and 60 Geo. 3, and 1 Geo. 4, cap. 9, were first passed, we have no doubt they were pretty generally observed. Printers and newspaper proprietors were then looked upon as rather pestiferous people, for whom the State had no great love, and who were therefore specially careful to do what they were told. But we have changed all that. A printing or newspaper office only requires to be registered once during a proprietorship, which may last fifty years. Once done, it need never be done again while the concern is in the same hands. There is no annual or periodical duty to pay; no notice to be painted outside; nothing, in short, to remind printers or the public of the reality of these obligations. Hence the whole thing soon fades out of mind, and a new generation grows up, not one in twenty of whom, we will venture to say, has ever heard of these Acts, while a still smaller proportion dream that ignorant or negligent disobedience to them exposes them to be plundered by anybody who chooses to use their capital, and then set up a shabby defence. The best way to meet this would seem to be to pass a short statute, enacting that henceforth no plaintiff who had failed to comply with the requirements of the Acts in question should be liable to be defeated in an action, merely because he had failed to affix his name, or

to register his types or newspapers, as by Parliament required. We would leave printers and publishers still liable to penalties for their neglect, as they ought to obey the law, and cannot complain if they are punished in parliamentary measure for their disobedience. But we would not hold out a premium to dishonesty by encouraging defendants to rely on "iniquitous" technical defences. We should therefore be glad to hear that some legal Member of Parliament has resolved to take up the subject, and, by carrying a Bill through Parliament, to redeem the law from the reproach to which the decisions on which we have commented only too justly expose it. By a concurrence of authority it has been established that, if one condition in a contract be illegal, the contract is only bad in part, but that, if one of several considerations for the promise be illegal, the whole promise will be void, * because

"Every part of the contract is induced and affected by the illegal consideration, whereas, in cases where the consideration is tainted by no illegality, but some of the promises are illegal, the illegality of those which are bad does not contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another." †

Now it is impossible seriously to maintain that when a man gives an order to a printer, or takes an advertisement to a newspaper, he is influenced to make the contract by any consideration like an omission to register. The bargain is made entirely irrespective of any such formality, and it is therefore the more to be regretted that the over straining of a sound principle should have visited these acts of omission with the penalties of positive moral turpitude. That the authority of the decisions we have cited should have remained unquestioned so long, is unfortunate enough, but we trust that some law reformer will be found with sufficient skill and resolution to prepare and pass a Bill which shall relieve us from the danger of having them cited much longer.

* *Featherstone* v. *Hutchinson*, Cro. Elix., 199.

† Per Tindal, C.J. in *Shackell* v. *Rosier*, 2 Bing. N.C., 646.

Art. VI. — THE NECESSITY OF FURTHER PARLIAMENTARY REFORM.

THE most powerful earthly potentate is money. It is the universal idol which all nations have mutually agreed to worship. Such is its omnipotent influence that it can make kings or consign them to indigence and obscurity: it can enslave or emancipate; it finds a ready entrance into any citadel but Heaven's, and, according to modern philosophy, there is now no reaching Paradise without the aid of this almighty agent.

The deference that is paid to it can thus occasion no surprise. It seems, moreover, to have a more extensive sway over men's minds than one at first would deem probable. Its nature, its component ingredients of base metal and pure, appear to occur to most men, and to exercise an influence over them whenever they say or do anything.

It is well known that gold is blended with alloy, to make the compound, when stamped, wear well as money; this confusion of pure and base occurs in everything. All the actions of men are similarly made up. Truth is seldom found alone; it is too scarce, or too keen and cutting for common use. Men therefore commonly mix it with the froth of fancy, or the filth of falsehood, before they circulate it; we can find no virtue without some vice; we can rarely meet with honesty without hypocrisy, or sincerity free from selfishness; we can discover very little christianity without cant, though we frequently meet with unadulterated cant without christianity, just as you meet with a counterfeit sovereign entirely without gold.*

This money-making process of mixing the base with the pure is visibly apparent in all the labours of our legislators.

* In proof of this view, "as to how completely English society is pervaded and governed *by wealth*, see an extract from De Tocqueville's posthumous Works in the "Essays on Reform," p. 269.

Can a single instance be adduced to disprove the truism? We know of none. It would be a waste of time to revert to any measure that became law previous to 1830. If there were a few particles of popular benefit contained in any of them, they were amalgamated with such a mountain of oligarchical dross that the atoms were quite lost in the mass. But even since that we do not recollect a single achievement which our statesmen have effected that does not evince melancholy evidence that the money-making process of blending the base with the pure was predominant, both in concocting the scheme and in the rules for carrying it into operation. No reform of abuses has taken place without leaving the roots of disease behind to grow up again, and to increase the more vigorously in consequence of its *virus* having been *nipped* for a time. It is true some thorough reforms have been suggested by the honest advocates of a pure political currency; but the more numerous dealers in counterfeit have procured the admission of so much alloy that the boasted boon, when brought to the test of actual operation, has proved to be only a piece of worthless, valueless, base metal, on which a set of knaves have been permitted to impress the guinea stamp.

The Reform Bill of 1832 affords a fit illustration of the preceding remarks. It may be remembered that Earl Russell, then Lord John Russell, some years ago, at a dinner given to him at Stroud, was reported to have said, "When I was a member of the Committee which framed the outline of the Reform Bill, I was solicited *to prepare a plan of which the chief heads were adopted by the Committee.* This plan began by disfranchising fifty small boroughs and the partial disfranchisement of fifty more. It then went on to prepare the enfranchisement of all the great manufacturing towns. After some discussion and consideration on the plan, which we ultimately submitted to Earl Grey's government, we suggested that *the vote by ballot* should be adopted, and that the duration of Parliament should be *five years.*"

It appears then that the first Reform Bill, in its embryo

state, contained a clause for the vote by ballot, and another for shortening the duration of Parliament. Had these suggestions been made law, no doubt they would have tended very powerfully to render the measure what it was held out to be—a genuine parliamentary reform—it would have been a coin really valuable and fit for general use.

What mischievous spirit changed all this intended good into positive evil? What malignant genius extracted all the practical utility, all the vitality, everything that would have made the measure beneficial and effective, and inoculated it with the *virus* of the old corruption which has since turned the vaunted *Magna Charta* into a national grievance? It requires no lengthened argument to show that the Reform Bill, especially in counties, has inflicted positive evil. Instead of extending the popular power of freely electing members of the House of Commons, in numerous instances, it has absolutely contracted it. Before the measure became law, there were many boroughs entirely under the control of their patrons, but the counties, generally speaking, were free. The electors of those rotten boroughs were corrupt and purchasable; but county constituencies were comparatively unshackled. Are they so *now*? The most inveterate opponent of all reform would not attempt to prove the affirmative.

The Reform Bill ultimately disfranchised some of the small boroughs; but it left untouched a large number of others, the very sinks of corruption. The Parliamentary inquiries which since have been so frequently instituted have proved that many boroughs are still as strictly pocket boroughs as were ancient Sarum and notorious Gatton. These inquiries, continued down to the present time, however expensive and ineffective, have only exposed these national nuisances; until the late session nothing has been done to remove them. The evidence of the practised performers of the dirty work has thrown a lurid light upon the mode by which a considerable part of the people's Parliament is made up. Within the period mentioned a large number of honourable legislators who had

thus wriggled themselves into Parliament have been convicted of gross bribery, and have been deservedly unseated. The seats of many other senators of the same description have been roughly shaken, and, judging from the sickly testimony which has been adduced on those occasions, it is probable that there is still a larger number of the people's Parliament equally culpable and unscrupulous who have escaped with impunity, and remain there to make laws for their countrymen; to lay taxes on the labour and skill of Englishmen, and to trade in legislation. Such patriots very generally purchase their seats in order to make *cent. per cent.* of the cost; in fact they are parliamentary tradesmen, and legislative speculators. The *Spectator* lately showed how powerfully joint stock undertakings are represented in Parliament. Railways have 225 members as directors; financial assurance and banking companies have 195 members; miscellaneous associations have 185 members of Parliament as advocates; most truly, says Mr. Sergeant Pulling, more than one third of the whole House of Commons are thus personally interested in undertakings which now enjoy, or are seeking, exclusive privileges and special advantages at the hands of Parliament. By this system the wildest schemes have their staunch advocates in the people's House of Parliament. All the stupendous swindles and ruinous machinations which have entrapped and pauperized such vast numbers of confiding people have commonly had Members of Parliament for their projectors, directors, and patrons. Let any one examine the lists of directors which so continually fill the columns of newspapers, and he can see the reason why so large a number of the Commons' House of Parliament have been made Members of Parliament, and why so little is done in amending bad laws, making better ones, and so much effected in carrying measures touching local or personal interests. Her Most Gracious Majesty, in Her speech at the commencement of the session, calls attention to subjects requiring new laws or amended ones; but Her faithful Commons have schemes of their own, requiring

laws to carry them into operation. The legislative tradespeople must attend to the business for which they are sent to Parliament, and by the time this personal work is done there is only just enough remaining to immolate the results of Her Majesty's proposals with the general Slaughter of the Innocents at the end of the session. It is alleged that between six and seven hundred Bills of this description were brought in during the last session. Making, therefore, some allowance for holidays, if the senatorial speculators who thus inundated legislature with their schemes could have carried their intentions into effect, Parliament must have passed Bills at the rate of five or six a day throughout the session, leaving Money Bills and all other measures out of consideration. The consequence has been that scarcely any measure of a public nature has been made law. The Bankruptcy Law, the last modification of which was apparently made for the purpose of whitewashing knavish tradesmen and to waste any trifle that they may let remain for the sake of good manners, still remains an expensive nuisance. It is true that a Bankruptcy Bill was brought in, but it was crowded out by the thousand and one private measures.

The number of attempts at private legislation is not generally given; it would afford useful information if the names of their authors were published at the end of the session; it would make a kind of directory, and point out the whereabouts of the senatorial tradesmen. Queen Elizabeth refused to pass similar measures. Her Most Gracious Majesty Queen Victoria would confer a great benefit on the community, and effect a highly useful parliamentary reform, by adopting the same course.

But are the people of England satisfied with this state of things? Have they any doubts upon the topic? If they have, let them search for themselves, and form their own judgment on the matter. Our views may be incorrect, and our notions erroneous—let them examine for themselves; we intend to state facts—let them see that they are real ones, and act accordingly. Our statement cannot alter the nature of things; we bring to

their notice what we believe to be realities, but they must test them, and all we ask is that they will treat them as they find them. For instance, we are impressed with the belief that our representative system is even now wholly out of gear; that no part of our electoral institutions, as far as the *people's* Parliament is concerned, is at all in accordance with our constitutional theory, with common honesty, or common sense. We intend to point out the main defects of each part, and to make some remarks on the results of those defects upon the general interests of the country. We shall then proceed to sketch a plan which, in our opinion, will render the system more effective, and better adapted for its purposes, and if the reformers of England agree with our views, we trust they will vigorously and heartily set to work and have them carried into operation.

There is an aphorism which affirms that the knowledge of a disease is half its cure. Even in political matters, before an evil can be eradicated, its cause must be known. The source of a common nuisance must be ascertained before an effectual remedy can be safely applied. Now, as we have said above, it is commonly alleged that our representative system is altogether disordered. Notwithstanding the number of political mechanics that were employed about it, and the amount of skill and integrity which some of them were supposed to have brought to the labour only a few years ago, the whole fabric is said to be again deranged, and all its timbers shaky. Some censors assert that what was not very long ago paraded before the country as a great measure, labelled "the second *Magna Charta*," and having the imposing attribute of "finality" ascribed to it, has turned out like only the old worn-out system, tinkered up with more selfish cunning than honest skill. But however this may be, the dissatisfaction with it is so general, and the murmurings at the evils which it occasions are so loud, that after many royal promises, and pledges by our chief statesmen, which ended in nothing, a new firm of repairers of such machinery have recently attempted a readjustment, and to some extent have accomplished their object. The know-

BY ORDER OF COUNCIL.

ledge, the talents, the strong inducement to excel in this political line, and the indomitable courage of the undertakers, are undoubted, and, though new hands in the trade, they have succeeded. But really, to accomplish the end which they attempted, it is obvious that the reformers of England must lend their combined and zealous assistance. To perform this task completely is a herculean labour, which cannot be accomplished without their watchful and hearty co-operation.

What then are the permanent defects of our representative system up to this time? What are its principal evils? What parts are rotten to such a degree that they must be removed; and how may the remaining portions be so modified and strengthened, as to be put in a proper state of efficient action? To answer these queries satisfactorily, it is, perhaps, necessary to examine the groundwork upon which the representative system of boroughs as well as that of counties rests. Take the boroughs first. Lord Russell has told us that the framers of the Reform Bill commenced by disfranchising fifty boroughs, and partially disfranchising fifty more. In looking through the list of boroughs, it is not easy for a novice in such matters to perceive any reason why some of them were consigned to Schedule A, and others suffered to retain the power of sending members to Parliament. For example: Okehampton contained 318 houses in 1831, Petersfield 272; the first was put in Schedule A, the second in Schedule B. Milburn Port contained 383 houses, Reigate only 256; the latter was allowed to send a member to the House of Commons, the former was disfranchised. Again, the assessed taxes for Appleby were £476; for Westbury, £272; and for Malmsbury, £346; the first borough was disfranchised, the other two were allowed to send a member each.

But, notwithstanding these apparent anomalies, the list of boroughs was made out on a principle which consisted in allowing equal weight in the estimation of the relative importance of a borough, to the number of houses which it contained and the amount of assessed taxes which it paid. The

method adopted for carrying this principle into effect was thus explained by the late Lieutenant Drummond in a letter to Viscount Melbourne. (*Hansard*, 3rd series, Vol. IX.)

1st. "Take the average number of houses contained in the boroughs to be arranged; divide the number of houses in each borough by this average number, and a series of numbers will be obtained, denoting the relative importance of the different boroughs with respect to houses.

2nd. "Take the average amount of assessed taxes paid by the same boroughs, and proceed precisely in the same manner as described with respect to the houses; a series of numbers will result, showing the relative importance of the different boroughs with regard to the assessed taxes.

3rd. "Add together the numbers of these two lists which relate to the same boroughs, and a series of numbers will be produced, denoting the relative importance of the different boroughs with respect to houses and assessed taxes combined." *

Lieutenant Drummond was highly talented, and a most

* Lieut. Drummond's formula for the relative importance of boroughs was thus given in the Phil. Mag., p. 26, vol. 1, new series.

Put H for the whole number of houses in all the boroughs.

T the whole sum paid in assessed taxes.

B the numerical value of their united relative importance: also put h, t, b, for the same of any one of the boroughs. The relative importance of a borough may be expressed by the formula

$$b = B\left\{m' \frac{h}{H} + p' \frac{t}{T}\right\}$$

in which B may be any number whatever, and m' and n' are numbers which serve to adapt the formula to some hypothesis concerning the relation which house importance bears to tax importance. In Lieutenant Drummond's rule B was = 1000000, and m' and n' omitted as of no importance. His formula stands thus:

$$b = \tfrac{1}{2}\left\{\frac{h}{H} + \frac{t}{T}\right\}$$

Mr. Pollock proposed the formula $b = \sqrt{\frac{h}{H}\frac{t}{T}}$

Dr. M'Intyre insisted that the correct formula was $b = \frac{h}{H}\frac{t}{T}$.

It should be remembered that the effects of this mode of determining the rights of boroughs to return members are still in operation. The Reform Bill passed in the last session does not disfranchise any borough, however insignificant; it leaves the incongruity, but the anomalous evil remains.

valuable public officer; he was an accomplished mathematician, and most happy in the application of his varied knowledge to political affairs. The above rules are founded upon intricate formulæ, the result of an elaborate analysis.

No one can more highly appreciate mathematical knowledge than we do. There is scarcely any other knowledge that admits of such palpable certainty. We should consider ourselves guilty of a species of moral treason were we to speak one word in its disparagement; on the contrary, we would willingly and heartily encourage its application to every variety of topic that can reasonably be submitted to such treatment. Still it must be allowed that some limit must be put to its use. We admire the lamented Drummond's talent and skill in his investigations, which led him to form the above rules, but we must admit that in such matters, considered broadly and as they really exist, there is nothing so fallacious as facts except figures. It would be no easy task to maintain that the application of rules or formulæ to the depriving of bodies of men of the power of sending members to Parliament, or conferring it on them, was a kind of hairsplitting, which, however plausible and ingenious, must occasion palpable anomalies, and inflict apparent if not absolute injustice. In its practical results it made distinctions without differences. For example: the lowest number obtained by the above rules, to which was attached sufficient weight to retain the power of sending a member to the House of Commons, was 1,593, Petersfield, which was only nine above Amersham, that had 1,584, and was put in Schedule A. Now, viewing the subject fairly and constitutionally, and that the ingredients of taxes and houses, on which the rules are grounded, might vary according to circumstances, the conferring the power of returning a member upon one of these boroughs, and denying it to the other, is very like gross partiality to the one and gross injustice to the other. And, taking this view of the subject, the same remarks apply to the whole of the boroughs affected by the rules. Except the boroughs that have the power of returning independent

members, the whereabouts of which could hardly be found, there was not that difference between the boroughs disfranchised and the boroughs put in Schedule B, and many others, as to justify the power conferred on the latter.

A legendary problem states that a vessel having an equal number of Christians and Turks on board was overtaken by a terrific storm, and the captain informed the passengers that it was impossible to save the ship unless one half of them were thrown overboard. The story says the captain made an arrangement for making the fatal selection, which was apparently fair and equitable; but it was so contrived that eventually all the Christians were saved. The rules above given were an ingenious device, somewhat similar to the captain's, and well contrived to save the half-condemned boroughs. But the drowned Turks and the disfranchised boroughs have good cause to complain of the application of the respective stratagems. However, when the borough system was thus re-constructed, when the power of sending members to the House of Commons was determined with such mathematical exactness, of course that power was made to depend upon some fixed definite principle. Surely there was some common relation with regard to weight and importance, which pervades the whole series of boroughs, new, repaired, and old—a kind of political equity that makes it manifest, why, if borough B sends members to Parliament, borough C should not have the same privilege—in a word, that the power of electing our tax-imposers is fairly divided amongst the body of electors, and that a mere handful of voters have no longer unjustly and absurdly just the same amount of power as the most numerous and important constituencies—that the few hundred or the few scores of voters of a pocket-borough have no longer as much influence in the House of Commons as the northern division of Yorkshire, Manchester, or Liverpool, and frequently much more.

Are, then, the numbers and wealth of the different constituencies which now send an equal number of members the same? Are they in any manner equalized? Is there any common

ratio either of property or number of people, or both combined, that was through our representative system? At this time does each member in the House of Commons represent anything like the same number of people, or the same amount of taxable property, or both conjointly? Lastly, is the power to send members to Parliament equally distributed, and the small part of the people invested with the elective franchise, or is the whole system, at this moment, a congeries of inequalities and anomalies? It is deemed necessary that reformers should consider these inquiries, and form an opinion upon them, and, for this reason, some palpable irregularities in several parts of the system will now be discussed.*

Dodd, the well known author of "The Peerage, Baronetage," &c., has during many years published a very useful manual, called the "Parliamentary Companion." It gives a brief biographical sketch of each member of the peerage, and of each member of the House of Commons; it also sets out in alphabetical order the counties, cities, boroughs, universities, and Cinque Ports that return members to Parliament, with a statement of the numbers polled at the last contested election, the population of each place, the number of registered electors, ten-pound houses, &c., according to the latest returns. If any borough be under special influence, this official *vade-mecum* of Parliamentary information duly names the patron. The publication comprises a very considerable quantity of useful and interesting matter under the above heads, and as the book is thoroughly impartial, its facts may generally be relied upon.

Mr. Mackey, barrister, of the Middle Temple, some years ago published a pamphlet, entitled "Electoral Districts." The pamphlet is referred to because it deserves a careful perusal by every Englishman who takes an interest in the Parliamentary representation of his country. He clearly points out the anomalies and absurdities of the system, which, although they require some modification to adapt them for the present state of

* Such discussion is still expedient, because in the new Bill all the palpable anomalies remain—the evil is only halved.

things, remain in all their astonishing vastness. The following are samples of the irregularities which pervade the system. The following twenty boroughs, namely:—

Andover	Evesham	Lymington
Ashburton	Harwich	Lyme Regis
Bodmin	Honiton	Malden
Bury-St.-Edmunds	Huntingdon	Marlborough
Chippenham	Knaresborough	Richmond
Devizes	Leominster	Thetford
Dorchester	Ludlow	

have a population of about 120,000, and have thirty-eight representatives in the Commons' House of Parliament. The following twenty cities and boroughs, viz:—

London	Sheffield	Edinburgh
Liverpool	Southwark	Dublin
Leeds	Tower Hamlets	Cork
Lambeth	Westminster	Belfast
Manchester	Birmingham	Wolverhampton
Marylebone	Bristol	Greenwich
Finsbury	Glasgow	

have an aggregate population of 5,267,000, and also return forty members. The above twenty boroughs have one member for about every 3,000 persons. The last named twenty cities and towns have one member for about every 130,000 persons; thus one group balances the other in the House of Commons, though the population of the latter is forty-three times that of the former. The Parliamentary districts of the Metropolis contain a population of about 2,300,000, and send sixteen members to Parliament. The eight boroughs, Evesham, Harwich, Honiton, Leominster, Lymington, Marlborough, Richmond, and Thetford, with a population of about 38,000, also, up to this time, send sixteen members to Parliament. If the Metropolis were represented equally with this group of boroughs, it would have nearly 1,000 members, and were the above named boroughs represented on the same scale

as the Metropolis, instead of sending sixteen members, they would have only about one fourth of a member amongst the lot.

A few years ago each borough member in England, on an average, represented 17,000 persons, and 1,045 electors; at present these numbers are larger. The following English boroughs have the power to send members to Parliament, though the population of each is less than 6,000:—

Boroughs.	Population.	Registered Electors.	Members.
Andover . .	5,430	244	2
Arundel . .	2,498	185	1
Ashburton . .	3,062	279	1
Dartmouth . .	4,444	254	1
Evesham . .	4,680	337	2
Harwich . .	5,070	355	2
Honiton . .	3,301	280	2
Leominster . .	5,658	363	2
Liskeard . .	6,585	437	1
Lyme Regis . .	3,215	243	1
Lymington . .	5,179	322	2
Marlborough .	4,893	271	2
Northallerton .	4,755	326	1
Richmond . .	5,134	318	2
Thetford . .	4,208	219	2

Now admitting, for the sake of argument, that either of these boroughs ought to have the power to send a member to Parliament, can any reason be assigned why some of them are allowed to send two members and others only one? Thus, Ashburton has 279 electors and sends only one member; Honiton has 280 electors and sends two; Liskeard has 437 electors and sends one member. These are statistical facts, can they be justified? The inequalities of our representative system will perhaps appear in a still stronger light to any one who will accustom himself for a time to compare great things with small ones. Thus, Liverpool has 9,504 registered electors to

each member; Honiton has 140; the Tower Hamlets have 11,685; Andover has 122; Mary-le-bone has 10,804; Marlborough 135; again, at Manchester each member represents 178,989 persons; at Thetford, each member represents 2,104; the Tower Hamlets have 323,922 persons for each member; Evesham has a member for 340 persons.

These are only a sample of the anomalies of our representative system; but if every kind of disproportion had been compressed into one large disparity, and had that disparity been adopted as the guiding rule in apportioning the power to send members to Parliament, the above specimen might be some practical illustration of its successful application. From beginning to end of the entire system the same anomalies occur. A chaos of absurdities forms its order. Another mode of exhibiting the gross incongruities of the system is, by balancing the power of one place with that of another, as it exists in the present House of Commons. Thus, Tavistock and Honiton, with a population of 12,168 and 711 electors, have as much weight in the House of Commons as the North and South of Devon, together with a population of 584,363 and 18,338 electors. In the same manner Maldon balances Manchester, and Marlborough, in the parliamentary scales, weighs as much as Mary-le-bone; Harwich is a set-off for the Tower Hamlets, and Ludlow, in the House of Commons' scales, weighs as much as Liverpool.

But it may be supposed that this inequality is attributable to the superabundance of wealth which the lesser boroughs contain, and that wealth and intelligence have formed the basis of the scale. Nothing of the kind. Take the metropolitan districts as compared with the group of eight boroughs already named; on the one side there are three millions of people and more property than is accumulated on any other spot of the globe of equal dimensions; on the other about 37,000 people with only comparatively petty interests at stake, and the whole, as far as the franchise is concerned, is nearly under local influence.

The preponderance of wealth in the large boroughs is more striking than that of the population. The group of large boroughs and cities given above comprises a large proportion of the entire wealth of the kingdom, whereas the small boroughs are, by comparison, insignificant in point of wealth. For example, the vote of Liverpool is counterbalanced by that of Honiton, each returning two members; whereas the present rateable value of Liverpool is £2,402,584, that of Honiton £9,965. The property of the latter is one two-hundred-and-fortieth of that of the former; yet, in all votes affecting taxation and other matters of public policy, the property of Honiton is an equipoise for that of Liverpool. This is only one example; but the same enormous disproportion exists between the rateable property of all the large constituencies and that of the small ones. Reformers should satisfy themselves by testing the facts that have been mentioned, by balancing the property and population of the large places with the like statistics of the small boroughs which have the same parliamentary influence, and form their own opinion as to whether these incomprehensible inequalities do not form a political monstrosity which disfigures and disgraces the British constitution.

It must not be forgotten that when the new state of things comes into operation, £9,965 at Honiton will balance £1,201,292 at Liverpool.

Notwithstanding the absurd and pernicious discrepancies which exist between small boroughs and large ones—some of which have been pointed out above, it may be fancied by the uninitiated in electoral matters that boroughs great and small are now unfettered; that, at all events, the Reform Bill shared off the very rotten and the mere pocket boroughs. The Reform Bill certainly effected a little partial good by putting a number of small boroughs in Schedule A. Had that measure been really efficient in this respect, it would have left none of them out; but did that memorable enactment extinguish all the pocket boroughs? Let us again turn to Dodd's Parliamentary *Vade-mecum*, and search and see; as the result we give the following specimens:—

1. ARUNDEL.—The Duke of Norfolk has considerable influence in this borough. At the last general election the Duke's second son, the Right Hon. Lord Edward George Fitzallan Howard, was returned by his noble father's 185 electors.

2. ASHBURTON.—Lord Clinton has the only influence prevailing here. This is a mistake. Sir J. Mathison, or his representative, has it.

3. BELFAST.—The Marquis of Donegal has considerable influence in this borough. The Marquis sends Sir Hugh Cairns and Samuel Gibson Gatty to take care of it.

4. BRIDGNORTH.—In some degree under the influence of the Whitmore family.

5. BURY ST. EDMUND'S.—The Duke of Grafton and the Marquis of Bristol have considerable influence in this borough.

6. CALNE.—The Marquis of Lansdowne has influence in this borough; the Right Hon. Robert Lowe is at present the Marquis's representative.

7. CARDIFF DISTRICT.—The noble family of Bute have influence here, and Mr. James Frederic Dudley Crichton Stuart is its member.

8. CARDIGAN.—Mr. W. E. Powell and the family of Pryse of Goggerddan have the prevailing interest, and Mr. Edward Lewis Pryse very naturally represents it.

9. CHATHAM.—The Dockyards and other Government establishments of this port give the government of the day considerable influence over the elections.

10. CHIPPENHAM.—Sir John Neild has considerable influence in Chippenham, and returns himself to Parliament as the most proper person to represent it.

11. CHESTER.—The Grosvenor family have great influence in this city. Earl Grosvenor returns himself to manage it, taking Mr. W. H. Gladstone with him, to assist him in the task.

12. CIRENCESTER.—The Bathurst family has influence here. Mr. Bathurst, one of the family, is sent to Parliament, and the Hon. Ralph Heneage Dutton is returned as his companion.

13. DEVONPORT.—The public establishments at this port give the Government considerable influence in the elections; but lately bribery has prevailed over Government influence.

14. DOVER.—The Warden of the Cinque Ports has considerable influence.

15. DUDLEY.—The prevailing influence in the borough is that of Lord Ward.

16. DUNGANNON.—The Duke of Devonshire possesses considerable influence here.

17. ENNISKILLEN.—The Earl of Enniskillen has paramount influence in this town. The Earl entrusts his interest to the care of his relative, the Honourable Henry Arthur Cole.

18. EYE.—Sir E. Kerrison's influence in this borough is considerable. The honourable baronet represents his own interest.

19. HELSTON.—The Duke of Leeds has considerable interest in this borough; Mr. J. J. Rogers has nearly as much.

20. HORSHAM.—The Duke of Norfolk's interest is considerable, but by no means predominant.

21. HUNTINGDON.—The interest of the Earl of Sandwich predominates in this borough.

22. LAUNCESTON.—The Duke of Northumberland's interest here is very considerable. Wirrington, which gave the influence to the Duke, has recently been sold, and consequently the Duke's interest in the borough was included in the bargain.

23. LICHFIELD.—The interest of the Earl of Lichfield here is considerable; the Earl sends his relative, the Honourable Augustus Anson, to represent it.

24. LUDLOW.—The interest of the Earl of Powis is considerable here, and his relative, the Honourable G. H. W. W. Clive, is sent to Parliament to take care of it.

25. MALMESBURY.—Lords Suffolk and Radnor divide the influence. Lord Suffolk's eldest son, Viscount Andover, is deputed to represent the whole influence.

26. MALTON.—The Earl Fitzwilliam has considerable influence here, and he sends his relative, the Honourable C. W. W. Fitzwilliam, to represent it.

27. MARLBOROUGH.—The Marquis of Aylesbury has some influence here, and he sends his relative, Lord Ernest Bruce, and connection, Mr. Henry Bingham Baring, to take care of it.

28. GREAT MARLOW.—Mr. Williams's influence here is very considerable. He goes to Parliament to represent himself.

29. MIDHURST.—The Earl of Egmont possesses influence here.

30. MORPETH.—The Earl of Carlyle has considerable influence in this borough.

31. NEWARK.—The Duke of Newcastle has much influence here, and he sends his relative, Lord Arthur Pelham Clinton, to take care of it.

32. NEWCASTLE-UNDER-LYNE.—The Duke of Sutherland has considerable influence here.

33. NORTHALLERTON.—The Earl of Harwood has some influence in this borough.

34. PEMBROKE.—The Owen family have great interest here. Sir Hugh Owen Owen goes to Parliament himself.

35. PENRYN.—The Government of the day has considerable influence in Falmouth and Penryn.

36. PETERBOROUGH.—This is usually considered the borough of Lord Fitzwilliam.

37. POOLE.—The family of Guest possesses influence here, which was purchased with lands in the neighbourhood.

38. RADNOR.—Mr. Price has considerable influence in this borough, and he goes to Parliament to represent it.

39. REIGATE.—Earl Somers has influence in this borough, but not so much as bribery.

40. RICHMOND (York).—The Earl of Zetland has considerable influence here, from property and residence in the neighbourhood.

41. RIPON.—Earl de Grey has the patronage of Ripon.

42. RYE.—The influence of the Lamb family is still great, but it is now shared by that of Smith, of Springfield Lodge.

43. SANDWICH.—The Lord Warden of the Cinque Ports and the Government of the day divide the influence here.

44. SHAFTESBURY.—The Marquis of Westminster has some influence here.

45. STAMFORD.—The Marquis of Exeter possesses most of the £10 houses in the borough; his nominee, Viscount Cranbourne, represents them in the House of Commons.

TAMWORTH.—The property possessed by Sir Robert Peel in borough and neighbourhood gives him considerable influence. members for the borough are Peels.

TAVISTOCK.—The Duke of Bedford has considerable influence

in Tavistock. A. J. E. Russell, who represents it, is a relative. To the credit of Tavistock, however, it ought to be mentioned that at the last election, when there were four candidates, the whole amount of election expenses sent in to one of the candidates was £14; he objected to £5 of that sum, and the whole amount paid for a severely contested election by that candidate was only £9.

48. THETFORD.—The Duke of Grafton and Lord Ashburton have considerable influence in this borough. The eldest son of the one and a friend of the other are sent to Parliament to take charge of it in the people's Parliament.

49. WAREHAM.—Mr. Calcraft has some influence in this borough, which he represents himself.

50. WARWICK.—The Earl of Warwick has considerable influence in this place.

51. WHITEHAVEN.—The Earl of Lonsdale has great interest here, and he deputes his relative, Mr. Bentinck, to take care of it.

52. WILTON.—The Earl of Wilton has considerable influence in this borough.

53. WOODSTOCK.—The Duke of Marlborough has great influence in this borough.

This list, though of some length, is only the published account of boroughs under the influence of certain lords, ladies, and gentlemen—a mere sample. If the policy of small boroughs and in numerous instances of large ones as well, be scrutinized it will be found that nearly the whole of them are governed by their rulers' pockets; or that they are ready and watchful for rulers who have pockets sufficiently capacious to contain the price of their independence. The Reform measure of 1867 leaves this pocket-borough influence untouched, or only modified. Its authors have not yet completed their undertaking—very likely they will perceive that they must set to work again.

From what has been said it can hardly be disputed that the basis devised by the Reform Bill of 1832, upon which the privilege of sending members to Parliament was attached to or taken from boroughs, was unjust in principle, inasmuch as

it disfranchised a number of boroughs scarcely distinguishable in population and importance from a large number of other boroughs that were allowed to retain the power of sending representatives to the Commons' House of Parliament. The Reform Bill in this respect was doubly pernicious and constitutionally bad, because it perpetrated a legal distinction between two groups of boroughs equally corrupt and to the same degree nationally mischievous; for by retaining the small boroughs it countenanced and adopted the very worst lineaments of the old rotten system. The roots of the political cancer are not eradicated; it has since grown vigorously and become as virulent as ever. If the reader have any doubts upon this point let him turn to the disgraceful evidence recently adduced at Yarmouth, Reigate, Totnes, &c. In dealing with the small boroughs at the epoch referred to, the grand error was, not in putting some insignificant boroughs into Schedule A, but in not disfranchising the whole lot of purchaseable and pocket boroughs; a political *desideratum* that remains to be effected.

An endeavour has been made to expose the absurd inequalities which exist between boroughs having the same weight in the House of Commons, and to make the fact prominent that the most populous and opulent cities and boroughs are counterbalanced by insignificant places having neither population nor property to justify their legislative power; but there is another point that deserves consideration; parliamentary influence as applied to persons in the large and wealthy constituencies, is almost infinitesimal, whereas in the small boroughs it is condensed to a point and used by some ruling attorney or governing leader altogether for his self interest, but generally injuriously to the welfare of the community, the commander of a corrupt borough and all his dependents fatten on the public detriment and grow great on the people's wrongs.

The fact is, the dominant managers of a small borough have absorbing interest with the member returned, and are frequently thus brought to the favouring notice of the Govern-

ment. One instance may be given as sample. At a small and insignificant borough a leading attorney was one of the borough rulers; he had a clever and active clerk; that clerk was made a registrar in a court of bankruptcy—thus, by detestable borough influence, he was put in a legal post of a thousand a year, to the exclusion of men who were duly qualified by professional training for the proper discharge of such duties. The borough ruler, however, did not promote his factotum so as to pass over his nearer relatives: one son, after filling other well-paid offices, was made a Tithe and Inclosure Commissioner, with a salary of fifteen hundred a year; and another son was made the Treasurer of County Courts, with a stipend of about one thousand a year, so that one magnate of a paltry borough obtained posts worth between three and four thousand a year. It may safely be asserted that neither of the lucky recipients would have had the least chance to get anything of the kind had they resided at a distance from the little pocket borough. As long as such boroughs are allowed to send members to Parliament, so long will it be impossible to put the right men in the right place; the rulers of such boroughs have peculiar influence for getting posts, and consequently the power of putting square plugs into round holes. In England, George III. said that any man who can get a post is always fit for it, hence the all qualifying nature of rotten borough influence; we have yearly experience to prove that it is a due preparation for any Government post whatever.

A few small boroughs have been selected, which are alleged to be under influence of certain lords, ladies, and gentlemen—the official phrase genteelly employed to denote "pocket boroughs." We hear occasionally of "packed Parliament;" what does the term mean? It seems to imply that the House of Commons to a considerable degree is composed of members who are deputed by lords, ladies, and gentlemen to take their seats, instead of being freely elected by independent constituencies, according to the old fashioned but perhaps erroneous theory of the English constitution. Still, is the people's House of

Parliament, at present, a packed Parliament, or not? Or is it partly packed and partly unpacked; and if so, to what extent does the packed part counteract the free? Who are the members whom the people freely send as their representatives? It will hardly be maintained that electors have much discretion in the matter, when their nominal member goes to Parliament to represent his own interest; or yet when some lord, lady, or gentleman deputes a son, or relative, or nominee to represent his, her, or their interest. Nor will it be affirmed that a member is one of free choice, when the strength of his purse compels the thoroughly independent electors to send him as their honourable member; such as at Yarmouth, Reigate, Totnes, &c.

Is it likely that either of the descriptions of legislators which have been indicated will prefer the public interest to their own? The packed members, if there are such, are engaged in parliamentary trade, and, like other judicious and sharpsighted dealers, profit is their aim—they represent purse interest, and they are not oblivious of the main chance; their guiding rule is—"make hay whilst the sun shines." Notwithstanding the glaring anomalies of the system which enables so large a number of the House of Commons to be elected by boroughs so utterly insignificant in wealth and population when compared with other towns which have no such power, the system is defended on the grounds that small boroughs are necessary as the avenues for the representation of special interests. That is, they enable certain men to enter the House of Commons who would be wholly shut out were it not for these convenient avenues. But the people's House of Parliament ought to be constituted so as to preserve the people's rights, and not for the mere convenience of men who desire to become legislators; it was not originally designed for such a purpose, nor can it be maintained that ambitious men who find their way into the House of Commons through the dirty ways of small and insignificant boroughs are more patriotic and independent than others who are freely chosen by the people. Mr. Hare, in his suggestive and learned treatise "on the Election of Represen-

tatives," puts this fallacious allegation in its proper light. He adduces the following twelve boroughs, namely, Arundel, Honiton, Ashburton, Lyme Regis, Thetford, Totnes, Harwich, Dartmouth, Evesham, Wilts, Reigate, and Richmond as fair examples of boroughs which afford avenues to the House, through which ambitious men enter; and he asks—

"What classes do the electors of these boroughs represent? Of what opinions are they the exponents—what interest do they protect? What have these unfortunate voters done that they should be put forward in so prominent a place as the few men whose judgment in the choice of legislators may be more safely trusted than that of the great body of their countrymen? It is a position which is almost certain to expose their wisdom to doubt and their virtues to danger."

It is difficult to see in what respect any particular class interest in the nation would suffer if the twelve boroughs above named ceased as such to exist. It would be a curious speculation to take the political history of any of the small boroughs, and, following the votes of its representatives for the last half century, to ascertain what distinctive opinions or feelings the action of its electors has been the means of imparting to the legislature.

"If," says Mr. Hare, "it be the object of any party to preserve the small boroughs, either with or without the ballot, for the purpose of securing what they may deem the advantage of reserving some seats which shall be accessible to pecuniary influences, a more honest and a not less effectual course would be at once to propose that a certain number of seats should be put up to auction, and that the State should have the benefit of the purchase money."

Perhaps enough has been said on the anomalies of the borough system as it at present exists to draw public attention to the matter. What then are the results of that system on our national affairs. What are the most prominent evils arising from the rotten and purchasable borough scheme?

What has been, and what are, its effects on British interests? To answer these questions satisfactorily it will be necessary shortly to revert to past events, to discuss some of the results of the rotten borough system, when in its more vigorous operation, as well as its consequences in more modern times.

During the long reign of King George the Third about *seven hundred million pounds* were added to the national debt. Historians tell us that thousands of years ago kings of Egypt erected the pyramids as temples and mausoleums; but be the object for erecting them what it might, they still remain in all their sombre hugeness, setting time at defiance; their vastness marks the ravages of ages, and they would appear to be as everlasting as their parent rocks, unless some overwhelming natural convulsion should shake their foundations. Our George the Third, by the aid of his ministers, erected a monument as vast and likely to be equally enduring—the golden pyramid of the National Debt. The pyramids of Cheops, Memphis, and Ghisa stand as eternal emblems of kingly folly and royal extravagance. The people's energies were wasted, and the wealth of the country thrown away upon these vast and useless rows of stones. What future generations thousands of years hence may think and say of the English pyramid it is impossible to predict. The epoch of its erection is now considered by the genuine admirers of the rotten borough system as the golden age. Every thoroughbred tax-eater dwells on the glorious period in raptures. It was the memorable era when rotten boroughs, unlimited taxation, and wholesale hanging were in full operation. It was the splendid age when pocket boroughs produced their patriots numerous and hungry, and rotten boroughs yielded their crops of statesmen vastly wise, and wisely grasping. Heroes, statesmen, and stupendous debt—these borough flowers and borough fruits were very fine and very abundant—they were hothouse productions which generally reach the highest perfection when the putrescent carcase or the rotting mass that supports them is of suitable magnitude and sufficiently putrid. How many

ages our astounding pyramid of debt may stand no one can pretend to say. Some enthusiastic patriots may hope that, at some time, one of the venerable Tors on old Dartmoor may turn out to be all gold, and that it will be appropriated to the payment of the debt; but unless some English *dorado* of that kind should fortunately be discovered, our only mode of dealing honestly with our mountain of debt so as gradually to diminish it, and thus prevent its crushing itself to atoms by its own weight, is by a careful management of our income, and a substantial retrenchment in our expenditure; in a word, by a thorough financial reform throughout our establishments, civil, military, and naval, domestic and foreign. Not by a shabby curtailment of pay from men who in reality do the public work, and who are often insufficiently paid for their labour, but by abolishing all offices that are useless, and by paying men who do little or nothing, exactly as much as they deserve, and no more. There are financial matters which the pruning hook of reform would much improve. Many sound-thinking men are of opinion that the circumstances of the country imperatively require that its application should not be delayed. England has, in an eminent degree, the two things that confer consequence—great possessions and great debts. The one makes her influential, the other ought to make her carefully judicious. But then elements of national greatness require especial caution in managing to prevent them from becoming destructive by their immensity. A careful and complete financial reform would appear to be the only certain preservation against such a catastrophe, but before it is possible to effect such reform, the rotten and pocket system must be abolished, and the House of Commons be filled with representatives independently chosen by the great bulk of free Englishmen.

But in dealing with our Alpine mountain of national debt, with all its difficulties and dangers, reformers may, and we think they should, bear in mind, that seven hundred millions of that debt was recklessly contracted by taking about sixty pounds down for a promise to pay a hundred pounds—this

was the swindling mode of burthening the people with debt when petty boroughs were numerous and dominant; very probably the pyramid would not have been erected in all its hugeness had not the small and rotten boroughs been in unrestrained operation. Human butchery on a gigantic scale was the staple trade of that system, and the gallows was its schoolmaster. If any want a summary of the rotten-borough policy, *circumspice*, look at your stupendous pyramid of national debt, which confounds by its vastness. Turn to the annals of past events and count, if possible, the tens of thousands of our countrymen who have been slaughtered at the royal game of cut-throats. Take a retrospective view of our national transactions at home, and see the thousands of our countrymen who have been strangled; numbers for forgery who could neither read nor write, and hundreds of other victims for the most frivolous offences. Had the people been justly represented, these wanton wholesale squanderings of money would not have been permitted, and these Draconian laws, sanguinary and savage, would never have befouled the statute book, nor stained the character of the country. Fortunately, most of these bad laws have been abrogated and, equally to our credit, some of the rotten boroughs have been deprived of the power to do mischief; but it has been shown that there is still a large number that remain in all their abomination; more work for the skilful and courageous Chancellor of the Exchequer is here indicated.

When pocket boroughs were in the zenith of their glory, the great art of government consisted principally in finding and making official posts for lords and lordlings, and its chief science consisted in filling these posts with the most influential members of the ruling class. "An upright minister" says a writer, "asks *what* recommends a man, a corrupt minister, *who?*" In the age referred to the minister's question was invariably, *who* recommends? The possession of a rotten borough was a near approach, and almost a certain inlet, to place and power. The way to a peerage was through this

description of bog; at any rate, nothing was so likely to obtain for its owner a sprig of nobility, and hence the lucky one became at once qualified for any official duties whatever; we have already quoted one of George the Third's philosophic maxims, that any man is fit for any post that he can get, and there can be no doubt upon the point, brains or no brains, lords with a rotten borough or two under their control were always considered the fittest persons to fill any official posts to which large pay is attached, and a number of underlings to perform all the duties. Those who examine for themselves will find throughout the chapter that no talent, however splendid, or ability however great, stood the least chance in competing with even the fifth cousin of a lord who had a borough or two under his control; this was in the rotten borough age, but, to a very great extent, the same baneful influence and the same exclusive system is still in unimpaired operation.

We have discussed at some length the origin of our pyramid of debt, and we may now observe that it has been propounded by men in high station, that we of the present generation ought to diminish that mountainous burthen, and not permit it to go down to posterity in all its vastness; this doctrine seems very patriotic; to apply any surplus of income over expenditure to diminishing the national debt instead of lessening taxation, does not look much amiss in print; but it demands some consideration before it is carried into effect; in the first place, the present generation of Englishmen had no voice in creating the debt; it has been handed down to us by men who cannot be called upon to pay it; we are their posterity, and they omitted to do for us what we are told we ought to do for our successors; besides this, the taxes which a surplus enables us to remove, are commonly taken from the food of the masses who have nothing whatever to do with imposing taxes, notwithstanding the immense sums which they pay, and therefore, it would be doubly unjust not to continue the benefit to them that accrued from taking off taxes. We cannot undertake to benefit posterity in this way; the mode of fairly

effecting that object is by curtailing our expenditure in all the departments of the State, from the top to the bottom; much might be done in this manner—as soon as we can get a House of Commons which fairly represents free Englishmen—but, in the meantime, we must not allow our heavy expenditure to be continued for the sole benefit of the tax-eating classes, and at the same time tax the unrepresented part of the community for the profit of posterity.

Some remarks have been made on the absurdity of permitting boroughs with small population and inconsiderable property to send members to Parliament—we fancy the inconsistency must be palpable—but to give them an equal right with the most populous and opulent cities and boroughs is a part that reflects disparagingly on the national judgment. It is worth repeating, that there is great mischief attending the incongruity of making small boroughs and large ones equal as to their power in Parliament. The influence in a small borough is always condensed, and generally rests in some ruling agent or governing attorney. Moreover, insignificant boroughs are very commonly represented by place-men, so that the dominant manager of the borough has a direct communication with the rulers of the State, and his wishes therefore must be and are attended to. Hence, his tribe, whatever be their qualifications if they have any, are always upon George the Third's standing maxim adapted for the public, and no other candidate can successfully compete with them. We have already given a noted specimen in proof of this, and we advert to the subject for the purpose of adding, that the consequence is that the public, instead of having the most efficient servants to do its work, has frequently a set of bunglers whose only qualification for the performance of their duty is rotten borough influence. Two common evils are in this way perpetrated; the public is indifferently served, and influential mediocrity or incapacity is openly preferred to talent and fitness; the public apparently thrusts aside men of ability and integrity, and appears to prefer the unqualified or the unfit for its services. We have

adduced one glaring instance of borough influence in this respect. If other illustrations are necessary almost every small borough will supply it; we shall find men connected with its ruling chiefs in high and responsible posts, which neither their acquirements nor their natural abilities would have obtained for them. Rotten borough influence has lifted them over the heads of their superiors in every respect, and forced them into a position which nature never intended for them, and which does not legitimately belong to them; if they are not too dull to be surprised at anything, they must wonder how they came there; they are exponents of the system so graphically described in the evidence given at Reigate, Totnes, &c. These are only some evils of the small borough system. Reformers should examine it more completely for themselves, so as to form a sound judgment as to whether it has not been the nursing mother of past and present extravagance—the main cause of our enormous encumbrances; the grand bulwark of misrule; the rampart that has guarded and still maintains every corrupt practice on a comprehensive scale; in fact, the chief impediment which even now stands in the way of all useful reforms, whether local or general, legal or financial.

Let reformers form their opinion as to whether the very nature of the scheme be not directly antagonistic to popular rights and national equity. Should a candid review of the past and present lead them to the conclusion that our representative system, as it is and as it is proposed to be, is unsuited to the requirements of the age in which we live, as well as unfair and unjust in its principal bearings—that as a preliminary step to any general improvements in our social and political orders it must be modified, as to annul its absurd irregularities, and to make it work more equitably—let them speak out and make that conclusion known. At all events let them not halt between two opinions; if they prefer extravagance and are enamoured of heavy taxation—if in their minds reforms, financial as well as others, are unnecessary—why then

let them be silent; in that case they can feel no interest in any measure, however complete and well devised, and they will therefore part with indifference, or enter the cave of Adullam once with their *confrères*, and denounce it as revolutionary and fraught with spoliation. But if, on the other hand, they desire the exercise of sound economy in national and local matters, and that all classes of Englishmen shall possess and freely exercise equal political rights, let them not delay in making their wishes known. Let them make known to political leaders the sort of reform which the people of England *want* and *will have:* press upon them how important it is at this strange juncture, when mighty dynasties depend as it were upon the hazard of the die, that the truly loyal people of this country should generously, and on the part of the Government spontaneously, be made to feel that they have social liberties and political rights in this their fatherland which are peculiarly deserving their care, and richly worth their defending should they be attacked, and not leave them under their present irritating impression that they are heavily taxed without representation, and that the proceeds of their skill and ceaseless industry are recklessly squandered and uselessly wasted.

We have now discussed some of the evils of the rotten borough system. There are, however, other matters of paramount importance, in which the House of Commons appears to have abdicated its functions as the custodian of the national purse and the dispenser of the people's money. The enormous increase of the public debt during the reign of George the Third was animadverted upon in a preceding page; that crushing load of debt was incurred by a reckless war. It is admitted, that to make peace or war is a breach of the prerogative, but it is an undisputed fact that neither the one nor the other is ever proclaimed by the Sovereign alone, but always by the consent and with the advice of the Crown's advisers—the Cabinet of the day. Now in these matters, which are frequently stupendous in their consequences, if Parliament happens to be sitting whilst the quarrel is engendering, if any

inquiries are made by the House of Commons, they are answered by an alleged inconvenience which would attend any discussion of the subject which is under the consideration of the different governments, and no information is obtained; the subject by this subterfuge is blinked. If any inquiries are made after the rupture has commenced, they are answered by denying the utility of any disquisition on the matter, as the quarrel had commenced, and consequently all the House has to do is to find the means for prosecuting the war with that vigour which may end in success; that is, the inquiry on any head is always too soon or too late, and in this way the House of Commons, the ultimate paymasters of the result of the entanglement, is kept in profound ignorance of all its bearing, until they are called upon for millions of pounds in taxes to pay the expenses incurred. If the members of the House of Commons were what they pretend to be—the elected guardians of the people's money—they would not submit to be hoodwinked and treated in this supercilious manner. In former times they acted differently, and, it must be added, more consistently and honestly. We learn from Sir E. Creasy's Treatise on the English Constitution, that in ancient times no war was commenced without calling on Parliament, making it fully acquainted with all the circumstances of the case, and obtaining the Commons' consent to find the necessary supplies, should they consider war necessary or inevitable. The House of Commons in those days acted up to their duty. Rotten and pocket boroughs had not then filled the house with parliamentary traders, ever ready to take advantage of large expenditure, in order that they or their dependents may gain an honest penny in their legislative trade. A thorough parliamentary reform will restore the people's Parliament to its pristine watchfulness and utility in these and other matters. When that important object is effected, if large expenditures of public money are incurred without their knowledge and consent, the spenders will be taught "that you have acted without our knowledge or concurrence; now go for your money to

quarters which supplied you with advice; the people shall no longer be fleeced for the sole benefit of the tax-eating tribes." But it is ridiculous to hope for any supervision, so long as the House of Commons is so largely filled with mere nominees and wholesale bribers.

Although we have not quite recently drifted into a ruinous war, we have almost always a little one or two in hand in some distant part of the world; all that the English tax-paying public knows of the beginning of it or reason for it, is an emergency vote for a large sum to defray the expenses. There is another point closely connected with the subject which requires some notice: we mean the immense sum spent annually on our army and navy. Next to the interest for the national debt this is the absorbing topic of expenditure; whether it be peace or war, the prodigious sums required every year are not diminished. There is quite a troop of naval and military officers in the present House of Commons. Whether that singular fact explains another fact—the immense sums required every year on this head—is not clear; but one thing is manifest, that these bands of unattached officers become larger and larger, and the expenditure proportionably increases. The gallant legislators mind their professional order; they never cry, "Hold! enough!" on the contrary, their usual cry is of the horseleech kind—"*Give, give;*" there is always something wanting. There is no man who has the heart of an Englishman within him who would desire to see his country not in a state to defend itself from attacks of any kind or from any quarter, but it is vexatious to find that, notwithstanding the yearly cost of our naval and military establishments, whenever we want a supply from either, there is nothing ready. We build ships to rot, or to be doubly remodelled before they can be rendered fit for service. We spend immense sums at Aldershot and other places, in order that expensive triflers may play at soldiers, but they are totally unfit for men to live in them. All that the House of Commons does in these scandalous matters is to vote the money to waste on them, and

never afterwards to ascertain whether it has been expended about them or not. A House of Commons, properly elected, would not so tamely permit all these enormities to be perpetrated; but egregious expenditure best suits the legislative tradesmen, who buy their seats at a heavy cost, for the purpose of getting *cent. per cent.* by the outlay. The consequence is, the national purse is without a bottom. However prodigious the number of millions that are cast into that receptacle it is always empty, and the tax-payers never know what becomes of the immense sums which are extracted from them. There is no cure for this common evil so long as rotten and purchasable boroughs exist. A House of Commons independently elected by the free people of England can alone obliterate this national disgrace.

The large number of naval and military officers which the House of Commons contains suggests the inquiry, Are they efficient officers which the country has *paid* for training? If they are, why are they not professionally engaged? Are they veterans who have worn themselves out in the service, and turn legislators to pass away old age? We are not aware that there is any peculiarity in the naval or military service which especially fits officers in either for legislators. There would be something systematically wrong in the management of these professions which furnish so large a number of their officers to become members of the House of Commons, and to fill commissions, &c., of all kinds. It appears from the evidence given at one of the corrupt boroughs' inquiry, that a candidate from one of these professions spent a large sum in bribery, to enable him to bring before the public some vexatious treatment which he considered that he had received: the money that he spent on bribery and his motive for doing it are not very distinct proofs of his qualifications to represent the people of England in their House of Parliament.

Englishmen boast of their *Magna Charta*, and designate it as the palladium of their civil liberties—however, some of its principal clauses have been rendered practically null and void: we

is put into the hands of men totally ignorant of law to carry it into operation. It may be said, All this may be very true, but what has it do with Parliamentary reform? We think, a great deal. The House of Commons, if it represented the people of England, would not permit the absurd and disgraceful system to remain—much less permit it to become every year more absorbing and iniquitous. There is no chance of eradicating the abomination as long as the House is so largely filled with legislators who buy their seats, by way of getting a large per centage, or a handle to their names.

One of the prerogatives of the Crown is to give currency to coin. "Money," says Blackstone, "is the medium of commerce; it is the king's prerogative as the arbiter of domestic commerce to give it authority or to make it current. The coining of money is in all States the act of the sovereign power." It might reasonably be supposed from this text, and many similar ones which are to be found in our law books, that the Queen is at the head of the monetary affairs of the nation, and that her servants, the Ministry, are responsible to Parliament and to the country for the proper management of all pecuniary matters of a national character. The governing classes in England, which are selected generally from about ten or a dozen families, have a very dexterous knack when they have any heavy duties to perform, to have them done by deputy; a set of Commissioners is sometimes appointed for that purpose, or some other selected body of men fixed upon to stand in the shoes of the ruling section, so that they may elude the labour and responsibility attached to their ruling functions; and thus, by a kind of jugglery, to make it doubtful whether any party is really answerable to the public for the performance or non-performance of such duties. This is precisely the case with respect to the prerogative of money-making; it is true sovereigns and other coins are stamped with the effigy of Her Most Gracious Majesty, but otherwise she has no more to do with the monetary affairs of the country than the man in the moon. To save the governing cliques trouble,

all matters of that description are put under the sole guidance of the Bank of England—a mere joint-stock company, which, of course, like other bodies of speculators, make the whole pecuniary business of the nation a subject of profit to themselves. They, almost at their pleasure, advance or lessen the national interests precisely to suit their speculations at home or abroad, ruining hundreds at a move; frequently not on account of any misadventures at home, but because money has been mis-spent, is too plenty or too scarce in some foreign market, with which, as joint-stock traders in money, they have transactions. If we had a House of Commons that in reality represented the people's interest, instead of being filled with prominent bankers, and the delegates of all descriptions of speculators, the powers transferred to the Bank of England would be exercised by some ministerial officer in the House of Commons, who would be answerable to the country for the due performance of his weighty duties. As things are, the Bank of England, with unexpected suddenness, raises the national interest from three to ten per cent., involving all commerce in ruinous stagnation. We repeat that if we had a Commons' House of Parliament, properly elected, so monstrous a practice would not be permitted to exist, and to produce such disastrous effects.

Having pointed out and discussed some of the prominent defects and national disgraces which may fairly be ascribed to our representative system in the House of Commons, and mentioned some of the disastrous results which that system has entailed on the nation, though other defects of the same description, and attributable to the same cause, will hereafter be named, some remarks may now be made on improving the electoral system, and on making the House of Commons what it now deceptively assumes to be, the people's House of Parliament. Before, however, we enter upon this part of the subject, it may not be irrelevant to make the following citation from the noted author of Lacon:—

"Reform is a good, replete with paradox; it is a cathartic, which

our political quacks, like our medical ones, recommend to others, but will not take themselves; it is advised by all who cannot effect it, and abused by all who can; it is thought pregnant with danger for all time that is present, but would have been extremely profitable for that which is past, and for that which is to come; therefore it has been thought expedient for all administrations which have been, or that will be; but by any particular one which is, it is considered, like Scotch grapes, to be very seldom ripe, and, by the time that it is ripe, to be quite out of season."

With a very trifling exception, this is a striking sketch of the tactics of the two parties who divide the government of this country between them, in reference to Parliamentary reform. Whatever measure be proposed by one set has been objected to and rendered abortive by the other. Mr. Disraeli's attempt, when he was last in power, comprised many useful propositions, and might have been made to some extent a salutary measure; but it was objected to by the other side, and a promise was made by the leaders of the professing liberals that they would introduce a more satisfactory scheme if the reins of government were taken from the hands of the men who then held them, and entrusted to them. Under this proposition or pretence the Conservatives were defeated and their oponents put in power, in a manner which Mr. Bright has denounced as the greatest swindle of modern times. By way, however, of keeping up appearances, a scheme to amend our representative system was introduced into the House of Commons, but it was found to be so utterly ineffectual that it cured no defect, and left all the anomalies of the system untouched, that, in fact, it was a mere legislative cobble of the most clumsy kind. The Tories laughed at it, and reformers of all grades denounced it as a useless sham. Under the deserved contempt of all parties the abortion was consigned to oblivion. It's authors kept their places which they had obtained by false pretences. The supposed chief author, as a *quietus*, was rewarded with a peerage, and for a time the great and celebrated parent of parliamentary reform halted in his career and

preached the somnolent doctrine "Rest and be thankful." A nefarious cry was raised by the pretended reformers—that the people did not wish for reform, because when they might have had it, they gave the Government no support by their demands for it; the fact was, that the proposed measure was so entirely worthless, and so manifestly a sham, that the people cared nothing about it—they did not consider it worth having, and therefore permitted the thing to come to its disgraceful end; it deserved their contempt, and obtained it most completely. Nevertheless, in the beginning of last year, the great reformer was himself again; he awoke from his torpid state, and became the joint parent of a measure of reform which at its birth was good as far as it went, but the above quotation was still applicable, and the reasonable plan of doing one thing at a time was frustrated—but this is only digression, and we shall now resume the thread of our subject.

Lord John Russell, in introducing the Reform Bill, on the 24th of June, 1831, said—

"When I propose a Reform of Parliament, I propose that the people shall send to this House real representatives to deliberate on their wants and to consult for their interests, and to attend to their desires. I propose that they shall, in fact, as they have hitherto been said to do in theory, possess the vast power of holding the purse strings of the monarch. I do it under the conviction that I am laying the foundation of the greatest improvements in the comforts and well being of the people. Let what will be done, the laws of such an assembly will not be voted by men hurrying from the country almost ignorant for what purpose, and arriving at this House at twelve o'clock at night, in time to give a vote upon a subject of which they have scarcely heard a word and which they have never considered. In such an assembly, the representatives of the people will consider, not with whom they are voting, but for what measure they vote. I say, then, that if we identify this House with the people of the three Kingdoms, however slow may be our progress, we are giving to the people all the rights and privileges they claim, we provide for carrying into effect the acknowledged principles of the constitution."

There can be no doubt that the noble framer of the Reform Bill believed at the time of its annunciation that it would accomplish all the salutary effects which he in the above peroration so hopefully anticipated from it. Paternal affection often leads a fond father to paint in bright colours the future eminence of his darling brat, who nevertheless sometimes turns out to be a very worthless scamp. That the Reform Bill has woefully disappointed its hopeful foster father may be learned from the fact that he has more than once announced his intention of producing another. During upwards of twenty years did the noble lord defend the glaring inconsistencies and vexatious injustice which that measure perpetrated. He was unwilling to believe in the utter failure of the vaunted panacea for political evils. Indeed, for a very long time fatherly feelings so usurped the judgment seat, that "Finality" was the attribute ascribed to the mischievous abortion. At last, however, England's then most noted constitutional reformer convinced himself that his Reform Bill had not proved itself to be that genuine political renovator which he once believed it to be—the supposed universal heal-all has turned out to be that sort of quackery which produces many disorders but cures none. It has been said before, that the money-making process was adopted in its formation, and that the traffickers in base coin were unwisely permitted to get the sovereign stamp impressed on base metal.

Instead of enabling the people to hold anyone's purse strings it tends so to paralyse them that they cannot hold their own. At all events, if it has apparently given them the office to hold the strings of the public purse, it is only for the purpose of keeping it open while the enormous sums are thrown in which they have no power to control or count, much less to keep there or take out again. At length, however, the renowned champion of constitutional reform, notwithstanding all his waverings and shortcomings, has satisfied himself that the measure, call it what you may or liken to what you please, was a great failure, and he has more than once attempted to give the country another.

As far as boroughs are concerned defects and anomalies in them have already been pointed out. It has been admitted that reform measure effected a small modicum of partial good by disfranchising some of the small boroughs, but how did it affect the county constituencies? Lord John Russell has stated that it was the intention of the framers of the reform measure to give a fair representation to all parts, that they aimed at giving no part an undue preponderance over another. Now, have all parts of the country a fair and an equitable representation? The palpable inequalities existing between small boroughs and large counties and populous towns having the same parliamentary influence have already been discussed. For instance Tavistock, with 8,857 inhabitants and 431 electors, has the same weight in the House of Commons as South Devon with 413,005 inhabitants and 4,502 registered electors. Is this fair? Hendon fully counteracts North Devon in legislative importance. Is this just? Is it giving a fair representation to all parts when the West Riding of Yorkshire, with a population of 1,497,688 inhabitants and 40,695 registered electors, has only two members, like one of the small boroughs for which some lady or gentleman deputes the two members? Can it be said that all parts are fairly represented when a county like Middlesex, with a population of 2,208,485 and 14,847 registered electors, has only two members, like Chippenham, which also sends two members whom it could hardly prevent from taking their seats whether it would send them or not? Sir J. Nicol's licence is quite sufficient. It is almost a mockery to say that a population of a million and a half, with only two members, is represented at all. In this respect, the parliamentary influence of the small and pocket boroughs compared with the large counties is as manifest as it is disproportionate and unjust. It is worth repeating that the parliamentary influence, personally considered, in small pocket or purchasable boroughs is brought to an operative point under the guidance of some Killick or Edmonds of the place, whereas in counties having such egregiously large constituencies that kind of influence is diluted to

an infinitesimal degree of smallness; the power in Parliament seems to have been fixed unevenly in proportion to popular and national opulence. The parliamentary scale proves that a large, populous, and wealthy county has the same portion of legislative influence as a snug little pocket borough with a handful of venal population and a small lot of tenth rate houses. These enormously large and ridiculously small constituencies balancing each other are characteristics apparent throughout the whole system. In small constituencies where the members are not deputed or spontaneously take their seats, they are elected by a *coterie* of partisans whose wants and wishes are so impressed on their member that they are embedded in his mind so as to become almost a part of his nature, whereas in large counties and places the members know comparatively few of the electors, and fewer still of their views and desires. Can it be said that the two sorts of electors here pointed out are alike fairly represented? Has not the one an unjust preponderance over the other in parliamentary influence? But how in other respects does the Reform Bill affect counties? Besides dividing some of the counties into two or more parts and giving additional members, it conferred the right of voting on the renters of farms to the annual value of fifty pounds and upwards. This was the noted Chandos clause. The reform measure, by disfranchising some of the rotten boroughs, only lessened the nuisance for a time; it has since revived, crept up, and is now become as offensive as ever. The evidence which has recently been given to the Commissioners appointed to inquire into the corrupt practices at several of the notorious boroughs most abundantly proves this, but that unfortunate measure, in the opinion of many experienced judges, has altogether swamped most of the county constituencies. The Chandos clause, as they consider, has had the effect of converting counties into vast rotten boroughs. Moreover, rumour, with its hundred tongues, tells us that that clause has also called another pernicious element into operation, tyranny. By creating the fifty pound tenantry voters, it consequently invests

landlords with the power of compelling that dependent class of electors to vote as they please. It is alleged that that class of voters are thumb-screwed, and driven *nolens volens* to the polling booth to vote for their master's candidates, and in this manner, it is asserted, they have altogether smothered the old independent yeoman. What foundation is there for this wide-spread notion? Have we any proof that it is well grounded? It is thought that one fact will go far to decide the question Probably many readers recollect when the independent yeomen of a large county in spite of the most determined opposition were accustomed to return liberal members at a time too when reform was deemed a kind of petty treason, and liberality very nearly akin to political insanity. How does the matter at present stand? Why, although four members are returned instead of two for the same county, they are generally all of the landlord colour, and, at least in one division of the county, it cannot be maintained that the thousands of liberal yeomen, who once formed so large a part of the constituencies, have now any member who represents their opinions or views. Supposing, therefore, that the noble band of sterling independent yeomen be still in existence, they have been politically extinguished by the Chandos clause, and at present have no voice in the House of Commons. Here again, members returned by coerced constituencies are said to be chosen and sent freely by the people. What a delusive mockery! The preceding remarks apply to matters as they now exist, but the new Reform Bill will only modify the anomalies and not remove any of them.

If the above views be well founded, as they are believed to be, there are two grand defects in the system for returning members for counties to Parliament, egregiously large constituencies, and the overwhelming power of the controlled and coerced fifty pound renters. The main question is, in what manner ought the system to be remodelled so as to make it work in unison with the constitutional rights of all parties. The remedial scheme will by and by be placed before the

reader. But in the first place it may not be entirely irrelevant to the subject under discussion briefly to advert to measures which have been proposed to reform our electoral system. For instance the revered Nestor of reform, Joseph Hume, once moved for leave to bring in a Bill to amend the national representation, by extending the elective franchise so that every man of full age, and not subject to any mental or legal disability, who should have been the occupier of a house or part of a house as lodger for twelve months, and should have been duly rated to the poor of the parish for the time, should be registered as an elector and be entitled to vote for a representative in Parliament; also enacting that votes should be taken by ballot, that the duration of Parliament should not exceed three years, and that the proportion of representatives should be made more consistent with the amount of population and property. Now, although some points contained in this scheme might have been reasonably objected to, and others deserve careful consideration before they are made law, still when the state of the national representation is fairly taken into account, no doubt every topic touched upon in the motion was deserving serious discussion. The time might have been inconvenient, as it always is, and the season inexpedient, as it never fails to be, but it is one thing to introduce and examine a measure, and quite another to carry it into law. The motion was in the rough; it might have been trimmed and modified, and perhaps added to it to make it more perfect and complete. It might have been discussed and defined clearly; its subject matter most intimately concerned the parliamentary rights of the people, and therefore it was not very decorous for their representatives to deny it admission, to slam the door of their house in its face, and haughtily refuse to consider it, which actually happened, a very large majority of the people's representatives contemptuously refusing to discuss the subject. It is true there were honourable members who did not profess reform on the hustings for the people, and vote against it in the House, or, what is still worse, skulk away from it altogether.

When dereliction of duty and principles, and evasive tergiversation are so common, it is quite refreshing to find a member of such sterling worth and genuine integrity; of such a member it may not be inaptly said that he was

"Faithful found
"Among the faithless, faithful only he
"Among innumerable false; unmoved,
"Unshaken, unseduced, unterrified,
"His loyalty he kept, his love, his zeal,
"Nor number, nor example, with him wrought
"To swerve from truth, or change his constant mind
"Though single."

Such was the indefatigable author of the motion.

Various other attempts have been made to remove the anomalies of the system, by Mr. Baines, Mr. Locke King, and others. Some remarks will be made on Mr. Berkeley's annual motion for taking votes by ballot, further on; but all these attempts at reform up to the last season have ended in defeat; the last endeavour by the Liberals to improve the subject was the ministerial one which terminated in their defeat, and placed their political opponents in power. The only praise which sincere reformers could bestow on the defeated measure was, that it was an exceedingly short step in the right direction; it aimed at giving the people of England a very small modicum of their political rights, by an almost imperceptible extension of the elective franchise. At first there was a trait in the proposition which imparted to it the character of honesty of intention on the part of its authors. We mean extension only. Do one thing at the time if you would do it well, is a maxim which as strictly applies to politics as to any every day affair. To attempt to amend the whole complex system, every part of which is out of gear, would have resulted, as it has always happened and always will end, in an unsatisfactory cobble. An attempt to amend all at once would have ended in curing nothing. The parties who objected to piece-

meal legislation on the matter wanted no effective legislation at all. They saw that the simplicity of the proposition would render it effective as far as it went, and therefore they strenuously opposed and ultimately defeated it. It was a fatal error when the parents of the measure suffered themselves to be driven from their simple original proposition and added last the disposition of seats; their departure from their first plan led to their defeat and political downfall. Whoever becomes the leader of reform, to be successful, must adopt the simple plan, and if he have learned anything from experience he will not be driven or coaxed to do many things at once, and will see that if he cannot manage one branch, it will be utterly hopeless to attempt a dozen.

The electoral representative system is at present complicated and cumbrous; it admits of all kinds of disputes, groundless as well as valid. The gift of the elective franchise to a man, in numerous instances is very like making him amenable to an everlasting Chancery suit; he is objected to this year; he proves that the objection is frivolous, but next year he is objected to again for the same reason; he again substantiates his claim and applies for his expenses, when it turns out that the objector is a man of straw, and not worth powder and shot. To put an end to this kind of expensive annoyance the system aught to be simplified, and the right to vote ought to be so plain and palpable as scarcely to admit of any cavil. The plan proposed by Mr. Hume would have had this practical effect; there is another, equally efficacious, which will presently be discussed.

According to the theory of the English government, taxation and representation are inseparably united. Lord Camden, upon a motion to repeal the Stamp Act on the 22nd. of February 1766 laid it down that,

"That position is founded upon the laws of nature. For whatever is a man's own is absolutely his own; no one has a right to take it from him without his consent. Whoever attempts to do it, commits

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an injury; whoever does it commits a robbery; he throws down and destroys the distinction between liberty and slavery." [Parliamentary History, Vol. 16, page 178.]

This doctrine is shadowed forth by De Lolme, Blackstone, and other writers on the English constitution. Locke asserts that the supreme power cannot take from any man any part of his property without his consent, and that taxes must not be raised on the property of the people without the consent of the people, given by themselves or by their deputies. Hence arises the maxim that every Englishman is present in Parliament, either in person or by his deputy; whatever be his pre-eminence or quality, from the prince to the lowest person in the kingdom, and hence the consent of Parliament is taken to be every man's consent. Lord John Russell, in the speech referred to above, broached the same doctrine. He said the ancient constitution of our country declares that no man shall be taxed for the support of the State who has not consented by himself or his representative to the composition of those taxes. The well known statute "*De tallagio non concedendo*," repeats the same language, and its true meaning has never been disputed. Hence, too, on this doctrine rests the maxim, that "Taxation without representation is tyranny."

Now this theoretical doctrine reads very soothingly, and does not look amiss in print. But is it a practical reality? Is every Englishman who pays a tax represented in Parliament so that he can give or refuse his consent to be taxed by deputy? Let us examine the question. In England there is one member for about 35,000 persons; in counties there is one vote for every 24 persons, and in boroughs one vote for every 22 persons; in each of these cases the average number is named. It is not, however, easy to ascertain the exact number of persons who are voters in each category, because in numerous instances a vote for a borough is also a vote for counties or parts of counties, consequently the stated number of electors no doubt far exceeds the number of persons

invested with the elective franchise. It is known that some electors are counted many times.

It is quite clear from the writings of the above cited authors that it was not originally intended to restrict the number of electors within such narrow limits. Even Blackstone tells us that if it were probable that every man would give his vote freely and without influence of any kind, that upon the true theory and genuine precepts of liberty every member of the community, however poor, should have a vote in electing these delegates, to whose charge is committed the disposal of his property, his liberty, and his life. Taking this statement to be well founded, as no doubt it is, it will probably be further conceded, that at present one part of Englishmen has a vote in electing such delegates, whilst another part, by far the largest, has nothing to do with it; those deputies are the representatives of the electors only. Such delegates, notwithstanding the delusive sophistry which is often used on the subject, cannot possibly be the deputies of men who have had no voice nor concern in electing them. Electors therefore have the power of committing the property, the liberties, and the lives of the non-electors to the charge of their parliamentary deputies; it is sheer fallacy and wholly untrue that men invested with the elective franchise are guided or influenced by others who are not so privileged. In short, the latter more numerous class are not represented in any manner, and consequently, if any of them are taxed, as they unquestionably are, they are taxed without their consent, and if they are so taxed, and the fact admits of no dispute, it is both unconstitutional and un-English. The sole constitutional sovereignty of the English people consists in their free and unfettered choice of their representatives. In their liberty of choosing rests their power of holding the public purse-strings; it is the grand palladium of all their civil and religious liberties; it supplies the invigorating air of freedom which they breathe; without it their liberty would die. Hence every free Englishman, especially every tax-payer, who has not the unrestrained

exercise of that choice is deprived of a privilege that constitutes his proudest birthright; he has an undoubted right to demand it; he wrongs himself if he delays to urge his claim for it, and it is a grievous wrong to deny it to him, or in any manner to restrain his proper and free use of it.

We shall on the earliest opportunity proceed to bring these introductory observations to a result. It has been our object so far, to show the urgent need of still further parliamentary reform; and it now remains to show how this further reform can, and may, be carried out in spirit of the foregoing considerations. We regret that the space at our disposal obliges us for the present to postpone the practical conclusions to be derived from them.

J. J.

Art. VII.—PUBLIC HEALTH.

Ninth Report of the Medical Officer of the Privy Council. G. E. Eyre & W. Spottiswoode. 1867.

Rivers Commission. Report on the Pollution of the River Lea. 1867.

Thames Valley Outfall and Interception of the Kingston District Drainage. Plan proposed by J. W. Grover, C.E., and E. Wragge, C.E. London: Longmans, Green, Reader, and Dyer. 1867.

A Sketch of the Cholera Visitation at Ystalyfera, in the Neath Union, in the autumn of 1866. By J. Rogers, Esq., Surgeon. Swansea: J. Griffiths. 1867.

The Medical and Legal Aspects of Sanitary Reform. By A. P. Stewart, M.D., and E. Jenkins, Barrister-at-Law. London: Robert Hardwicke. 1867.

The Sewage Utilization Act. 1867.

IF we are much indebted to the early pioneers of sanitary improvement for long continued labours on behalf of the public health, we have also to deplore the evils resulting from

over coloured statements and fallacious estimates as to the immediate benefits which would inevitably occur from monies thus expended, and the amount of cost which such improvements would entail. Nothing perhaps has more retarded progress in this direction than the entire break down of the weekly repayment system for private improvements, which was the favourite crucial test to which all works were brought in the early days of writing and lecturing on the health of towns. Up to the present time the whole question of private improvements remains unsolved. Until the last year in the whole of the Nuisances Acts no power existed authorizing nuisance authorities to raise money to do works of construction they might have considered necessary, so no power up to the present time has been given by the legislature to Boards of Health, Improvement Commissioners, or Sewer Authorities, to borrow monies to execute those private works which the default of the owner and occupier throws on the local authority. These owners are the persons who naturally have become the strongest opponents to the full application of sanitary measures. Sewerage rates, or general district rates, have been ill enough borne by those who have not been taught the value of health appliances, in towns where, by such opposition, the operation of the Public Health Act, or Local Government Act, has been stinted to its smallest proportions, and where, as of course, the benefits have been equally small. When to these rates are superadded the cost of providing for cottage property, water supply, cisterns, water closets, and drains, to join the subordinate system where such is provided, or the greater expense of connexion with a sewer, then complaints are loud. Cottage property, as a rule, in our large towns is in possession of persons to a great extent of limited means, who by patching and contriving, especially by non-expenditure of money on repairs, extract a livelihood from the tenants, by giving in return the very smallest amount of comfort. To these persons £6, £8, or £10 per cottage to meet the requirements of a local board for sanitary appliances is to change a valuable property into an in-

cumbrance, and the alternative of payment by private improvement rates, spread over a period of thirty years, is one which although provided for by the 11 & 12 Vic., c. 63, s. 90, is practically inoperative, as no local board has legally any power to appropriate any monies out of the funds at its disposal for the necessary advances. In every town or district there thus becomes a body of persons deeply interested in the maintenance of old abuses in which they have acquired a vested interest. These persons, in face of the apathy of the general public, are active in securing the election to the local board of the district of persons pledged to resist extravagant expenditure, and to keep down the rates, a very favourite cry for popularity. To cottage owners, inspectors of nuisances, medical officers of health, Government inspection, and central power of supervision are at variance with the spirit of our constitution, destructive of the liberty of the British subject, and invaders of that stronghold of our rights, a man's house, which in their opinion should be a castle, to prevent any interference entailing cost. While it is most desirable to educate the public mind as to the benefits certainly accruing from works of sewerage, &c., it is evident that no teaching can have any influence on the party of resistance, whose only object is to save their pockets, at the cost of the health and lives of the poor families inhabiting these miserable tenements. To them and for them there is but one mode of action, and that must be supplied by legislature, which no longer shall leave it optional whether life's blood may be coined into shillings of rent, but shall compulsorily enforce the provision in every cottage through the land of the means of decency, comfort, and health.

The right use of these means is a matter of education, but if we are to believe the statement of Dr. Buchanan, one of the medical inspectors of the Privy Council, who reports on the sanitary condition of twenty-five towns in which sanitary works have been in progress during the past few years, and which have been chosen as instances where structural improvements have been thoroughly carried out by the local authorities, we

have then to come to the conclusion that progress in decency, cleanliness, self-respect, and morality is as striking in these towns as the improvements in their health. Measured by the mortality returns of these towns, there is nothing of so much primary importance as an ample supply of good water. We look forward to the time when our rivers may no longer be polluted by sewage matters, and when a constant supply will remove the foul nuisances which now, like a pest, lurk in the cisterns, or apologies for such which are to be found doing duty in the back yards of the poor, to hold a scanty supply for the one or two hours' service vouchsafed to their customers daily by the great water companies. This is to remedy waste, but we fully believe that carefully conducted experiments have proved that a constant supply at high pressure can easily be given without loss to the companies, and that this is one essential element in the prevention of diseases of an epidemic and destructive character every one who has investigated the subject firmly believes. If we are to be guided by statistics, we come invariably to this conclusion, that in any town where sanitary works have been undertaken in combination with improved water supply, that there is to be found the most complete resulting benefit. Drainage works without this may indeed become a curse instead of a blessing, and sewer gases driven back through the pipes, and entering houses, causing typhoid and continued fevers, have been the most potent cause of discredit thrown upon sanitary operations. But, as an article of diet, water is either the poison or health bringer to the family. Leicester, in 1847, obtained an Act of Parliament to construct water works. Up to this time the capital required, £80,000, has not been raised, and the inhabitants still use well water, which from the previous use of middles, still partially continued, must be impure. The mortality in this town, therefore, as we might have expected, is only reduced from 264 to 252 per 10,000 of the inhabitants, or only 4½ per cent., while Merthyr Tydvil, where sewerage, hardly completed, has not yet had time to fulfil its work, a good supply of water has reduced the mor-

tality from 332 to 262, equal to 21 per cent.; Cardiff from 332 to 226, or 32 per cent.; Croydon from 237 to 190, or 20 per cent. There are but few exceptions to this as a general law, and where they exist other local circumstances explain the difference. But, on the other hand, an impure or scanty water supply is inevitably accompanied by great mortality. The lines of cholera visitations in great provincial towns have often been sharply defined by the nature of the supply, and we agree with Mr. Radcliffe who reports on the epidemic of cholera in London in 1866, that the predominant lesson derived from the outbreaks of 1848-49 and 1853-54, was that the localities of chief prevalence of the disease were mainly, if not solely, determined by the degree of impurity of the water supply. A very mournful but equally valuable illustration of this is afforded by the lesson taught us in the cholera outbreak in the eastern districts of London, beginning at Bromley, and covered by the days from the 11th to the 21st July, 1866. The East London Water Works, deriving its supply from the River Lea, supplies 99,000 houses, and over 700,000 of the population. The Company takes its water from a loop of the river near Tottenham Mills. Before this, the Lea has drained some 500 square miles of country, and receives in its course the sewage of numerous towns and villages. At Luton, with a population of 20,000, the sewage gets, after treatment by the liming process, entirely back into the river. Of the other impurities discharged into its water some estimate may be formed from the fact that one manufacturer alone sends from one to two tons of oxalic acid yearly into its waters—a quantity which would be poisonous did not the accidental presence of lime, to a great extent, neutralize its action by forming with it an insoluble compound, which falls to the bottom. Hatfield, Hertford, Ware, Bishop's Stortford, through the Stort—which empties itself into the river—Hoddesdon, Broxbourne, Cheshunt, Waltham Abbey, Waltham Cross, and Enfield, all add to its pollution—so that below this it is described by the Commissioners as a "common open sewer,"

largely used as such by a portion of the metropolitan and suburban population, "the foulness of the water and its bed augmenting as the Thames is approached." From a branch of this river, thus polluted, after undergoing filtration, the greater part of the East of London is supplied. This water is stored in covered reservoirs at Old Ford, but there are also large uncovered reservoirs occupying several acres of ground on the east bank of the river. These reservoirs contain impure water, but sometimes, when an extraordinary demand has made the filtered water run short, the water from them has been supplied in the district of the East London Waterworks Company. Following carefully the deaths which occurred from the explosion of cholera in the east district of the Metropolis, we cannot but come to the conclusion that its chief strength was expended on precisely those parts and those houses supplied with this water. The New River supply, which is also derived from the river Lea, but in the upper valley, before the river has been exposed to the great mass of its pollution, also supplies a portion of the eastern district—

"Out of every 1,000 of the population drinking New River water three died; out of every 1,000 drinking water from Old Ford seven died, and this remarkable difference took place among two sections of a population living side by side, and intermingling to a great extent, the less affected being exposed in the highest degree to accidental infection from the most affected."

It appears from the statement of Mr. Graves, that "at the close of June or beginning of July, late in the former month or early in the latter, water was drawn from the northern uncovered reservoir into the covered reservoirs to the depth of three inches, to supplement a defective supply from the filter beds." The inquiry of Captain Tyler shows that once in the end of June and once in the beginning of July, water to the extent of 300,000 gallons each time, was taken from the northern uncovered reservoir. Thus it becomes evident that impure water was supplied to the inhabitants of the district

immediately before the explosion of cholera therein. But it is supposed that water only conveys the special choleraic poison received into it from the discharges of persons suffering from the disease. Experiment has shown that the river Lea soaks into these uncovered reservoirs of the East London Water Works Company; cases of cholera had before occurred on the banks of the Lea in houses directly draining into the river, and it may be inferred that the great heat which then prevailed tended in some way materially to increase those organisms which constituted the cholera poison. Let this be as it may, we have half the metropolis supplied by water which is more or less poisoned—and that habitually. The wonder is not that we have so much disease and misery in the East of London, but that we have so little. How is this to be remedied; are we to wait until all the towns, districts, and parishes abutting on the valley can agree on some conjoined plan for benefiting themselves, and no longer continue to carry disease and death to their neighbours? They systematically push their filth from their own doors, when it becomes unbearable, careless as to the suffering they may inflict on others. The Metropolitan High Level Sewer to Bushy Creek is the natural outfall for the whole of the valley. It has been, however, so constructed that it can hardly serve its own purpose, and the Metropolitan Board have steadily refused all applications to allow its use by parishes beyond the metropolitan area. Under these circumstances the various parishes carry on an internecine war among themselves. The river Lea obtained an injunction against Tottenham, which in turn has attacked Hornsey. Edmonton threatens the justices of Colney Hatch, and in its turn is attacked. The only remedy as it appears to us from these anomalies is the constitution of a Central Board, with powers to direct works, especially in districts where they can only be effected by the joint action of various bodies with varying interests. Well may it be asked, as a pendant to this state of things, "What is to become of the drainage of towns situated on the body of the

* Thames Valley Outfall, p. 1.

Thames, now that Parliament has decided that no more drains shall be allowed to discharge into that river, and that within a period of three years all existing sewers shall be stopped up under penalties varying from £100 to £50 a day?"

It is true the Sewage Utilization Act of this session, 30 and 31 Vict., c. 113, by sections 1 to 10 gives power to sewer authorities to unite when they consider such union would be for the advantage of such district, and to form one district out of many, with the consent of the Secretary of State. But where it is for the public advantage, the Government should have power to step in and enforce such union; permissive legislation on these matters is, as Mr. Jenkins observes, a "bugbear." It shelves action, and perpetuates injury. The right to tax when the tax will fall heavily on the imposer, is likely to be but sparingly exercised, and it is only when Government shall have the power to compel action on the spot by the presence of a medical officer of health, independent of private practice, and independent also of the sanitary authority whose default he is to correct, that we can hope to see, in times freed from alarm, due sanitary provision for the wants of the people everywhere provided. The result of the inquiry into the condition of the towns reported on as to cholera, induces the Medical Officer of the Privy Council to state that "cholera epidemics appear to have been rendered practically harmless in the towns examined." That is in towns where sewerage and other works are more or less perfected. In looking at these towns we find that in 10,000 of the population, in 1848-9, in Merthyr, 276 persons died of this epidemic. This was reduced in 1854 to 84, and in 1866 to 20. The numbers respectively in some other towns were as follows:—Cardiff, 208, 66, 15½; Alnwick, 205, 0, 0; Salisbury, 180, 14½, 0; Newport, 112, 1½, 12; Brynmawr, 100, 0, 0; Bristol, 82, 11, 1½; Dover, 40, 16, 4⅝; Croydon, 27, 21, 2; Carlisle, 22, 6, 0; and so on through the list.

On the same point of the subject Mr. Rogers, writing of cholera during the past years in one of the South Wales' unions, says:—

"I had, in my own practice, in round numbers, 1,000 cases of choleraic disease; out of these 95 died. Of these it is not too much to say that nearly all died of local circumstances, the effect of avarice, or ignorance or neglect of sanitary precaution; in short, given a case of cholera in a foul dwelling, *death*; in a healthy one, *recovery*."

Another very important subject of inquiry comes under consideration in the Medical Officer's report, namely, the prevention of phthisis. From the facts gathered it appears almost proved that a very notable decrease in this most formidable disease will attend as an inevitable consequence of the draining and drying the subsoil of the ground on which a town stands. Thus Salisbury has decreased 49 per cent., Ely 47 per cent., Rugby 43 per cent., Banbury 41 per cent., Worthing 36 per cent., Macclesfield 31 per cent., Leicester 32 per cent., Cheltenham 26 per cent., and Dover 20 per cent., in all the deaths occuring annually from this disease. It may be said of both these diseases that it does not conclusively follow that the diminution in the ravages has been produced by sewerage works, the one being so occasional a visitant, and the other being an incident of hereditary predisposition, and other non remediable causes. Let us take, therefore, a class of diseases always more or less present where there are large aggregates of population; and look at the effects in these 25 towns on the mortality arising from typhoid fever, a disease recognized as having much in common with neglect, overcrowding, bad air, and bad water. Here the change is perfectly astounding; Salisbury, which once drove a king away from its shelter by its then direful visitation of plague, has lost 75 per cent. annually of this scourge; for every hundred persons who formerly every year were victims to typhoid fever, there are now but 25; Stratford has improved 67 per cent., Croydon 63, Merthyr 60, Ely 56, Ashby 56, Brynmawr 56, Penrith 55, and Warwick 52 per cent., and so on through the whole category, the trifling exception where the improvement has not taken place being dependent on other local causes not

yet removed. Diarrhœa is another disease showing, but in a less marked way, the same beneficial results. As we have before noted, injury in several towns when it has arisen being traceable to a defective state of ventilation in the sewers, especially where pumping is required, owing to the sewers not being able to clear themselves by gravitation, and where outfalls are so defective as to allow a backing up of the sewage matter. In all towns it has been conclusively shown that sanitary works much more than repay in money the money expended. It has been truly said that the cost to a parish is generally greater than the value of the fee simple of the house in which the death has occurred—

"The removal of the heads and aids of families at once adds materially to the list of paupers and becomes a permanent burden on the funds of the union, which, if capitalised, would be greater than the amount required to prevent the contingency, to say nothing of the sacrifice of comfort, health, and life in workmen's dwellings in ordinary periods."

(Sketch of Cholera Epidemic, p. 22). The results of gain to human life are such in these towns as to require some following out of the figures before their importance can be fully recognized. Cardiff saves now annually 320 lives, Newport 250, Croydon 140, Macclesfield 160, Salisbury 50, Merthyr 300, and other towns in greater or less proportion. Let us take Salisbury; this beautiful town had, before sanitary works were commenced, a mortality of 27½ per 1,000 of its inhabitants; in the last quarter we perceive they were only at the rate of 14. The most unhealthy rate reduced to the most healthy. What has followed from this in the last 10 years? There are saved the value to the community of 500 lives—nay, the 500 lives—who can estimate what this may mean of comfort and happiness secured—how much misery and destitution and crime spared? Each of these cases of lives saved means nearly twenty times the same number of attacks of sickness removed, funeral expenses, loss of work, broken up homes, and pauperized families. Is this a mere enthusiastic hope, or a scientific in-

duction from facts? Let us take another instance. In Macclesfield, says the Board of Health of that place, in 30 streets, which have been sewered and repaired by the board, comprising a population of one seventh of the whole borough, the death-rate has been 15 to 1,000, whilst in the entire borough it is 26 in 1,000. If the 30 streets were compared with the rest of the borough, instead of the whole which comprehends the 30 streets, the mortality would stand thus:— the 30 streets sewered 15 deaths to 1,000 the rest of the borough 31 deaths to 1,000. The inducements therefore to live in sewered streets are very apparent, and it must be borne in mind that most of these streets are inhabited by the poorest families and they are by no means well situated as regards salubrity. It should be stated that the exact population of these streets has been now accurately ascertained, so that the figures may not admit of doubt. From independent researches and inquiries which we have made, we believe the difference in mortality may be stated as 1 : 2 : 3 in streets in large towns with perfect sanitary appliances, partial improvement, and the entire absence of regard to health. It is a matter of general remark at the meetings of the Brynmawr guardians that the attacks of disease are more single and isolated than they used to be, and seldom or never do those sweeping attacks of malignant disease, prostrating whole families before them, present themselves as they used to do, and as they still do occasionally occur in the adjoining town of Beaufort in the same union. Our limits compel abstinence from further quotation; enough has been written to show how much sanitary work may accomplish of good. Sad experience tells us how much of this is still undone. We look to improved legislation on these matters and specially to such earnest co-operation on the part of local authorities in the good work as shall atone in some measure for that apathy and indifference which has made permissive legislation comparatively unproductive.

W. H. Michael.

Art. VIII.—OUR JUDGES, OUR PERSONS, AND OUR PURSES.

If the Judge is to be a terror to evil-doers the administration of the criminal law must be vigorous, effective, and consistent. The latter property is perhaps the most important, and indeed the most excellently framed law loses all efficacy when inconsistently administered.

Common sense and common law agree in the principles regulating the penalties for crimes against life and limb, and crimes against mere inert property. Coke, Hale, and Blackstone all recognize the superiority of the former's claim to protection, and such claim was recognzied by the ancient Anglo-Saxon code. Property may be recovered or reinstated in validity; life never can, and limbs but seldom if ever in their pristine vigour. It is in the highest degree essential that health and strength of body and members, the health and strength on which depend the acquisition of property, should be guarded with the greatest vigilance, and all injuries to them punished with the sternest and sharpest retribution. And if the reader is astonished at the enunciation of such trite truths, such mere elementary truisms, a perusal of many cases lately adjudicated on in the criminal courts will remove all cause for astonishment, and prove the need there is that some of our judicial functionaries should be awakened from the lethargy or hallucination respecting the several rights of person and property into which they have fallen.

The evil of leniency in cases of injury to the person is one of those that has attained enormous proportion of late. It is one whose fruits are seen in the savage assaults and the bloody affrays which must be checked, if need be, by the bitterest pains of servitude and the lash. The next Session of Parliament will not have fulfilled all its duties if it ends without the enactment of a brief measure, fixing severer punishments for

specified acts of violence. What such an Act should be will presently be shown.

Here let us consider the present code of criminal law and the various cases of misplaced "discretion" which are culled from a file of newspapers. They deserve the most earnest consideration from every Judge and Member of Parliament who may happen to see them, and their lamentable effect is to produce that curse to any system of law—*a belief in its hazards and its chances as dependent on individual administrators.*

The Consolidation Act, 24 & 25 Vict. cap. 100, is the present code regulating the punishment dealt out by the law of England to the commission of crimes against the person. The annexed table shows the penalties attached to the different species of violence which it is the aim of this paper to discuss.

SUMMARY CONVICTIONS.

Common assault . . .	£5 fine or two months hard labour.
Aggravated assault on women	£20 fine or six months hard labour.

INDICTABLE OFFENCES.

Grievous bodily harm	Penal servitude for life.
Common assault	12 months' imprisonment.

Now there is no exaggeration in saying that dozens of cases are adjudicated on by magistrates under the first of these two headings which ought to be tried under the second. And, when so adjudicated, not even the full summary penalty—often not even half of it—is inflicted. Indeed, it is enough to provoke the most phlegmatic person into anger, to see the kind of apathy with which some of the London magistrates regard the cases of assault brought before them, and the ridiculously slight fines with which they punish them. The larceny of petty articles is visited with months of hard labour, while (to give instances reported in the newspapers) knocking a woman's tooth out and cutting her face, pulling a handful of hair out by the roots, indecently assaulting a servant, striking a woman with a rake in the face, and wounding her that she faints, and

other similar brutalities, have all been punished of late by the infliction of trumpery fines.

What is the consequence?—The savage spirit animating the ruffianism of London, and fostered by the Forcible Feebles at some of the courts, has full swing. Eyes blackened, noses broken, ears bitten off, frightful wounds, contusions, and lacerations are the fruits of the magisterial leniency. One magistrate in particular seems, since his appointment, to be utterly blind and deaf to the complaints made for mere bodily injuries. In his court have been reported shocking assaults, not one of which has been visited with that bitter imprisonment which alone cures brutality.

Is it that the air of a London magistrate's court has some enervating effect? Are the scenes and instances of shameful assaults and savage ferocity so numerous as to deaden the magisterial sensibility? Why is not the two months' penalty rigidly enforced in every assault where any bodily disfigurement or laceration—aye, be it the slightest—results, and why is not a minimum of fourteen days given to every other proved savage attack? *Because the magistrates forget the precious value of limb and bone while perceiving that of watches and purses!*

Of the strange perversity of judgment in this matter, which distinguishes many of the London magistrates, enough has been said in a former number, under the title "Crimes of Violence and their Punishment." Rather is it intended in this paper to point out the pernicious leniency which extends to some courts of far higher position than Metropolitan police courts. Not merely at the Middlesex Sessions have the heavy sentences passed off for offences against property, and the light ones for offences against the person. A sentence of four months for manslaughter with the knife was passed by an eminent judge not long since. Such a manslaughter is divided by the thinnest line from murder, and how paltry does it seem when compared with the heavy sentences of penal servitude inflicted at every assize and quarter sessions for robberies of articles of property.

Manslaughter, rape, assaults with intent, infliction of grievous bodily harm, and assaults resulting in *any* personal mutilation, ought by every rule of common sense to meet with most exemplary punishment. Yet they only seem to rank, in the minds of many administrators of the criminal law, with robberies, thefts, and forgeries, and generally *below* these last, in heinousness. A lamentable perversion of judgment this, and most terrible in its consequences. The brutal violence of our English savages is, in effect, a result more or less of a pernicious idea that the person may be injured with little risk, while the pocket is guarded by the most terrible rigour of the law. Unless this idea is forthwith exploded by the infliction of very heavy punishment (with no remission) for violence, the lawlessness which has temporarily grown up among the dangerous classes will have terrible results. Already rowdyism and ferocity seem to have infected the mobs in many places in an unusual degree, and the sooner the lesson is taught that the Law is above all in England, the better for everyone's welfare.

Property is as nothing compared with life and limb. Who does not regard the robber of his watch as a far less culpable offender than the villain who stabs or beats him to death's door. The sharp sting of the lash, the terrors of the hulks, and the rigour of prison life are the only fit reprisals for crimes of brutal violence committed for mere savagery and love of inflicting pain. The wife beaters, the villains who offer violence to women, the smashers of bones with pokers and hobnailed boots, the cannibals who bite off ears and noses, the ruffians who use quart pots as lethal weapons, and the vitriol throwers, are the worst criminals in England. By their side, the shoplifter, the watch stealer, the pickpocket, and the swindler are trifling offenders. And until the judges and the magistrates adopt this classification, we shall continue to shudder aud sicken at the devilish brutality and cruelty which crop up at every gaol delivery.

It cannot be denied that the London stipendiary magistrates

have done much, by their leniency towards mere acts of violence, in deadening the minds of criminals towards the nature of ruffianism; and one or two whom we could name seem, to judge from the *Times* reports of their courts, to show the most ridiculous ignorance of their functions as repressive agents of brutality as well as of theft. At one court several savage assaults have been punished with trumpery fines. It makes one regret that the option of a fine was ever retained in the 42nd section of the 24 & 25 Vict., c. 100, which rules common assaults. It is a source of miserable weakness in some magisterial decisions.

The moment the dreadful theory gains distinct shape, that the integrity of life and limb are little valued by the law, all security and cohesion of society ceases. Mercy, or rather weakness, in such cases is very cruel to the criminal classes as well as to their victims, because sooner or later it engenders a fierce and pitiless reaction; and more than that leniency to offences of this class intensifies more than ever the commercial taint which runs so much through English law. Every consideration must point towards the far severer punishment of offences against person than of those against property.

What then are the suggestions for ameliorating the misplaced lenity which sows such dragon's teeth:—

First. (as before advised) a circular from the Home Office pointing out the imprisoning powers of the Act regulating offences against the person. This applies to magistrates' courts only.

Second. A short and tersely drawn Act, punishing every common assault with *any wilful mutilation* with a maximum two years hard labour, and, in the case of a male, twenty lashes. Committal for trial *peremptory.*

Third. Intensified punishments on proof of previous convictions for assaults.

Severity is needed. The lash has been so admirable a medicine for the disease of garotting, that we cannot doubt its efficacy in that of the brutal assault and battery. *And the lash*

has terrors for the brute. Let a little consideration for the wives beaten almost to death, and the bitten, smashed, and kicked victims temper the philanthropy which looks after the perpetrators and shudders at the cat-o-nine tail's name.

To sum up the events of the case briefly, it is only necessary to reiterate that property can be fully reinstated; life, limbs, and teeth cannot. Attacks on the purse injure the bank-book, attacks on the body injure the constitution; and while offences against property shorten only the assets attacks on the person often shorten life.

One word more. Every proved assault, either with intent or indecent, and every proved rape, ought to meet with the full terms of punishment. Nothing more demonstrates a weakness in a State than the insecurity of its women's safety, and nothing can be a bitterer satire on civilization than to see women unable to walk alone on the high road.

The sooner the judges, chairmen of Quarter Sessions, and magistrates decide on punishing grievously all crimes of unredeemed brutality the better for our national character and our social and individual safety. Not only for our own benefits but for those of the weak and defenceless in the lowest classes in the great town, ought we swiftly, sternly, and surely to teach the lesson that all violence ensures the heaviest retribution from the law. Impossible it is to overrate the importance of such a lesson, and it is earnestly hoped that the considerations imperfectly pointed out in this paper may at once find some place in the minds of those who have the great and awful responsibility of the just administration of the Criminal Law.

WILLIAM READE Jun.

Art. IX.—HISTORIC POINTS IN THE LAWS RELATING TO WOMEN.

He who commences the large inquiry, to which this paper is but a humble contribution, in the hope of discovering some historic guide to a solution of what controversies may still be rife, upon the immense question of "Woman and her Rights," must prepare himself for much disappointment. The result of the most prolonged research will be to satisfy his mind, more and more, of the truth of a conviction, which he will have begun to entertain, almost at the outset, that there is no one question of jurisprudence upon which the authorities of the earth have differed so widely, and with so little in their antecedents or arguments to account for the conflict. It is not that these are favourable, and those hostile, to this or that view of the female *status*. But it is that, whether favouring or opposing any particular view, they invariably differ from their adversaries quite as much in respect of concession as in respect of denial of right. It was said by Dr. Matthew Gibson, in his famous correspondence with Edmund Burke, that he would undertake to find in the *corpus scholasticum* of anti-papal churches and sects all the dogmas of Rome, less one; the Roman supremacy. It may be said of the female status that, in the mass of the written and unwritten laws of man, which have come down to us from the beginning of time, we find every point of equality, civil and political, established in favour of the woman, except only the general conclusion to which the discovery seems logically to point.

At all times, and in every scheme of law or custom, there has been, no doubt, an exceptional provision for the case of the female. But the principle of the exception has seldom, if ever, been the same, even where the mere details have appeared to show some affinity. The female has been regarded as an

inferior, as an equal, as a superior; and in each case the same, or very nearly the same, precautions have been taken against giving validity to her acts. Sometimes, as in Great Britain and Ireland, she is stricken with positive incapacity, out of tenderness to her person, or, as Blackstone admiringly puts it * "for her protection and benefit," and, to show "what a great favourite is the female sex of the laws of England." Occasionally, as in the French jurisprudence of that time of decay, called "renaissance" by its fautors, the same disabilities are declared; and they are justified because of the "nine wicked conditions" peculiarly noticeable amongst the many others, inherent to the nature of that abominable sex.† In one country she is incapacitated, *quià* exempted; which again is the case of this kingdom; and in some others, *e.g.* in Italy and Spain, she is exempted *quià* incapable. As little agreed are the legists upon the reasons of the disability, or of the exemption, as the case may be. According to the municipal lawyers of some countries, it is because the woman is weak of body, but not of mind;—according to those of others, because she is weak of mind, but not of body; and, according to those of others, because she is weak of both. Some codes, again, disdain to be so defended. These rest their justification upon the revealed law, so far as they understand that law; and, as they differ in their premises, so they must needs differ in the application. Finally, one school of nations profess to base their doctrine of exclusion, (or privilege as they may prefer to call it), upon the mystic union of "*caro una*" between husband and wife;—although how that should affect the question of the *feme sole* and her rights passeth all comprehension. Others, again, deny that the religious dogma has ever been received into the scheme of temporal law, and prefer to find the origin of their doctrine in the "*tutela*" of the Roman law;—although here again such a parentage is beyond all wonder, to those who are not ignorant that the "*tutela*" of wives was unknown to

* I. Comm., 445.

† Le Songe de Verger, Liv. I., Ch. cxlvii, *apud* Gide: Etude sur la condition privée de la femme, p. 520.

that law, and was strictly confined to children; and this, moreover, without distinction of sex.

Variations of that kind had better be left to explain themselves; and without further preface let us now proceed to as general a classification as the case will admit, and the law of space allow.

The barbarism of a nation or race can be regarded only as a condition of degeneracy from some lost status and forgotten law. It is, therefore, in the truest sense, abnormal; and, as such, it can make no figure amongst the codes of civilised States, except so far as occasionally to point or modify the application of these, when coming into conflict with the "lewd usages" of a barbarous race. But that exception, belonging to international law,* need not be further noticed with reference to the matter in hand. Rejecting, therefore, all that the antients have recorded, or their philosophers dreamed, and all that our modern discoverers and travellers have represented or invented, touching the condition of woman amongst the wild or barbarous peoples, the present inquiry is confined to an examination of the leading characteristics of the jurisprudence and legislation of civilised man, upon that important and delicate subject.

The patriarchal period is, of course, excluded. We cannot conceive the notion of a family-jurisprudence, or a family-legislation. And we may safely believe that no one ever thought of either, until after the Tribe, or the Nation, had replaced the Family, and the State had gathered into its own hands the several jurisdictions, which the Heads of all the Families within its borders had been accustomed, each at his own hearth, to administer and enforce. But thus much may be said with respect to that era, and to the monuments which it has left behind it, of its status of the Woman in the Family. That must have been in all countries substantially the same—whatever the existing distinctions of land or race—the purely patri-

* Fallati: "Keime des Völkerrechts bey wilden und halbwilden Stämmen." Tübinger Zeitschrift für Staatswissenschaften (1850) pp. 173, 181, 207, 219, 225, J. Th. Roth, Archiv für das Völkerrecht. Heft I., p. 33, ff.

archal time knew them not. It is not impossible to trace the rude outlines of that Old World institute. Marriage is the foundation of the Family. Husband and wife are each essential to its constitution, and enjoy an influence and an honour nearly co-ordinate. Monogamy, therefore, is the first condition of that society. From the moment when that condition fails, the institute is doomed. Yet, even in the second and degenerate stage, that of polygamy, it is the first wife who enjoys—as it were hers only—that distinction which the designation of wife always gave. It is true that her lower associates participate. It is true that none are deprived of the honour which they severally claim from their own children. But the title of the First Wife transcends theirs, even in that respect. All the offspring of the Patriarch, by whatsoever "*venter*," are accounted to be also the children of the first wife, or, as the Israelites, even in after times, used to designate her—"The wife of his youth." To this day, a still more antient people, the Chinese, follow the same practices. The first wife with them is "the principal mother of the husband's "children." The subjection of the children to the domestic authority endures in the patriarchal system until emancipation. The emancipation of the son takes place upon his quitting the domicile; the emancipation of the female child takes place only upon her marriage. She passes then into another family, and assumes the place of honour which she has seen filled by her mother in the home of birth which she has left. But the home remains; and the emancipated children—whether male or female —are always at liberty to resume the former *status*, when they have lost the new one.*

Passing onwards, the questions present themselves: What then are the leading distinctions among the institutions of civilised men on the subject of woman, and her relations to this

* Genesis, XVI., 1; Proverbs, V., 18; Ta Tsin Leu Le, 108; Manú, II., 138-9, III., 55-6, 60; Yájnavalkya, I., 74-88; I. Strange, Hindú Law, 453; Lenz, Geschichte der Weiber im heroischen Zeitalter, *apud* Gide; Etude sur le Senatus-Consulte Velleien, p. 32. Gràgàs: *Ibid.* p. 226-360; Iliad, IX., v. 341; Odyss. VI., v. 182; VII., v. 69; Sprenger, Muhammad, II., 535, III., 82-4.

world? and what have been the principles on which they agree, and those as to which they appear to be in conflict?

A learned German writer of the present day*. supposes mankind to be susceptible of classification under two great divisions, viz., (1) the Passive races, and (2) the Active races; and he thinks that he has found a marked difference between those of the first and those of the second class, with regard to such of their habits, customs, and legislation as affect the female status. The classification is artificial and the distinction imaginary. Of the first, it is sufficient to say that Rome, Germany, England, and France are all said to be "Active races," equally, that is, with Muscovy; that of China is put into one class and Tartary into the other; that the Muslim nations are similarly parcelled out; and that the civilised or semi-civilised Aryan is ranked now with his fellow, and now with savage man. As to the second, none who have considered with careful attention the incongruities and contrarieties, in regard to that question, of the manners, customs, and laws of either of these two supposed classes, or even of almost any one of the races thus arbitrarily assigned to either of them, not only at various periods, but even at the same period of the world's history, can hesitate to reject it.

The truth is that no such classification is possible. It may be presumed that, in the beginning, the mutual rights and duties of the two sexes were understood and observed, just as other rights and other duties were. But, as the boundaries of just and unjust have not been always respected in later ages, so, in particular, there was ever the greater temptation to disregard them in the case of the female, because of the facilities afforded by the physical weakness of her sex. No other solution appears capable of universal application than this; and none other has even the occasional advantage of historic corroboration. Thus the same scripture which among the Hebrews, the same Smriti which among the Hindús, the same hymns and

* Die Frauen, etc., von Dr. Gustav Klemm (Dresden) T. I. 1-20, 316, 321, 338; T. III., 338.

epics, and histories, and written laws, which in Greece and Rome, and the same sagas, which in the lands of the North tell us, of the normal equality and even ascendancy of Women, in the Family, or Tribe, or State—testify also to the continual invasion of her commonest rights in particular cases. But those acts of brute force, frequent as they have been, at all times, and perhaps more frequent in all countries, during the long interval between the beginning of the decline of the patriarchal authority of each *paterfamilias*, and the final absorption of that authority into the power of the State, constituted not even a case of exception to the common rule of right. There was no nation so barbarous in its practices of that kind, as not to know their barbarity and lawlessness. Nay, it not seldom occurred that the worst of these acts were most familiar in countries, where the general temper of the people favoured to excess the rights so invaded. Learned writers* have well remarked, that in the bosom of the same German tribes, where the condition of the female was so often that of subjection and oppression, the sex was nevertheless surrounded with respect, with honour, and, in regard to its supposed spiritual gifts, with superstitious veneration: insomuch that, even after the usages of the race had got themselves written down into codes, with little discrimination of good practices from evil, there might be seen, side by side with the articles which despoiled her of equality, and, as it were, in consideration of such wrong, those which bestowed upon her a double measure of protection, and avenged the blood of the poorest female with more of rigor than that of the Land's Noble or the Tribe's Chief. The inconsistencies are undeniable—shocking, if you will;—but they are part and parcel of our subject; for they belong to the fallen nature of our race. It is the "*mal seme d' Adamo*," discerned by the eye of Ariosto, whithersoever the poet turned it; the stone of the metaphor,—which Palgrave loved so well,—for ever marring

* Etude sur la condition privée de la femme, p, 229. Grimm, Rechtsalt., 404. Mem. de l' Acad. des Inser., t. V., hist., p. 330.

the hopes of the builder, because fretted with leprosy even from the quarry!

From the survey of what are improperly termed the Codes of the East, certain facts are obtainable, which are applicable to all; and also others which are peculiar to the codes of particular nations, races, or religions; *i.e.*, the Chinese, the Hindú, or the Persian; the Turanian, the Semitic, or the Aryan; the Pantheist, the Polytheist, or the Muslim. In the brief space of these pages, it is impossible to devote a separate consideration to each, or indeed to give more than a mere enumeration of some chief characteristics. They are shortly these: *

I.—The Family is the Integer. The sexes are equal; for the Head is supreme. The Head is represented by some other member—male or female—of the Family, whom the custom designates, during the minority, the incapacity, or the absence of the Head. II.—The peculiar characteristic of the Aryan Family in this last respect is that the Family is also a Copartnery. In every member is vested a proprietary right, present and reversionary, of which not even the Head of the Family can deprive him or her without consent. Yet, in other respects, the Head or (as before) the male or female representative of that Head, has the sole and unfettered management of the family estate, and may lawfully consume it in the exercise of his or her *bonâ fide* administration. No other member of the Aryan family, male or female, so long as it endures, has any voice in that matter. It is only through a legal and solemn partition of the family estate, that each member is separated from the rest, and placed upon a footing of *quasi* independence as to the common head. But partition destroys the Aryan family, and is final (the maxim being that "*once* is partition made"), and therefore it is never resorted to but out of necessity and with reluctance. III.—The position of the female in every Eastern family is secured to her by the law. Respect is

* The following authorities may be consulted:—Manù, B. III., V., VIII., IX., XI.; Yajnavalkya, B. I., II.; Kúrán, Súrá II., IV., V.; Ta-tsin-leu-le. B. III.; Selden, de Uxore Hebraicâ, Lib. III.; Gans, Erb-Recht in weltg. Entwick. T. I., pp. 148-250.

enjoined in the name of the deity or deities, from whom it is supposed to have been received. Her rights and duties are reciprocal according to that law. The equality of the husband and wife is asserted in the same text of Holy Writ, the same "slok" of the Puránà, or the same súrá of the Kurán, which enjoins the former to protect and cherish the latter, and the latter to submit herself to the natural superiority of the former. IV.—Here, again, the Aryás surpass all other known races (except, of course, the Banù—Israel of the Semitic race) in the expression of that equality. In the Hindú formula, husband and wife are but one person,—therefore bounden to mutual fidelity until death (a principle which excludes polygamy);—and he alone is perfect here below who consists of three persons in one; that is to say, "of his wife, of himself, and their offspring." V.—The necessary consequence of these principles would be to entitle the wife, or, at least, the widow and the emancipated female everywhere, to an equality of civil and social rights, without the family, that is to say, in her relations to third parties also. But this is prevented, by the introduction, from high antiquity, of another maxim, which is received everywhere in the East, by Muslim and by Kafir alike, and according to which every woman, sole or coverte, major or minor, is esteemed to be of inferior intelligence and volition, and is therefore protected against the wiles of the other sex, and of her own also, by being placed under a species of perpetual interdict or incapacity, which makes void her acts and obligations out of doors. But this, as indeed the terms show, is always presented in the light of a privilege, or of an exemption, and not of a disability; and, when the good of the family requires it—*e.g.*, where the manager is a female—it ceases altogether.

The distinctions introduced by religion, by race, and by positive legislation deserve a more detailed exposition than it is possible to give within the compass of this paper. But the following explanation of the leading points may be found not altogether without profit.

The Hebrews were a Semitic people, but they were also "a peculiar people," and for very obvious reasons their laws and customs are not to be regarded as belonging to race. Without entering into the painful controversy still raging between Dr. Colenso and the Established Church,—in which, be it said in passing, either side appears to have caught up only a fragment of the truth,—thus much at least is clear, that we must take the Scriptural narrative as it is, or reject it altogether, if we take it into account at all, as part and parcel of the history of the jurisprudence and legislation of the antient world.* This is especially true of the present subject of inquiry. If we follow the Scriptures, it is impossible to doubt that the status of the Daughters of the Promise, as well before as after the promulgation of the Mosaic Code, was far higher and better than that of the females of any other contemporary stock, whose history has come down to us. "Man" was the "male and female" creation of God. The first pair were created with an equality of rights. Every succeeding pair had before their eyes that example to be their own model. The children of the Family, without distinction of sex, were equal before the law, so long as they remained within the Family. Emancipation was the consequence of separation from it. The son "left his father and mother," or, as it is elsewhere said, went "forth from his country and his father's house" to found a new Family and be its head. The daughter did the same, not to found a Family, however, but to join that of her future husband, and to be "of one bone and of one flesh" with him for evermore. Monogamy—without even divorce to modify it—was the original law. Polygamy was tolerated afterwards, because of "the hardness of the hearts" of a people, to whom the polygamy of every neighbouring people had become a familiar spectacle; "but, in the beginning it was not so." †

* The writer has used the word "jurisprudence" throughout this paper in the continental sense; that is to say, as equivalent, or nearly so, to the terms "case-law" and "judicial exposition," better known in English courts.

† Abraham and Isaac, in this respect, stand in marked distinction to Jacob, the third Patriarch of the race, the founder of the House of Israel. Genesis, xxvi, 34, 35, xxvii., 46, xxviii., 1-9, xxix., xxxi., 1-17, 36-55; (and, in particular, 50.)

What the condition of the female is amongst other Semitic peoples we know. What it was before Muhammad we may faintly guess. Without adopting all the crude opinions of the antients on that subject, we are safe in supposing, with a learned writer of our own times * that the Kúrán, in some important respects, laid upon the women in Arabia and the East restraints and disabilities before unknown. The distinction, for instance, of marriage (*nikáh*), and temporary concubinage (*mutáa*), was not appreciated by the Pagan Arabians, who resented equally, and even to bloodshed, the abandonment of the female relative, whether wife or concubine.† Under Al-Islam, the story of Odenathus and Zenobia would have been an anachronism — an impossibility: — Cleopatra would have had no opportunity of beguiling and tampering with Julius Cæsar and ruining his lieutenant: —Dido would not have headed the emigration ships from Tyre :—and Semiramis could never have done anything to excite the emulation of Catherine the Second. Still it is far from true, that even now, and under the Kúrán—for she is everywhere in the East its subject, either as believer or as tributary,—the condition of the Semitic female is such as the Western world used to believe, when Maracci and Relandus and Launcelot Addison were in fashion.

The theocratic element is said to have prevailed, even over the patriarchal element, in the pre-Muhammadan legislation and jurisprudence of all Semitic peoples. It certainly obtained a decided supremacy by means of the Kúrán. What loss the female suffered in her family rights, through the new revelation was, perhaps, made up to her in large degree, by the additional guarantees which the precepts and threatenings of 'the Book" afforded against oppression and injustice.‡ It is quite true that the "harem" of the Asiatic is as sacred and as well guarded, by use and opinion, against invasion of the

* Muir, History of Muhammad (1861), vol. III, p. 304.
† Sprenger, Leben und Lehre des Muhammad, dritter Band, s. 84 (1865).
‡ Sale's Kúrán, Prelim. Disc., Sect. v. and vi., pp. 93-4, 98 (1844).

State, as the home of the Englishman, or Lord Chatham's ideal thereof.* But it is also true, that a certain intervention on the part of the public authority is neither forbidden by the Kúrán, nor opposed to the Súnna, nor foreign to the habits and feelings of the Jamáat. Of that authority the protection, when invoked, is freely accorded unto all, without distinction of sex or rank; and it may be invoked by the aggrieved party, or in case of need, by his or her lawful representatives. It is a grave error, for instance, to suppose, with the writer first cited,† that, because it is not specifically mentioned in the Kúrán, the wife's right to a divorce or separation, for any one of "the thirteen causes," is not recognised by the Ulema as within the spirit of the legislation.‡ It is the same with all the female's rights, personal or proprietary, whether *in spe*, or *in esse*, whether the female be married, or maiden, and whether she be minor, major, or widowed;—those rights are warranted and enforceable by the same law which acknowledges and defines them. If she takes a half share, and her brothers each a whole one in the inheritance, it must be remembered that the distribution is otherwise equal; for primogeniture is disregarded, and the distinction of *realty* and *personalty* is unknown.§ In no case, can her consent be forced to an invasion, an alienation, or a restriction of those rights, nor to a ratification of such. Even a betrothal in marriage—nay, the contract itself—must be annulled, albeit made by authority of parents and guardians, and in due form of law—if the bride on attaining the age of consent, (which is that of puberty)—refuses to implement it.‖ It is favourable to the practical value of the

* See Mr. Urquhart's "Spirit of the East" (1839), vol II., p. 396.

† Muir, *ubi suprà*, p. 304.

‡ Compare Urquhart, *ubi suprà*, p. 394, with Sale, *ubi suprà*, sect. VI., pp. 95-6, and Baillie's Digest of Muhammedan Law, (1865) p. 203.

§ Urquhart, *ubi suprà*, pp. 392-3.

‖ The authorities were very fully collected and examined, in the celebrated and much litigated case of the double marriage of Khatiza Bibi, bint Ghúlam Hussein Roghai, before the Supreme Court of Bombay (1860-4), and eventually decided by the present High Court, sitting in Banco, in favour of the female's right to annul; in the suit of Muhammad Ibrahim Parkar v. Ghúlam Hussein Roghai, and others (1863-4). The authorised report has not yet been published (at least in Europe).

right, that the Muslim law does not recognise any change in the *status* of birth by reason of marriage. The wife belongs to her father's family. They manage her dowry and separate estate during marriage, and afford her a home and protection, when that relation ceases, or is suspended, and the means of marrying again, in the former case. If she requires a divorce, they must demand it in her name, and conduct the proceedings, whether arbitral or judicial, to their end; and also provide for her re-marriage when divorced. Upon occasion, indeed, before Islám, the Arab kinsmen of the wife claimed and exercised that function, even against the wife's will; and it is doubtful how far the Prophet meant to condemn the extraordinary claim. But at least the ordinary duty is as above stated; and we may well believe, with the biographer and commentator of Muhammad, that it is only in "lands demoralised and without the sense of honour, such as Egypt and Syria," that these singular provisions, preserved from the earliest patriarchs of the desert, have ceased to be of profit. *

The nations of the West are all of Aryan race. It may therefore be not surprising to discover, in the laws of antient Greece and Rome, in the customs of antient Germany, in the Eddas of the North, and in the Codes and capitularies of the Franks, the Lombards, and the Burgundians, very considerable affinities to the provisions of the Vedas and Puránas of the Hindú and the Zendavesta of the Iranian nations of the same race, with respect to the condition of woman in the Family and the State. It was equally to be expected that, by the side of those affinities there would, in the course of thousands of years of separation from the common Aryan stock, and from each other, be found varieties, discrepancies, contrarieties even, not less considerable. Such in both respects has been the fact.

From the Hindú and Persian estimate of her intellectual inferiority, the spirit of society relating to woman which obtained among the Ionian Greeks, differed in no essential measure, and the laws were answerable to that spirit. Amongst the ruder

* Sprenger, *ubi suprà*, zweiter Band, s. 535; dritter Band, s. 84.

Dorian and Æolian Greeks, the intellectual inferiority of woman was less sharply declared, and perhaps less important, and, in Sparta at least, the legislation of Lycurgus had done much to remove the physical inequalities also of the two sexes;*—inequalities of far more consequence in the eyes of a martial people. Subject to these qualifications, there can be no doubt that, where the dominion of Sparta did not come, the general *status* of the Grecian female was precisely similar to that of her Hindú sister of the same times, and, in a great measure, of our own times also. The chief differences would seem to be that—1, the basis of the family was widened:—all the citizens were holden to be equally interested in its affairs with its natural members:—and the family had become, as it were, reconstructed upon a communistic model:†—2, the προῖξ (better known to us as the Roman "*dos*") had grown into use, as an essential part of the marriage contract:—3, the widow, instead of remaining in the family of her deceased husband, reverted, upon his death, to her former status or settlement by birth:—and 4, in all questions of conflict touching her rights or duties, as indeed in all questions of a litigious kind, it was no longer by the voice of the priest or the college of priests that the decision was given, but by that of the *agora* of the people.

Rome, whose genius and manners were far more nearly akin to those of the Dorians and Æolians, than to those of the other Grecian states,—presents, as well in the resemblances as in the differences of her antient laws of women, with respect to those of the cognate Hellenes, a remarkable illustration of the traditional Aryan descent. I.—What antient Rome had, from the first, and always, preserved with a tenacity only surpassed by the Aryan of the changeless East, was the sacerdotal origin of and jurisdiction to administer the laws, by which her

* Compare Grote, Hist. of Greece (1862), part II., ch. VI., XI., XLVIII., vol. II., pp. 148, 337, and vol. IV., pp. 228-30, and note (5), with Mure: Language and Literature of Antient Greece (2nd. edn., 1854), vol. II., p. 335, vol. III., pp. 76, 304-5, and Plutarch: Lycurgus;—XIV., 2.

† Gide; Condition privée de la femme p. 67, Plutarch, Solon, XVIII., 6, Aristot. Polit., VIII., 1, Demosthenes, Coron., 205.

society was constituted, and more especially the laws of women. It was so when the Pontificate was the sacred and reserved right of the Patrician order. It remained so, after the *plebs* had wrested that monopoly away. The *jus romanum*, first and last, was ever, if not a religion, in the modern sense, at least an abstruse and mysterious science, belonging to religion, which the vulgar might not practise, nor so much as learn, but must leave to the College of Pontiffs. II.—It was an almost necessary corollary from that order of things, that the Grecian novelty, of an intervention of the State in the Family or its affairs, should be steadily and jealously excluded at Rome. The modern Hindú family is not more conformable to the old Aryan type in that respect than was the Roman family; that is to say, such as it was, before the inchoate degeneracy of the rēpublican manners was stimulated into new action, by the legislation which Augustus and his successors found necessary, for the defence of that form of usurpation which always finds parasites amongst the base and the corrupt of mankind, and is called Empire. It was part and parcel of the *jus privatum* itself, ever supreme in the republic, and ever guarded against assault or fraud, by the mysterious "*formula*" of the "*contractus*" and of the "*legis actio*," * and the jealous rigor with which the law was strengthened, against every modification of those safeguards of private right. III.—Conservative of many other Aryan traditions, elsewhere lost to Europe—that wonderful system maintained, much longer than in any other civilised land of the antient Western world where it was known to subsist, the patriarchal tradition in particular. Nowhere was the paternal power, nor the immunity of the domicile and its jurisdiction, carried further than in Rome of the Kings and the Republic. VI.—The Family was the Integer. The child, without distinction of sex, and (subject to what will be said presently), the wife, too, were "*in manu*" (or power)

* Uti legâsset ita jus esto, Ulpian XI., 14. Uti lingua nuncupâssit ita jus esto. Cato, de Re Rust., 145-151. Festus: vox nuncupata, Varr. de Re Rust. II., 2, 3. Cicero, de Orat. I., 57-58. Quas actiones ne Populus, prout vellet, instituerent, Pomponius, fr. 2, T. 6, D. I., 2.

of the paterfamilias. But it was a power defined and restrained by morality and custom. Above all he was but the consort of the wife. Their marriage was said to be *conjunctio maris et fœminæ, et consortium omnis vitæ divinæ et humani juris communicatio.** The *communio bonorum* was the ordinary regimen, as amongst older Aryan nations; and the whole family had the advantage of that. The family was not divided. The females were not relegated into a separate apartment, as with the Ionian Greeks. They had but one *atrium* at home; and they all assembled there. "*Ubi tu Gaius, ibi ego Gaia*" were the words which had made the paterfamilias; and, by the corresponding style of "*Dominæ Uxor*," she was entitled to be addressed by her husband when present, and described when absent.† The wife, in fact—as Dionysius of Halicarnassus expressly says ‡—was "mistress at home in the same sense as the husband was master." V.—In one important respect, the Aryan status of the female was far better preserved in free Rome, than in India, Persia, and the East at large, by this time lost to freedom. The external life of the citizen was not denied to the woman—not even to the wife. If the Comitia were closed to her, the Forum was not. She went abroad, amongst the other citizens of either sex, appeared at the Exchange, or (for she might be a banker) at the Bank; she was received as surety or bail for any person; she transacted all kinds of affairs, in short—her own private affairs, the affairs, too, of her household, of her family, of her husband, and of her clients; for women could plead, and they exercised that right until by a legislative Act of the already expiring Republic (A.C. 48) they were expressly excluded from that common right.§ This was the signal for further legislation in the same spirit; and, in the specification of the functions

* Modestinus, D. 23, 2, 1.

† Gide, p. 110.

‡ Lib. II., 25. Κυρία τοῦ οἴκου τον ἀυτὸν τροπον ἣν ὅνπερ ὁ ἀνήρ.

§ Fr. 1 s. 5, D. III., 1. Origo vero introducta est ab Afraniâ, improbissimâ fœminâ, quæ inverecundé postulans et magistratum inquietans causam dedit edicto. Valer. Max., VIII., III., 2. Compare Sir George Bowyer's Commentaries on the Modern Civil Law, ch. x., p. 58.

which, under the new regimen, were prohibited to the Roman female, we have the best confirmation of the fact that, during the long and glorious period of the Republic, she was deemed competent, not only to conduct in person her own suits and those of litigants whose attorney she was—at a time, too, when every suit was in the form of a *legis actio*,—but also to sit amongst the "*judices*" (jurors) upon occasion, and to perform many another judicial acts.* VI.—The "*communio bonorum*," like nearly every other right, might be excluded by agreement, and so might the "*manus*" or power of the husband. A wife so exempted could scarcely be deemed the "*fœmina cooperta*" of Lord Coke's barbarous latinity, or the *feme coverte* of his less barbarous French.† When the "*dotis conventio*" became common, the Republic was perishing in corruption, and amongst other institutes, the "*consortium omnis vitæ*," as marriage was still called,‡ had ceased to be so regarded. But Lord Mackenzie is mistaken in supposing, that the extinction of the "*manus*" thus wrought became the emancipation of the Roman matron, or that the measure of her liberty, already so large, was thenceforth increased.§ It might have so chanced; but it did not. The dissolution of the family was the signal for creating the permanent incapacity, not only of the mother, but of every female member of it. They were so disabled, not as wives or as children, or as persons *in manu* or *sub potestate*, but as females. For the first time in the history of Rome, the Asiatic fiction of the inherent incapacity of that sex—"*fragilitatis et imprudentiæ causâ*,"—became the principle of legislation.‖ And even then—for to that extent we may agree with Lord Mackenzie—it is certainly true that, in some respects, the degree of liberty which was left to them "contrasted strongly with the heavy

* Ulp. XIX, 18; Gaius II., 90, 96. Nec judices esse, nec postulare, nec procuratores exsistere; Fr. 2, D. L. 17, Fr. 18, D. XVII., 5, Fr. 20, S. 6, D. XXVIII., I, Fr. 12, D. II. 13, Plutarch, Lycurg. et Numa Comparat., III., 9.

† Co. Litt. 112 *a*.

‡ Modestinus, D. 23, 2, 1.

§ Studies in Roman Law, 89.

‖ Gide. pp. 165, 173, 465-560, C. 5, 14, Marezoll, V. 165.

disabilities, imposed on wives by the Common Law of England and Scotland.* Its effect was chiefly to place the female in a state of perpetual tutelage to her husband, to her agnates, to the State. In this, most probably, consists the preference of modern civilians for the dotal regimen, over the regimen of community—a preference strongly marked in the Russian and Prussian codes, in the Code Napoleon, and in the codes which have been formed upon its model. The laws which made the husband's "*auctoritas*" a condition precedent, to so many acts which were left, under the regimen of community, to the free action of the "*domina uxor*," were, practically speaking, a part of that dotal regimen, which they were framed to modify and correct. They are compatible with that regimen only. That is why it is received at this day with so much favour by certain States. VII.—For special cases—it was said—and in the view of the common interest of the family at large, the law demanded the intervention of some tutor on the female's part, as a simple measure of precaution against injury to the family estate. The new legislation certainly extended to many cases where that was not in question; but it left the *feme coverte* (and much rather the *feme sole*) in some respects still very free. Her solemn acts demanded the presence of the tutor; because they imported (*in posse*, at least) a diminution of patrimony; and, for the same reason, he was a necessary party to every alienation of the "*res mancipi*"—the most reserved of all family estates. But, beyond these limits, her administrative power was free. She might purchase, sell, lease, traffic, lend, grant releases of her own demands, satisfy her own creditors, make gifts by delivery, and assign her choses in action.†

The Church undoubtedly has always possessed a certain influence over the legislation, as well as the jurisprudence of Christian states. That influence has sometimes, as in the case of the Gothic codes and the laws of the Anglo-Saxons, been

* *Ubi suprà.*

† Ulpian XI., 27; Gaius II., 47, 81, 83, 85, III., 171; Vatic. fr. (*apud* Gide, p. 118, *n.* 2.), Cicero, Topic., 11, pro Flacco, 84.

exercised in a direct and immediate way, but more frequently in the way of persuasion only. Again, the Church herself has, at sundry times, undergone the counter-influences of the world, and her own laws concerning marriage have proportionally varied with the spirit of those times. Before she ascended the imperial seat of the Cæsars, the constitutions of the Cæsars, so often levelled against herself, were an abomination; and neither the antiquity of the Twelve Tables, the majesty of the *Consulta Patrum*, the equality of the *Plebiscita*, nor the wisdom of the *Honorarium Jus* and its commentators, could so far outweigh the considerations to which their Pagan origin undoubtedly gave rise, as to induce the Christians or their teachers to submit themselves, even in their secular concerns, to the guidance of those alien authorities. Therefore, during the first three centuries, at least, the apostolic doctrine of the perfect union and equality of rights between husband and wife, under the mystic headship of the former, continued to be the law, by which all their secular relations, no less than their spiritual relations, continued to be governed, and, upon occasion, to be enforced.* But, when the Church became herself a temporal power, and especially a Roman temporal power, a great revolution in her practice ensued. The *Jus Civile* of imperial Rome, nearly *en masse*, was received into the bosom of the *Jus Canonicum* of the Church, after some slight purification. Henceforth the condition of the Christian wife was entirely changed, or rather, remaining in the eye of the law temporal what it had ever been, it lost the alleviating protection of the law ecclesiastical. It is possible, as M. Gide suggests,† that the increasing fervor in favour of the life of virginity recommended by St. Paul himself, and after him by the Fathers, ‡ may have contributed to that result, whether by reconciling Christian minds in general to the change, or by

* See the authorities admirably classified in Gide, Liv., II., ch. I., pp. 191-201.

† *Ubi suprà*, p. 202.

‡ Corinth. VII., 25, Hermas Pastor II., IV., 4, S. Irenæ, *Adv. hær.*, 41, S. John Chrysost., De Virgin., t. I., p. 282, S. Jerome, Ep., 22, ad Eustoch., t. I., p. 144, contra Jovinian, I. 9, t. II., p. 330.

the opportunity which it offered to the more ascetical of their teachers. Be that as it may, there can be no doubt that, from the time when the Church became a power in the empire, the wife ceased, in the practice even of the ecclesiastical courts, to be dealt with as really and truly one with her husband, and, as such, entitled to the common rights of person and estate, which until then * she had enjoyed there. She reverted to her pagan status,—properly that known to us under the name of *feme coverte*,—a status altogether incompatible, as Mr. Macqueen has justly remarked,† with the theory of an union of persons, which has been imagined by some writers,‡ but has been disapproved by a learned writer of our own times. § For the canon law, from that time forth, denied the *communio bonorum*, and the equality which it implied; denied also the *paraphernalia*, and the separation implied in that; and revived the dotal regimen, ‖ with its necessary, or at least natural, consequence, the incapacity of the wife. Pursuing that incapacity with extremity of logic, the canon law reiterated, nay, surpassed, the imperial exclusion of women from all virile—that is to say, civic or out-of-door offices or occupations. As under the Empire, so now under the Church, they were disabled from becoming pleaders, arbitrators, accusers, sureties; but, more severe than the Empire, the Church now superadded the further incapacity of bearing witness in courts of justice. More than twelve hundred years later, we find it still in force in the courts of France, ever more prone to follow the Church in her rigor than in her liberality. Even so late as 1686, whilst Madame de Sevigné and Madame de Lafayette were in the height of their contemporary fame, a jurist, regretting that women were ever freed from that incapacity, laid down the doctrine that two male witnesses ought to outweigh three

* Godef. ad L. 27, c. Th. xvi. 2. Constitut. Apostol., III. 16.
† Rights and liabilities of husband and wife (1849), p. 18.
‡ Bracton, f. 429, *b*. Littleton § 168. I. Bl. Comm. 442.
§ Mr. Justice Coleridge; note (12) to I. Bl. Comm., 443.
‖ Nullum sine dote fiat conjugium, c. 6, caus. xxx. qu. 5, c. v. x. iii. 21, c. 28, c. 6, x. iv. 20.

female ones.* Not seventy years before that, however, the absolute incapacity, by the former canon law, of females to appear as witnesses in the courts, had been recognised and enforced in England, on the eve of our Great Civil War,† by a Puritan House of Commons, on the very popish authority of "St. Bernard," and at the instance of that very Protestant English lawyer Sir Edward Coke, who cited the mediæval saint.

It may be added that the recognition came much too late, for in the meantime the canon law had undergone another revolution. A new jurisprudence had come in with the barbarian conquerors of the Roman Empire; and, whether it were to signify her adhesion to the new powers, or to guard the temporal interests of her children against lesion, the Church found it equally incumbent upon her to accommodate her laws concerning persons and their rights to the code or capitulary of each successive invader. No contrast could be greater than that which these presented to the code of Imperial Rome, in every respect of personal rights, and especially those of females. On the one side there was the *dos*; on the other the *communio bonorum*, the *morgengabe*, and the dower; on the one side the right of equal partition; on the other that of the primogeniture of the male; on the one side the distinct and separate characters of husband and wife, on the other their union into one jural existence; on the one side the wife's incapacity; on the other her capacity; on the one side the gynecæum, on the other the home; on the one side the prohibition to plead and plight; on the other the jurisdiction of the "lady," or dame" to judge and govern the vassals of her court. Nor can it be denied that, if we look beyond the alterations then made in the Canon Law proper, and into the development which, under Church influences, the Roman civil law itself, where it came into contact with the rude and honest laws of the North, received all over Europe,

* Bruneau, Observ. Crimin. viii. 40.

† Mrs. Newdegate's case (1620) *apud* "Notes upon the Representation of the People Act, 1867," (Ridgway) pp. 92-93.

we shall find reason to estimate very highly the Church's merit in that respect. Whilst she reformed her own laws, by her canons and decretals, she transformed the *Jus Romanum*, the *Jura Barbarorum*, and the *Jus Feodorum* by her influence; and to accomplish this she never hesitated to resist all attempts —and they were many--on the part of the conquerors—and they were strong,—to anticipate Mr. Thomas Carlyle and Mr. Ruskin by raising "the mights of man" above "the rights of man." Thus, when against Philip Augustus himself, the punishment was decreed of the wrongs done to Ingelburga of Denmark, the Holy See, as M. Gide observes with great truth, ‡ "consecrated a yet higher principle than that of the indissolubility of marriage;" for "it proclaimed, before a society given up to all the violence of brutal strength, the equality of right between the strongest and weakest, between the man and the woman." And, as it was thus that the Middle Age grew up and consolidated itself (*crevit et facta est*) in every land, so it is even now nearly always easy to trace, in the monuments which it has left there of its jurisprudence and legislation, the respective shares which the Imperial Code, the Barbarian or Feudal laws, and the canons of the Church herself, had in the common work.

The written laws of some Aryan nations of the West, such as the Kelts and the Slavs, bear marks of the ecclesiastical instruction of their framers, and cannot be relied upon as evidences of what, before Christianity, were the reciprocal rights of the two sexes in those great divisions of the human race. As to the Kelts, the slight notices in Cæsar and the still fainter allusions in Tacitus, enable us to conclude only that there was a general resemblance, between their laws or customs, and those of the German tribes of their respective periods: and it seems quite certain that, in nearly every case where they differed, the distinction was due to a certain degradation of morality among the Kelts. * Perhaps the only exception to

* Ubi suprà, p. 206.

* De Bello Gallico, v. 14., vi. 19. The promiscuity of sexual intercourse, and the cruelties practised upon widows, contrast fearfully with the purity of old

this last remark is the case of the Keltic *dos* and *donatio propter nuptias* and their destinations, which, as described by Cæsar,* have puzzled the learned, † and were most probably a misapprehended version of some explanation, which he may have received of the Keltic usage of equal partition, between husband and wife or their estates, upon the dissolution of the marriage by death or divorce. ‡ But this must be left to conjecture. As to the præ-Christian Slavs, we have not even so much of information as we have of the Kelts. We know generally that, like those of the Kelts, the Germans, and every other Aryan people, the government was patriarchal, and that the ideas of the people were modelled upon their form of government; but how much of power the wladika (or head) of the family retained in his hands, and how much—or rather, whether any portion of it—was allowed to pass into those of his wives before the days of Cyril and Methodius § we cannot even conjecture. We must therefore content ourselves with what we do know, the condition of things amongst the German peoples; and that it will be seen is quite sufficient for our purpose.

The compilations of the Scandinavian laws, when compared with those of the Gothic, the Frankish, the Burgundian, and Lombard laws, are recent. But the very reverse is the case with regard to the laws which those compilations respectively contain. The Scandinavians have always been comparatively free from influences which, in the South, were very fatal to the simplicity and homogeneity of the laws of the sister nations, from the banks of the Rhine and the Elbe, who settled themselves among the ruins of the Roman Empire. Nor is it too

German morals, and the old German veneration of women. Spence's "Inquiry into the Origin of the Laws, etc." (1826), pp. 324-6.

* Id. VI. 19.

† Gide. p. 372. Humbert, du régime nuptial des Gaulois, p. 17, and Giraud; Histoire du droit français, p. 36.

‡ Dull Gwynedd Ant. LL. and Inst. of Wales. (Record Commission) 81. Dull Dyved, Id. 522-536. Dull Gwent., Id. 746-762. Compare however (for Ireland) the Seanchus Mor I. Antient Irish Laws and Institutes (Dublin, 1865), pp. 40, 48, 54, 151-4, *et passim*.

§ Yet the historian of the present Russian jurisprudence has done his best to give it a Slavonic and not a Byzantine origin. Ewers: Das aelteste Recht der Russen. Dorpat, 1826.

much to say that, whilst the philosophical historian of that empire has traced a picture of the "German manners" of his time, which we must confess to be very unlike to the later portraits, which we find in the capitularies and codes, drawn of themselves by their descendants after their migrations to the valleys of Tiber and of Po, of Tagus and of Douro, of Seine, of Loire, of Rhone, and of Garonne, is yet almost feature for feature the same with the historical representation of the mediæval condition of the North, and with the still living laws which are preserved to us in the Grâgâs, and with the traditions of the Eddas and Sagas which have never passed out of the people's remembrance.

The following are the leading characteristics of the laws and customs of all Teutonic tribes, having reference to our present subject. I.—The Aryan traditions ascribed the origin of the family to God, and therefore invested the Head with the attributes of sacrifice, judgment, and rule within his demesne. Those traditions were maintained in the north of Europe with the same tenacity as amongst the Hindûs. To this day the traces linger, and the name of the Scandinavian "Godord" records the time when every Udaller, within that demesne, was the hereditary priest, and judge, and lord thereof.* II.—The fame of intellectual superiority—nay of supernatural gifts—was awarded to the females of the tribe by common consent; at the same time that their general inferiority in point of bodily strength and martial capacity exempted them from the use of arms. For it was strictly an exemption only; and the cases were not few in which their occasional equality in that respect was too well asserted by feats of arms to admit of question.† It may, therefore, be safely asserted that, on the whole, the ascendancy of that sex was firmly established amongst the warlike peoples of the North, at the moment when they conquered their new seats in the

* J. Grimm; Deutsche Rechtsalterthümer, (1854), pp. 267-8. Deutsche Mythologie, 1854; pp. 469-80, 568. Tacit., Annal. II. 10, x. 1-16. De mor. Germ. 10. Caesar, de Bell. Gall VI. 21. Grâgâs Thingskapathâttr, 61.

† Spence; *ubi supra*, p. 327. Tacit., de Moribus Germ. 8.

heart of the crumbling Roman empire;* and that then, if ever, they deserved in its literal sense the honourable paraphrastic designation, by which their German posterity still love to describe women in general; that is to say "Men of the female sex."† And, to the very last, we find the Germans, even in their new settlements in the South, and amid so many changes of their old laws, as they were there led into, by the influences elsewhere referred to, still adhering with rigor to the principle, which enacted, for the death of the humblest woman, a punishment heavier than that by which the death of an Antrustion or even of a male Chief was avenged.‡

III.—But the exemption from the bearing of arms involved the like exemption from the duty of attendance in the public assemblies, whether of State or of justice, for all these were "*concilia armata.*" The woman's place in the family, the tribe, and the body politic was not the less advantageous to her on that account. She was a member of that co-partnery, in as large a sense as ever the Aryan race had known the right, and much larger than that in which the Hindús know it at the present day. Monogamy was the common law.§ The wife was the "gesell" of the husband, and not his chattel. Her personal and patrimonial rights were secured to her. In point of authority over the children and the common stock she was second to himself alone. On his death the headship of the house, for every substantial purpose, became hers by survivorship.‖ The unmarried female child was in the parental power; but so was the male child; and, in point of succession, the common law of equal partibility admitted no distinction of

* Spence's Inquiry, etc., pp. 323-4.

† Dr. Gustav Klemm; Die Frauen, etc., "Das heisst die Menschen weiblichen Geschlechts." (Dresden, 1854). Erster Band, s. 1. "Personen männ-und weiblichen Geschlechts." J. J. Moser; Versuch des neuesten Europäischen Völker-Rechts; 2ter Theil, (1778), s. 503.

‡ Spence, p. 326; Grimm, Rechstalterthümer, p. 404. Gide, 229.

§ Caesar (*ubi suprà*, I., 53), and Tacitus (*De Moribus*, 18) record an exception in the case of princes. M. Gide appends the curious remark, that the last example of this pagan privilege was that which, with the concurrence of Luther, the Landgrave Philip of Hesse asserted in the sixteenth century, pp. 234-5.

‖ Lex Scaniæ, p. 108; Grágàs. t. I., p. 305; Gide, 236.

sex.* Wife, widow, or maid, the political position of the old German female was not inferior to her civil *status*. She was capable of government; she was capable of priesthood; she was capable of military duty,† if she chose it. Her reputation for supernatural attributes amongst the heathen, no doubt, as Mr. Spence has remarked, ceased to be of advantage, when Christianity came in, and the neophytes decreed the death of every sorceress.‡ But that lamented writer has failed to see that the change was beneficial to her in another respect. If she was forbidden thenceforward "to write or send the Winileod," or to study the "Runes" any longer, she acquired a new title to her antient religious honors.§ Her intellectual superiority pointed her out to become the "*literata*" of the family, and to whom it properly belonged to learn and to teach the sciences divine and humane of the epoch; a privilege which was carried so far among the purer divisions of the German race, that, in partitions of estate, the legitim of the female included, not only the "robes, the jewels, and the gems" which "women wont to wear," but also "all books ministering to God's service which women wont to read."‖ IV.—It has been already observed, that the further the German invaders receded from their antient seats, the greater and the more rapid was the decline of those old manners. It is not surprising, therefore, that in the most remote of their new plantations, those of the Goths in the Iberian peninsula, where their codes were compiled by bishops, and approved and promulgated by Councils of the Church, nearly every trace of their primordial beginnings should have disappeared. And, although, between them of the South and the Scandinavians, there were many other German settlements varying from both, and each from other, in the degrees of fidelity to the pristine traditions of their race,

* Tacitus, de Moribus, 20.
† Gide, pp. 236-41.
‡ Spence, *ubi suprà*, pp. 364-6. Compare Gide, pp. 241-3.
§ "Honour God and thy wife." J. Grimm, Deutsche Mythologie, t. I., p. 369.
‖ Sachsenspiegel, I., 24, §. 3.; Procop., de bello Gothico I., 2,; Annal. Franc. Eccl., t. I., p. 477; Cassiodor. *Var.* IV., 1.

there can be no doubt that everywhere, except in the furthest North, a very general and thorough revolution speedily declared itself in favour of the Imperial civilisation, and the Modern Civil Law, and that everywhere — not less than in France, the *droit coustumier* was made to yield step by step to the *droit écrit.* V.—The *status* of women felt the change, yet not so much as might have been expected. For, strange and paradoxical as it may appear, the course of that adverse influence found a check in the little less adverse influence of feudalism, at that time rapidly working itself into power. The "*sexûs imbecillitas,*" whether of mind or of body, could scarcely be urged as an argument of universal incapacity, in times when "*dames temporelx*" * sate in Parliaments, and Councils of State, and concurred in their proceedings, when "*dames de grande estate*" † were numbered amongst the "*peers de realm,*"‡ presided in courts,§ led armies and commanded garrisons,‖ were declared competent for embassies,¶ were grand constables, earl marshals, high chamberlains, and hereditary sheriffs,** and performed those functions in person,—took part in elections to Parliament in England, and in the proceedings of States General in France,†† were deemed *capaces successionis* in respect of the Crown, in every kingdom of Europe but France,‡‡ and were in every European kingdom—for in this instance France herself opposed no exception — more than once called to the regency or guardianship of Crowns, not theirs by succession or inheritance.§§ VI.—The Salic Law

* Rot. Parl., vol. III., 6; Henr. IV. (No. 9), 546, *b.*: "Antiquity, etc., of Parliament" (1656), f. 76; Selden, Titles of Honor, f. 720; Collins, 1.

† "Statutes of the Realm," vol. II., p. 321, 20. Henr. VI, c. 9.

‡ Lady Despenser's case; M. 11, Henr. IV., 1, 15, pl. 34, Staundf., f. 152, *b.*

§ Whitelocke on the King's Writ, vol. I., pp. 476, *et seq.*

‖ Blount, T. 221.

¶ J. J. Moser, Versuch des neuesten Europäischen Völker-Rechts (1778) 3*ter* Theil, s. 97; Sir George Bowyer (1848), *ubi supra*, p. 58, *note* (*c*), Bynkersh. Qu. J. Publ., Lib. I., c. v.

** Butler's note (280) to Co. Litt., 325, b. 2, T. R. 406, 7, Mod., 270.

†† Olive *v.* Ingram, 7 Mod. 264 and cases there cited. Revue Britannique (Oct., 1838), pp. 250, *et seq.*; Laboulaye, *infra.*

‡‡ 1 Mar. I., St. 3, c. 2; Recherches sur la condition civile et politique des femmes, par M. Edouard Lefebvre, Laboulaye (Paris, 1843), pp. 109, 160.

§§ Laboulaye, *ubi supra.* 7, Mod. 270, 2, T. R. 406.

can hardly be objected to, even as an exception to the common right. The vulgar notion of that law is very inexact. It was by no means a law common to the Franks, but a local custom prevailing in the Salian corner of their Gaulish possessions. It did not exclude females altogether from territorial succession, * for it merely postponed them to all the males of the stock. It was not only inoperative to the prejudice of the former, with respect to the acquisition of and succession to *mobilia*, but it even preferred them to the males in that respect. †

It was not the law of modern France;‡ and the pretentions of the English son of Isabel of France § in the fourteenth century were repelled, by the House of Valois, upon entirely other grounds. They alleged the "*Coustume et loy particulière de la Maison de France*" ‖ not the law or custom of the land; and "*par vertu de cele coustume*,"—a mere family tradition of the Valois only, and not by virtue of any Salic or other law, —the exclusion of Edward the Third of England, and his line, from the Crown of France, continued to be justified by the French jurists until the middle of the sixteenth century, when for the first time Seyssel made the Salic Law familiar to France. It is wonderful indeed that, even at that late period, such an argument should have come into fashion, in a country whose recent accessions of territory were chiefly due to the utter absence of a Salic law, in the great annexed fiefs of Bretagne, Burgundy, and the like, and which was even then meditating a like acquisition, by virtue of the same *jus maritagii*, in Scotland too. And how far was this from being true, of Bretagne in particular, for two centuries after its annexation, we know, from a familiar example in the reign of Louis XIV., that of Madame de Sevigné, who not only inherited the fief which gave the right to be summoned to sit in the "Estates" of Bretagne, but was

* Dutillet, Recueil des Roys de France, t. 1, p. 308.
† Laboulaye, *ubi supra*, pp. 109, 160.
‡ Id. p. 448.
§ Dutillet t. 1, p. 308.
‖ Songe du Verger (circ. 1516), div. I, c. 147, *apud* Lefebvre. Laboulaye, p. 458.

so summoned, and, what is more, actually sat and took part in the proceedings of that important assembly.*

England's part in this long and eventful history of one of the most important of the provinces of law, written or unwritten, must be familiar to every English lawyer. To enforce it now upon the reader's remembrance is neither within the scope of this paper nor the space at our command. Suffice it therefore to say that it is the least satisfactory part of the jurisprudence and legislation of this country. It is a mass of incoherencies. Some of them have incidentally been passed under review, or noticed by way of illustration of the general topics, which have been presented in the course of the present dissertation. But there remain others not less worthy of comment. When the long-desired and often-promised measure for the revision and fusion of the two conflicting systems of law and equity shall at length be accomplished here—as it has been for British India—we may hope to witness the disappearance of those blemishes upon the administration of justice. Until then, we must be contented to bear with—and evade, as we can—the current anomalies of a system which combines, but does not amalgamate into one channel, the opposing streams of the old Teutonic custom, the theories of the Feudalists, and the doctrines of the Imperial Civil Law.

In the meantime we shall do well to profit of the sound counsels, with which one of the most learned, as well as most recent, of the continental jurists — of whose valuable researches the present writer has largely availed himself—concludes his "Study upon the private condition of Woman in Ancient and Modern Law," a memoir to which, to the credit of France be it said, the crown of merit was lately awarded by the Institute. Doubtless that most valuable essay—for so the modesty of M. Paul Gide, its author, is contented to describe it—contains much which is liable to be questioned, and some amount of error; more especially in that portion which concerns the common and statute law of England. But these

* Révue Britannique, Oct. 1838, pp. 250, *et seq.*

are but the spots on the disk of the sun. They in no wise detract from the splendour of the service, which that learned member of the bar of Paris has rendered to the science of the law in every civilised part of the globe. And if our legislators, in the new order of things which is to open upon us with the first day of January, 1869, shall find themselves strong enough to undertake a comprehensive revision of the laws of England, touching woman in her social, civil, and political rights, they cannot begin better, than by laying deeply to heart the whole of the eloquent "*critique et conclusion*" of M. Gide's profound and elaborate "*Etude*," and especially the following passages, with which we are fain to content ourselves, in the actual limits of the space at our disposal.*

"It is not in the power of the legislator, to deny to any human being the free exercise and honourable employment, of the faculties wherewith Nature has endowed him. Legislation loses sight of that principle when it excludes the Female from this or that field of commerce, or civil affairs. It violates principles and contradicts itself, when, after acknowledging in the Female the title and rights of proprietor, it despoils her of her credit—one of the lawful advantages and essential elements of her property. It will be replied, perhaps, that the women have no reason to complain; for, if the law does deprive them of their credit, it is precisely in their interest; and for fear lest they should abuse their credit to their own loss. Far be from us that hateful sophism, which has been prayed in aid of every form of servitude! It is not only the right, it is the duty of every man to make the most he can of all the powers, bodily or spiritual, with which God has endowed him. And the laws which condemn him to the leaving idle and barren any one of those powers, are always unrighteous and mischievous laws, be their pretext what it may. . . . To paralyse and suppress the natural action of a man is no more in the power of any legislator soever, than it is to change the nature of man. What the legislator may, perhaps, succeed in doing, is to transform the action which is legitimate and useful, into one which is illicit and hurtful; and he does so whenever he declares incapable of action one

* Gide, *ubi supra*, pp. 518, 523.

who by nature is capable thereof. He does not suppress—he perverts the social action of the incapacitated. For transactions which are honourable, he substitutes those of a culpable kind ; and, for loyal and fruitful dealings, fraud and litigation; and out of the way to wealth and concord, he makes a way to let ruin and disorder in. . . . The mischief reaches its height when, on the one hand, the incapacity is levelled against proprietors, whose interests are mixed up with all the civil transactions of the community, and, on the other hand, fixes itself upon one moiety of the persons composing it."

T. C. ANSTEY.

Notices of New Books.

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

Notes upon the Representation of the People Act, 1867. By Thomas Chisholm Anstey, Esq., of the Middle Temple, Barrister-at-law, London. Ridgway, 1867.

Like almost every important statute, the Reform Act of 1867 contains many provisions and enactments which are calculated to give rise to many complications and to many difficulties of construction, some of little, but some of very great importance. In fact the measure—perhaps inevitably, but still unfortunately—was framed in very great haste, discussed necessarily in a fragmentary manner, subjected to much trivial discussion, and rather hurried over at the end of the session ; and the consequence is that it perhaps contains even more than its due share of errors and omissions—certainly more than so exceedingly important a measure ought to contain. There is, however, fortunately still time to repair those errors and to supply those omissions before the statute comes into real operation, and before the questions relating to its construction become really important.

The object of Mr. Anstey, in the very able and elaborate volume, which is the subject of this short notice, is to give an analysis of the Reform Act of 1867, with observations on the probable effect of its various enactments ; and he carefully points out the various difficulties to which we have alluded with a view to their removal. To what extent Mr. Anstey is of opinion that these difficulties are likely to interfere with any benefit likely to be derived from the Act, appears from the following passage, which we quote at length :—

" Upon the whole it would be hard to find among the half-hundred volumes of Ruffhead's edition of the Statutes at large, a more lively illustration than is furnished by this Act, of the soundness and wisdom of the now forgotten ' Seventh Instruction to Draughtsmen,' ' Confidental, No. 14,' first issued in 1854, by a Statute Law Commission, of which commission were members Lords Brougham, Cranworth, and Westbury, the present Lord Chief Justice and Lord Chief Baron of England, Vice-Chancellor Sir W. Page Wood, and the late Lord Lyndhurst. It is as follows :—

" The practice of making a new law by incorporating, by reference,

the provisions of existing Acts on another subject, so as to make it necessary to read them *mutatis mutandis* should be used with great caution; as the result often is that brevity is attained at the cost of error and confusion."

"Those instructions were peculiarly applicable to a Bill which purported to compass not only the amendment, but a certain consolidation of the laws relating to the Electoral Franchise. In those respects it received no change in its passage. Together with the preamble which recited the expediency of amendment, but contained nothing to restrict the measure to the office of a mere Amending Act, Parliament also, without alteration, sanctioned the more comprehensive declaration of its purposes contained in the 'Short Title Section,' which ordains that "This Act shall be cited for all purposes as 'The Representation of the People Act: 1867.'" An Act thus intituled should have been so draughted as to suffice to itself; it ought not to have been forced to borrow, from a confused medley of older enactments, the keys to its own meaning. It may be too much to say that a perfect consolidation of that branch of the Statute Law should have been accomplished in the short space of a session, oppressed with the labours of amendment. But the attempt should have been made. It is not unreasonable to deplore in "The Representation of the People, 1867, Act," the almost entire absence of a criterion to determine the relative extent of constructive incorporation and of constructive repeal. A new Act is added to a list of enactments already numerous and complicated, where not absolutely conflicting; and instead of specifying which of these it is intended to abrogate and which to maintain, it purposes to incorporate them all within itself, but only "so far as is consistent with its tenour." Such an Act, it is submitted, cannot be said to deserve its title."

We hope that the observations and criticisms contained in this volume will carry due weight. We have not space to review them at the length and with the minuteness that they deserve, or we would willingly show more fully the skill and *acumen* with which the author works them out. We would also most willingly extract some further passages. Certainly no subject is more important, or ought to be more carefully studied, at this particular period, than the defects and difficulties of the new Reform Act, and Mr. Austey has done the best possible service in dealing with them so promptly and so clearly.

Treatise on Benefit Building Societies and Life Assurance Societies. By Arthur Scratchley, M.A. New Edition. London: C. and E. Layton. 1867.

THIS work is full of useful and practical details as to the formation and management of building societies and of local enterprise encouragement companies in general. The second part, or rather volume, for the work consists of two volumes bound in one, contains a great deal of matter concerning life assurance that will be found of

the greatest value by all interested in the subject, whether as insurers or otherwise. The whole book will be found also useful by lawyers, though rather addressed to the lay world of investors and insurers, for whom it is calculated to be an excellent, safe, and comprehensive guide. In all respects it is careful and complete, though the arrangement might be somewhat improved, so as to make reference more easy.

The American Law Review. July, 1867. Boston: Little, Brown and Co. 1867.

THE fourth number of this review shows no falling off in respect of interest and value from the standard of the previous numbers. It contains, besides the usual digests of the English and State reports, &c., articles on the limitation of the liabilities of ship owners by statute; the rights of action of a bankrupt; modern reform in pleading; seals (a curious collection of antiquarian notes), and government claims. We are always glad to call the attention of English lawyers to this organ of their American brethren.

The Metropolitan Poor Act, 1867. By R. Cecil Austin. London: Butterworths. 1867.

THIS edition of the Metropolitan Poor Act, 1867, is accompanied by an introduction, notes, and commentary, all useful and to the purpose. The editor is well qualified for his task, from his special acquaintance with his subject, and this edition of the Act will be of the greatest service to parish officers and to all who are interested in the condition and treatment of the poor.

Books Received.

The Government of England: its Structure and its Development, By W. E. Hearn, LL.D., Professor of History and Political Economy in the University of Melbourne. London: Longmans, Green, Reader & Dyer. 1867.

Ireland before the Union. By W. J. Fitzpatrick. London: Hotten. 1867.

A Treatise on the Law of Patents, as enacted and administered in the United States of America. 3rd Edition. By George Ticknor Curtis. Boston: Little, Brown, & Co. 1867.

The Upper Canada Law Journal.

The Lower Canada Law Journal.

The Journal of Jurisprudence. July, 1867.

The Law Times.

Hunter's Suit in Equity. Fourth Edition. By G. W. Lawrance. London: Butterworths. 1867.

Events of the Quarter, &c.

During the recess nothing has transpired of any moment connected with law, but the addresses and discussions of societies, which usually hold their meetings some time during the long vacation—a period best suited for the convenience of legal gentlemen to attend, who at other times are busily engaged in the practice of their profession. The foremost of these is the Social Science Association, which held its congress at Belfast, on the 18th of September; and next, the Metropolitan and Provincial Law Association, which chose Manchester for the scene of its discussions.

For many years the former had the advantage of Lord Brougham to preside over it, who annually gave a disquisition on all topics of legal and social importance requiring amendment—paving the way, as it were, for consideration of them in other places until ripe for legislation. The last two years the Association has had laymen at its head—and though jurisprudence is not by far the least important department of the Association, yet little has been mentioned by them on the subject of law reform. Lord Dufferin this year, as President, felt unequal to cope with the task; and his Lordship, in his address, which in all respects was excellent, only refers to the state of the law relating to landlord and tenant in Ireland, which, after all, is more a social than a legal question. A report from the Council recorded the progress made during the past year in some of the social questions which occupy the attention of the Association; and Mr. David Dudley Field gave an address on the "Community of Nations."

The Right Hon. Mr. Justice O'Hagan, as president of the Jurisprudence department, in his address dwelt at some length on the science of law, in the culture of which, he said, in these countries lawyers and laymen alike have long been inferior to the learned of the continental nations. Having disposed of native jurisprudence as far inferior to the Roman law, he takes, in their turn, statute law, codification, international law, and addresses himself peculiarly to the young men of his own profession on the study and acquisition of the law. On the subject of assimilation of the laws of England and Ireland, he pointed out instances where the Parliament of Ireland had anticipated English progress—as in a general registry of deeds and assurances, and the formation of county courts, which have existed in Ireland from an early period, and out of which sprung the office of assistant barrister, whose duty it was to aid and advise the justices at sessions, and at the same time to hold a civil court, of which he was constituted the sole judge, with a specified jurisdiction in cases

of tort and contract. In reference to these courts, which are called the Civil Bill Courts, the learned President goes on to say:—

"It is remarkable that, in the Civil Bill Procedure of Ireland, we find the germ of that fusion of law and equity towards the consummation of which we are daily advancing. The Civil Bill Court is a court of equity for the defendant;-and was so long before the statute permitted the pleading of equitable pleas in the superior law courts, or armed them with the powers of injunction, mandamus, and compulsory accounting, which enables the suitor, sometimes with great advantage, to dispense with the intervention of a proceeding in Chancery. We are destined, I have no doubt, to witness, more and more, that consolidation of jurisdictions with which our Scottish brethren are familiar; and which the experience of the American tribunals seems to assure us may be safely adventured here, for the more speedy and economical decision of causes, and the removal from us of the reproach that, in the same country, with the same subject matter separate courts are required to deal, on different and sometimes conflicting principles.

"I do not presume to judge of the condition of the local tribunals of England; but, certainly, our Irish ascertainment of the value of a skilled, capable, and independent lawyer, in directing and controlling trials at sessions, is not unworthy the consideration of those who have not had the advantage of the services of such a functionary. And our experience, in this regard, may, perhaps, lead us hereafter to raise the question, whether those services might not be more efficiently bestowed on circuits travelled, as at assizes, by changing judges, with a diminished probability of the exercise of local influence, and without the intervention of those who, having been mixed up, ministerially, with the initiative of criminal proceedings, in conducting preliminary inquiries, may not always find it possible to preside, at the close of them, with that absence of pre-conception and foregone conclusion, which is essential to the complete integrity of judicial action?"

Speaking of the appointment of a Public Prosecutor, an office which has endured for a lengthened period in Ireland, he said:—

"This is another of the singular instances in which Ireland has outstripped her more favoured sister. England has no Public Prosecutor. The Attorney General, save in cases in which he is specially engaged, has nothing to do with the management of criminal trials. The duty of prosecution is cast upon the injured; and the Executive Government does not charge itself with the responsibility of prompting them to activity, restraining their excesses, or assisting them to just and reasonable conviction. 'The most exalted functions of the Crown, and the most sacred rights of the subject, are left to the discretion of attorneys and policemen.' These strong words are not mine. They were spoken by the eminent Judge of the English Admiralty, Sir Robert Phillmore, when he introduced into Parliament a Bill to supply the want which he earnestly deplored.

"And this condition of things is allowed to continue, although the appointment of a Public Prosecutor has been urged for many years,

by the best and wisest men in England—including her three last Chief Justices—and has had the emphatic sanction of a Royal Commission, in 1844, and a Parliamentary Committee, in 1856.

"I know that the principle of action involved in such an appointment has been, more or less, the subject of controversy. I have, myself, been obliged, in the House of Commons, to defend the Irish practice against an able Anglo-Irish friend of mine; but it seems to me very plain that that system at least, and its general scheme and operation, is worthy the best attention of jurists in England, with a view to its absolute or modified adoption there.

"The supreme law of social safety is the warrant, as it should be the bounding measure, of the infliction of punishment, by man on man. That infliction is not designed to compensate for individual wrong, or satisfy individual vengeance. The "lex talionis" of the Hebrews is obsolete; and we hold in horror the "vendetta" of the South. We punish crime, only that we may prevent the repetition of it, and work the amendment of the criminal. Vindictive justice does not belong to human law. It cannot penetrate the depths of the soul, and gauge the worth of human actions by reaching their hidden springs, in the tangled motives and the various training, which make men what they are. It must be guided, in its conflict with fraud and violence, by a regard for the results to the community which requires protection, and to the offender who needs reform.

"Such are the principles which, in my judgment, should govern all penal jurisprudence. They are recognized by our ancient law, which institutes prosecution universally in the name of the Sovereign as the representative of outraged society; and makes the accused responsible, not to the accuser, but to the State.

"The course of our criminal procedure, pursued in the light of these principles, should be stately, calm, and passionless. The prosecutor should act in a judicial spirit. He should be impregnable to any influence of fear or favour. He should labour to discover truth and do justice, without any wavering from the clear line of duty, to undue pressure on the one side, or imbecile tenderness on the other. He should be conscious of his great responsibility in dealing with the interest of liberty and life, and beware, whilst he deals with them, of displaying temper, or indulging self-will, or making those sacred interests the subject of an unworthy struggle for forensic victory.

"Such conduct of criminal causes the public prosecutor can secure; but, if they be committed to the management of individuals—who may be poor, or corrupt, or revengeful—it will be sought in vain. The poor man may not have the time or means to prosecute effectually. The corrupt man will compromise with his adversary. The revengeful man will violate honour and falsify fact, to glut his malignant hatred. And so, the law will not be enforced at all, or enforced unjustly. Surely, the system under which such results are possible is a reproach to the great country which has so long endured it; and deserves the condemnation pronounced on it by Sir

Robert Phillimore, in the speech to which I have already adverted, as 'unwise, preposterous, and indecent.'"

He then glanced at "Crowner's Quest Law," dilated on the Incumbered Estates Court, the Irish Convict System, and Bankruptcy, all suggestive, in some respects, of beneficial assimilation to the English law on these subjects. He acknowledged the importance of the assimilation of the Irish Court of Chancery to that of the English, and, in referring to the revision of the Statute Law, wound up with some valuable comments on the history of the Brehon Law of Ireland of past ages.

The Master of the Rolls (Ireland) delivered a long address on the Repression of Crime. He commenced by reviewing the deterrent and reformatory element of punishment, and commented upon various modes of dealing with prisoners when arrested, or first brought before a magistrate. He said:—

"I shall perhaps be pardoned for referring to another instance in which our criminal law appears to me to treat the guilty with an over refined delicacy. Notorious offenders are a class whose existence is undoubted by the police, but ignored by the law. Why should not a man who is supposed to have committed several offences of the same kind, be tried for them together? If he has been in several successive employments in all of which his employer was robbed, though never robbed before or since, the inference must be that the accused committed the thefts which always happened where he was, and never when he was not there. This becomes stronger with each successive instance; yet in all the more grave offences called "felonies," each charge must be tried wholly by itself, and a profound silence be observed as to the others. The practised thief must be treated as if never before suspected. This rule does not apply to misdemeanours, and has been relaxed by the statutes which allow three cases of larceny or embezzlement against the same prosecutor, committed within six months, to be comprised in one indictment. That a limitation should be fixed as to the period within which the offences should be committed is reasonable, though "six months" seems a short one; but what is the reason for requiring that the property should be the property of the same person? Or that no more than three repetitions of the crime should be investigated? If a lodger and the landlord in the same house are robbed, or a man is employed in collecting debts for several employers whose monies are embezzled, the diversity of the ownership of the property rather increases the probability of the identity of the criminal. It is unreasonable that the commission of twenty peculations should expose the rogue to no more risk than the three to which the prosecutor is confined, and that a privilege should be accorded to the more heinous offenders who commit felonies which is denied to the less guilty, who commit only misdemeanours."

Prison discipline in its various forms is dwelt upon at considerable length. In treating of juvenile reformation, he refers to another social problem which is now in course of solution, and though not directly connected with punishment, appears a sort of corollary to

the propositions established in the case of reformatories, namely, how far should the State interpose in dealing with children who have not committed actual crime, but who, from the vice or neglect of those about them, are likely to fall into criminal courses? How far is the State justified in interfering with parental authority, and the natural relations of society, merely in the hope of making better citizens? And further, whether the imprisonment of young children, as a punishment merely, should not be wholly abolished? In reference to the latter he said:—

"The general theory of our law favours their irresponsibility. If a child is naturally so perverse and wicked that, without being educated in, or compelled to practise, crime, he will do so, he seems rather a fit subject for an asylum for mental disease than for a prison; and if his misdeeds are the consequence of training or compulsion, it is unjust to punish him without giving him an opportunity of escaping from the irresistible influences which he of himself could not avoid."

On the theory of punishment, in speaking of punishment in the two aspects in which it can be practically applied—deterring and reforming—he said:

"I do not, however, hold the theory advocated by many, that the sole justification for judicial punishment rests on its adaptability to these purposes. I think the idea of retribution should not be disregarded in any criminal code. I mean by "retribution" the infliction of pain as a consequence of guilt, irrespective of making satisfaction to the party injured. The emotion of resentment—*deliberate* resentment, as it has been called by moralists, to distinguish it from passion or revenge — is a part of our human nature, and given to us for some purpose. The expression in reference to one who has committed a crime, that he "deserves to be punished," involves a truth which our moral perceptions compel us to recognize, and which means more than that the person spoken of "requires to be improved." It seems part of the scheme of Providence that guilt should deserve pain, and that man should be the means of inflicting that pain on his fellow-man in cases involving their mutual relations. The question is not barren of practical consequences. If the theory which denies the right of inflicting pain for its own sake as an act of justice be carried to its legitimate consequences, the enormity of the crime should have no effect on the amount of punishment. Indeed, on this theory, it is hard to see why the infliction of pain, in some form or other, should be the means invariably employed with criminals."

Speaking on the subject of pecuniary fines, a class of punishment frequently inflicted for minor offences but which he considers open to great objection, he said:—

"Among the poor the punishment falls, not on the offender, but in reality on his family. A drunken or violent man is more likely to sacrifice the comforts, nay, the necessaries of his wife and children, than to forego his own evil indulgencies to pay a fine. The former may suffer to some extent by the loss of his labour during imprison-

ment, but he must bear at least the chief part of the pain inflicted by it: Of the fine they bear nearly all. For the wealthy, fines such as we often see inflicted even for serious assaults, are so inadequate that they are in truth no punishment at all."

With this truth he brings to a close his comments on the state of the criminal law, and sums up in the following:—

"The review upon which I have ventured may lead us to the conclusion that the field is not the most hopeful to labour in. The fear of punishment is weak, and its application uncertain. Reformation works in a limited sphere. Other known remedies for existing crime are few and imperfect. Statistical evidence of the decrease of crime shows to some extent the success of such measures; but we are aware how fallacious such evidence is. Many other causes leading to the same result co-operate, for which allowance must always be made—the general improvement of society—the spread of education, and the higher moral tone which pervades all classes. If then, while the tendency to crime exists, no punishment can be so certain and severe as effectually to deter, and no discipline so well devised as surely to reform, where are we to look further for improvement? Let the effects of these co-operative influences teach us. The great social problems, how to banish the want and misery which so often stimulate and seem to excuse crime, and the ignorance and vice which make the fitting instruments for its practice, are those which go to the root of the matter. They embrace a field more hopeful and more extensive than is open to the labours of our special department. They aim at preventing the growth of the noxious plants which our labours but struggle to destroy; they annihilate the disease which our labours can only mitigate."

In the department of Jurisprudence the following special questions, besides a number of voluntary papers, had been arranged for discussion and on which papers were contributed.

Section A.—International Law.

1.—Is it desirable that there should be an international currency; and if so, on what basis?

2.—Is it desirable to establish a general system of international arbitration? and if so, on what principle should it be organized?

Section B.—Municipal Law.

1.—On what points should the laws and procedure of England and Ireland be assimilated?

2.—Is it desirable to establish a Court of Criminal Appeal on the facts; and if so, on what plan?

3.—How far is it desirable to further centralize or localize the administration of justice?

Section C.—Repression of Crime.

1.—What better measures can be adopted for the repression of crimes of violence against the person?

2.—How can the organisation of our police be improved with a view to the more effectual repression of crime?

3.—Is it expedient and practicable to make prison labour productive and remunerative?

On the first question, in section A, Professor Leoni Levi and Mr. Pagliardini sent papers, and on the second Lord Hobart and Mr. David Ross.

On the first question in the Municipal Law section Mr. Herbert R. Mozley read a paper. He maintained that the Irish writ of summons and plaint introduced by the Common Law Procedure Act of 1853, should be abolished, and the English system of writ of summons and declaration substituted for it; that the English pleading rules of 1853 should be adopted in Ireland, and the mode of raising issues both of fact and law assimilated in both countries. The requirement of the Act of 1853, that every defendant shall state all the points material to his case, tended to multiply issues. With regard to the law of interpleader, he trusted that the provisions of the Common Law Procedure Act of 1860, by which the burden of the suit was shifted from the innocent defendant to the parties between whom the controversy really lay, would before long be extended to Ireland.

Mr. Hugh Hyndman, on the same question, reviewed the law and practice of the Civil Bill Courts in Ireland, and the difference between it and that of the English County Court in some points of inferior court jurisdiction affecting the superior courts, and stated some of the principal recommendations of the report of the committee appointed at the recent meeting of Quarter Sessions practitioners in Dublin. He considered that the jurisdiction of the Civil Bill Courts ought to be extended to cases of breach of promise of marriage, with power to the court to examine on oath all the parties to the action, and also to actions for criminal conversation. Also, that civil jurisdiction in slander should be given, but that in any case the damage should not exceed £5. Jurisdiction in bankruptcy ought to be given to the Quarter Sessions for the receiving proofs of debt and oral testimony; and the jurisdiction in equity, conferred upon the English courts by the Act of 28 and 29 Vict., c. 29, should be extended to the Civil Bill Courts in Ireland, and also, with the consent of the parties, the power to try actions beyond their jurisdiction. The English practice as to the issue and service of the processes of the court, and as to the venue, and also as to the notice of intention to defend, and the nature of the defence in cases of disability, ought to be adopted in Ireland. He condemned the present system of execution of process in Ireland as difficult and perplexing. He illustrated the pressure of the rule as to costs in the superior courts where the debt in contract did not amount to £20, and considered it might prove beneficial to suitors in the Irish Civil Bill Courts if the English provisions for removing County Court causes into the superior courts were extended to them. He suggested a cheap and simple means of converting the Civil Bill decree into a judgment that would carry interest, would operate as a charge in equity on lands, would

enable the Sheriff to seize and sell chattels real, and might be registered as a mortgage with its ordinary priority, or upon which Government stock and securities in public companies could be charged, or a debt in the hands of a garnishee attached; or, when the decree was under the proposed equitable jurisdiction, of giving it the force and effect of a decree of the Court of Chancery. These objects he proposed to accomplish by a registry of the decree, under certain restrictions, in the office established under the 7th and 8th Vict., cap. 90, or according to the practice of the Court of Chancery.

A paper by Mr. Henry Miller, of Glasgow, followed. It described in detail various evils arising from the difference in the laws of the three kingdoms, directing particular attention to the inconvenience and hardship suffered by creditors in each country in being compelled to institute new processes against their debtors when they left England for Ireland or Scotland, or when they left any one of these countries for any other.

A discussion followed the reading of the papers, and the suggestions contained in them were generally approved.

On the second special question papers were read by Sir J. E. Eardley Wilmot, Bart., and Mr. Charles Clark. Sir Eardley Wilmot said, it frequently happened, after the conviction of an accused person—and perhaps even more so after acquittal—that facts transpired which, had they been presented at the trial to the jury, would have given a different complexion to the case submitted to them, and altered their verdict. The defective mode adopted in public prosecutions was very naturally the cause of this, left as they were mostly to private individuals. At present the Home Department was the only Court of Appeal wherein sentences were altered or set aside without the authority or publicity of a regular court of justice, by a single functionary without the judicial qualifications for forming a judgment, and without the necessary appliances for receiving and weighing testimony. The life of any individual at the last, when placed in the balance of death and eternity, should not depend upon the fiat or judgment of any one man, however exalted his intellect, or eminently and deservedly respected his moral character. There were two modes of instituting such a court—one by extending and enlarging the powers of the existing Courts of Appeal in criminal cases, now confined to matters of law, by empowering them to deal with matters of fact also; the other by the institution of a Supreme Court of Appeal, after the name and form of the Cour de Cassation in France, composed, as that court was, of two departments—the subordinate or outer department, to be presided over by three judges, who should sit as a preliminary court to decide the question as to whether the case should be submitted or not to the superior or inner court, presided over by five judges at the least. Of the two courses suggested for constituting a Court of Criminal Appeal, he was in favour of the last, and thought that such a court should be surrounded by every aspect of pomp and dignity, and should be open to the humblest and poorest, as well as to the rich and influential.

Mr. Charles Clark followed on the same subject. He recommended the establishment of such a court, to which, on the criminal showing reasonable probability of error, the matter could be publicly re-heard by the party who heard it, and others equally fitted to decide; and the decision, however disliked by the defeated party, having the advantage of publicity, and thereby avoiding all imputation of private influence or unfairness, would become the judgment, not merely of those who pronounced it, but of the public in general. There is a demand for the establishment of some means by which a verdict in a criminal case, deemed to be erroneous upon the facts, should be re-considered. He was of opinion that the criminal who thinks that his conviction has been wrongly pronounced, and that the evidence does not sustain the verdict, should be at liberty to apply to any one of the superior courts for a new trial. At present he can only ask for relief in a matter of law. Justice requires that he should be able to do so in reference to a matter of fact. If this is done the cause of justice—in other words, the real interest of the public—will be benefited.

On the third question Dr. Pankhurst read a valuable paper. After referring to the local administration of justice in ancient times, and the constitution of tribunals of commerce on the Continent, he said commercial courts were not wanted in order to possess a voluntary court of arbitration, for chambers of commerce furnished now this instrument for the conclusion of commercial differences, and the efficiency of that instrument is only conditioned by the sagacity with which it is worked, and the amount of satisfaction its action gives to those who come under its jurisdiction. Having referred to the various views held as to the constitution and character of tribunals of commerce, he expressed the opinion that their three great attributes were—convenience of situation, simplicity of procedure, and promptness of decision,—that these three things were, in effect, the expression of the two great duties which civil government owed to the people over which it exercised dominion—namely, to make the laws to be obeyed simple and clear, and to administer those laws conveniently and cheaply. Therefore, the way to escape from the present evils in the legal system was not to establish special tribunals which destroy unity in the law and uniformity in its administration, but to insist on the due performance by the State of its two fundamental duties towards the community. The rules of law should be clear, consistent, and comprehensive; the proceedings should be simple; the administration should be convenient, and, therefore, local. A code which would give a complete system of legal rules accurately classified and precisely expressed, would be an immense boon to the profession and to the public, and would supply to local tribunals the only thing necessary to give them complete efficiency. He considered, also, that there was a national need for a complete provision for local justice, inasmuch as at present some of the existing local courts had considerable extent of jurisdiction, many with large business, and concluded by observing that the centralisation of justice gave them unity in the substantive law, and uniformity in its appli-

cation. The localisation of justice can alone make the law efficient, prompt, and economical in respect of administration.

Of the voluntary papers, Mr. G. R. Tennent read one on the expediency of remunerating trustees executing private trusts. He advocated assimilation to the Scotch system, and urged that facilities should be afforded to private trustees to have the power and option of placing the estates under their care in judicial administration, and thus, *inter alia*, securing the great advantage of an annual audit of their accounts.

A paper was read by Mr. Edward Gardner, in favour of the abolition of the oaths. On discussion, the meeting was of opinion that it was undesirable to do away with the form of oaths in courts of justice.

The subject of Trial by Jury in England, Ireland, and Scotland was discussed in their papers by Mr. Serjeant Pulling, Mr. O'Hagan, Q.C., and Mr. G. R. Tennent.

The paper by Mr. Serjeant Pulling was on the English System. He proposed that the legal qualification of jurymen should be altered, and that instead of the honorary test at present existing some more liberal test should be had, so as to include, in addition to those already serving, others who were exempted. Lists should be made out, revised, and compiled as the Parliamentary lists are—there should be a roll of service kept—and there should be a rotary service, so that all persons who were marked for juries would take their proper share of the work. A penalty should be inflicted on those who neglected their duty in making out the lists. Jurymen should be remunerated, and those who did not attend should be punished.

The paper of Mr. O'Hagan, Q.C., had reference solely to the jury system in Ireland, in which he complained of the absolute discretion entrusted to the sheriff of selecting jury panels. He would exclude from the box in definite and equal numbers, to prosecutor and prisoner; and in reference to the right of peremptory challenge by the Crown, he said, that the result was that the panel was first selected by an officer substantially appointed by Government, and next that the prosecutor had a really unlimited power of challenge. He advocated a proper remuneration to jurors for their time and expenses, and the abolition of the system of keeping juries without food or other refreshment, and thus starving them into returning a verdict. He said, in conclusion, that much had been said in praise of trial by jury, to all of which he cordially subscribed, but in this, as in other cases, the corruption of the best might prove the worst, and there was nothing which more interested the community than to remove blots and imperfections from a system which in the ideal is so admirable.

Mr. Tennent said that the procedure in Scotland is similar to that followed in England; but unanimity is not required after the expiry of three hours' deliberation. The expenses of jury trial are much greater in Scotland, and the tendency is to dispense with it as much as possible. The qualification of jurors in criminal cases is the same as in civil proceedings as regards common juries, but criminal juries receive no remuneration. If the prisoner pleads guilty, his plea

must be signed by himself or his counsel. The prosecutor, however, cannot be compelled to receive such a plea, but may proceed to lead evidence before a jury after it has been recorded. When the plea is "not guilty," the jury are at once balloted and sworn. The verdict may be pronounced by a majority of the jury when they are not unanimous. On the whole, the system of criminal jury procedure may be regarded as very efficient.

Mr. Falkiner, Q.C., read a paper on the rule of evidence, excluding the testimony of witnesses, especially that of married persons in certain cases, and of the parties to action for breach of promise, in which he described and illustrated the untenable grounds on which the principle of excluding evidence rested, and the great injustice that followed the attempt of applying it as a general rule. He stated that the principle of exclusion on the ground of interest still existed in the following cases: actions for breach of promise of marriage—married persons in criminal proceedings—married persons and parties in the suit in proceedings instituted for adultery, and criminals; and showed reasons for the abrogation of the general rule.

Mr. Lowry Whittle followed on the exclusion of the evidence of the prisoner in criminal cases, in which he argued that the prisoner should be examined on oath, with the exception that he should not be cross-examined as to general credit.

Mr. James Heron and Mr. George Perry contributed papers on the subject of Bankruptcy. The former dwelt on the want of uniformity between the bankrupt law of England and Ireland, which was frequently both vexatious and embarassing, and urged the want of a law to cheaply and expeditiously realize and divide a bankrupt's estate. He would borrow from the Scotch law on the subject that relating to administration apart from the judicial department, which, with his proposed amendment on the Irish system, he believed would work advantageously to all parties concerned. The latter made several suggestions as to improving the laws, making a quicker return of the bankrupt's assets, and to have a more complete system of punishing dishonest bankrupts—a punishment which, at present, was impossible. He suggested that, in certain cases, the dishonest bankrupt should be punished by refusing to allow him to pass his final examination, and, in cases of greater dishonesty or extravagance, and gambling trade, such other punishment should be added to the refusal of certificate as would prevent the bankrupt from again beginning to trade.

Mr. G. W. Hastings, the General Secretary, spoke on the subject of the law as to the property of married women. After referring to the ancient systems, he said, that only ladies with a considerable amount of property could have a marriage settlement. In the case of women who had saved small sums before marriage, there was no protection, and no law could prevent the husband from spending his wife's money, or his wages, as he thought proper, however recklessly, to the injury of his family.

A paper by Mr. Dix Hutton, "On the Record of Title in Ireland," giving a description of its working and advantages, illus-

trated by practical examples, terminated the work of the department.

Several papers were read in the section of "Repression of Crime," of great interest, but which we have not space to report.

SIR W. H. BODKIN.

The justices of Dover have presented the following address to Sir W. H. Bodkin, the Assistant Judge of the Middlesex sessions and Recorder of Dover, expressing the high gratification with which they heard that Her Majesty had been pleased to confer upon him the honour of knighthood.

"It will ever be a source of pride for us and all the inhabitants of this ancient Cinque Port to remember that one who has received so distinguished a mark of Her Majesty's favour has been for many years associated with this borough in the highest judicial capacity; and while we have watched with admiration your wise, firm, and impartial administration of justice, we have individually the most pleasurable recollections of the unvaried courtesy and kindness we have experienced at your hands. We earnestly trust that your judicial career may yet be continued, not only in connexion with this borough as our Recorder, but also in that still higher position which you so worthily fill as the Assistant Judge."

CENTRAL CRIMINAL COURT.

The grand jury, on being discharged at a recent sessions, submitted the following presentment to Mr. Baron Bramwell:—

"The grand jury summoned at the present session beg to call the attention of your Lordship, the judges, and the bench to the nature of the numerous cases brought before them. At a sessions heavier than has occurred for some months—nearly two hundred bills of indictment have been presented to them—it appears the majority of the cases have been burglaries and robberies with violence from the person. The grand jury would submit that the evidence in the majority of these cases has been so clear, that it was obviously unnecessary to present the cases for their investigation; that the public—both prosecutors and witnesses—have been put to serious inconvenience, as well as the time of the grand jury taken up, by these cases, which, having been fully gone into by the police magistrates, might have been committed for trial without being sent before another tribunal. On the back of each bill is the name of at least one police constable, on some three and four; and the serious detriment to the public service, and the consequent failure of justice in many instances by such a number of constables being withdrawn from their ordinary duty, seems, in the opinion of the grand jury, to call for some alteration in the law, by which, in minor cases, the preliminary forms in the administration of justice may be facilitated; and, therefore, through the proper channel, they beg to draw the attention of Her Majesty's judges, and, through them, of Her Majesty's Government, to this important question."

LORD KINGSDOWN.

The Right Hon. Thomas Pemberton Leigh, Lord Kingsdown, who died at his country residence, Torre Hill, in Kent, on the 21st October, was the son of Mr. Pemberton, barrister-at-law, and was born on February 11, 1793. He was called to the bar in 1816 by the Hon. Society of Lincoln's Inn, and was invested with the silk gown in 1829. He practised in the Rolls Court, of which he became the leader. In 1841 he was appointed Attorney-General to the Prince of Wales. In 1843 he succeeded to a life interest in the Wigan estates, from which he derived a most ample income, and, in accordance with the will of Sir Robert Leigh, he took the surname of Leigh. Shortly afterwards he retired from professional practice, but continued to manage the estates of the Duchy of Cornwall. For twenty years Mr. Pemberton Leigh performed his judicial duties without emolument or reward, until he was elevated to the peerage by the Earl of Derby in 1858.

THE RIGHT HON. FRANCIS BLACKBURNE.

The Right Hon. Francis Blackburne, late Lord Chancellor of Ireland, died on the 17th September, at his residence, Rathfarnham Castle, at the age of 85 years. He was born in 1782, at Footstown, in the county of Meath, and is a descendant on the maternal side from Dr. Ezekiel Hopkins, who was Bishop of Derby during the famous siege. In 1798 he entered the University of Dublin as a student, where he won a scholarship, a gold medal, and other distinctions. In 1805 he was called to the bar, and in 1822 he attained the dignity of King's Counsel. In 1823 he was appointed to act as judge in the counties of Limerick and Clare, under the administration of Lord Wellesley, to enforce the Insurrection Act, and so continued until 1825. He was appointed Attorney-General in 1830, and remained in office up to 1835. In 1841 he was reinstated in the office of Attorney-General, and in the following year, on the death of Sir Michel O'Loghlen, he was promoted to the office of Master of the Rolls. In 1846 he was transferred to the Chief Justiceship of the Queen's Bench, and in that capacity presided at the special commission which tried Mr. Smith O'Brien and his associates in the rebellion of 1848. In 1852 he was promoted to the office of Lord Chancellor, which he vacated on the retirement of the ministry. In 1856 he was appointed to the newly created office of Lord Justice of Appeal in Chancery, which he retained until the return of the present ministry to power, when he was induced to accept the Great Seal again, which, early in the present year, his failing health suggested the necessity of resigning.

THE RIGHT HON. HORATIO WADDINGTON.

The Right Hon. Horatio Waddington, late Under Secretary of State for the Home Department, died at his residence in York Place on the 3rd of October. He was the son of the late Rev. George Waddington, Vicar of Tuxford, Notts, and brother of Dr. Waddington,

Dean of Durham. He was born in 1798, and was educated at the Charterhouse; he afterwards proceeded to Trinity College, Cambridge, where he graduated M.A. in 1823. He was a wrangler, Chanceller's Medallist, University Scholar, and a Fellow of his College. He was called to the Bar of Lincolns' Inn, in 1825, and formerly held the office of recorder of Warwick and Lichfield. In 1848, he succeeded Mr. March Phillips as under Secretary of State. Mr. Waddington was sworn a member of the Privy Council, in 1866, and on his resignation was appointed on the Judicial Committee. He was also a member of the Cambridge University Commission.

MR. WILLIAM MOODY.

The late Mr. Moody, Barrister-at-Law, who died on the 9th of October, in the 74th year of his age, was educated at Winchester School, (where he took several prizes), and afterwards at Trinity College, Cambridge, where he graduated B.A. in 1815, 9th wrangler and M.A. in 1818. He was elected to a fellowship in 1816, was called to the Bar in Lincoln's Inn in 1820, and went the Western circuit. He was subsequently appointed standing counsel to Trinity College, Cambridge, but his chief work in the law was his editorship of the Crown cases from 1824 upwards, jointly, and sometimes solely with, in succession, Sir Edward Ryan, Mr. Frederic Robinson, and Mr. Malkin.

BAR EXAMINATIONS.

At the July examination on the subjects of the lectures and classes of the readers of the Inns of Court, held at Lincoln's Inn Hall, on July 1, 2, and 3, 1867, the Council of Legal Education awarded the following exhibitions to the undermentioned students, of the value of thirty guineas each, to endure for two years:—Constitutional Law and Legal History, Mr. William A. Hunter, student of the Middle Temple; Jurisprudence, Civil, and International Law, Mr. Rooke Pennington, student of the Inner Temple; Equity, Mr. Robert Bannatyne Finlay, student of the Middle Temple; the Common Law, Mr. George Sangster Green, student of Lincoln's Inn; the Law of Property, &c., Mr. Job Bradford, student of Lincoln's Inn.

The Council of Legal Education have also awarded the following exhibitions, of the value of twenty guineas each, to endure for two years, but to merge on the acquisition of a superior exhibition:—Equity, Mr. John Arnell Creed, student of the Middle Temple; the Common Law, Mr. Rooke Pennington, student of the Inner Temple; the Law of Real Property, &c., Mr. Charles John Wilkins, student of the Middle Temple.

APPOINTMENTS.

Lord Cairns, Sir W. Earle, Sir J. P. Wilde, Sir W. P. Wood, Mr. Justice Blackburn, Mr. Justice Smith, Sir J. B. Karslake, Q.C., M.P., Sir Roundell Palmer, Q.C., M.P., Mr. W. M. James, Q.C., Mr. J. R. Quain, Q.C., Mr. H. C. Rothery, Mr. Ayrton, M.P., Mr. Hunt, M.P., Mr. Childers, M.P., Mr. J. Hollams, and Mr. F. D. Lowndes, have been appointed a Royal Commission to inquire into the operation and effect of the present constitution of the English Court of Chancery, the Superior Courts of Law at Westminster, the Central Criminal Court, the Court of Admiralty of England, the Admiralty Court of the Cinque Ports, the Courts of Probate and Divorce for England, the Courts of Common Pleas of the Counties Palatine of Lancaster and Durham, and the Courts of Error and Appeal from all the above-mentioned tribunals, as also into the operation and effect of the present separation and division of their respective jurisdictions, and also into the operation and effect of the present arrangement for holding of sittings and assizes in England and Wales, and of the present divisions of the legal year into terms and vacations; and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said courts respectively, as well in court as in chambers, with a view to ascertain whether any and what changes and improvements, either by uniting and consolidating the said courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of the judges in the said courts or any of them, or empowering one or more judges in any of the said courts, to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said courts or any of them, or of the sittings and assizes, is now distributed or conducted or otherwise, may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the judicial business now transacted by the same courts, and at the sittings and assizes respectively; and further to make inquiry into the laws relating to juries, especially with reference to the qualifications, summoning, nominating, and enforcing the attendance of jurors, with a view to the better, more regular, and more efficient conduct of trials by jury, and the attendance of jurors at such trials. Mr. Thomas Joseph Bradshaw, Barrister at Law, has been appointed Secretary to the Commission.

Sir Alexander Young Spearman, Bart., Mr. John Fowler, C.E., Mr. John Mulholland, Mr. Seymour Clarke, and Mr. Christopher Johnson, have been appointed a Royal Commission on Irish Railways, and Mr. W. Neilson Hancock, LL.D., Secretary.

Lord Justice Sir John Rolt and Sir R. J. Phillimore (Judge of the Admiralty Court) have been sworn in Privy Councillors.

The honour of knighthood has been conferred upon Mr. William

Henry Bodkin (Assistant Judge of the Middlesex Sessions), Mr. Charles Jasper Selwyn (Solicitor-General), Alderman William Anderson Rose, Alderman and Sheriff Waterloo, Sheriff Lycett, and Hon. John Iles Mantell (late Chief Justice of the Settlements in the Gambia).

Dr. Travers Twiss has been appointed Queen's Advocate, in the place of Sir Robert Phillimore, promoted.

Mr. Woolrych, Police Magistrate, has been transferred from Southwark to Lambeth, and Mr. Partridge from Thames Street to Southwark. Mr. Ralph Benson, Recorder of Shrewsbury, has been appointed to the vacancy created by the resignation of the Hon. G. C. Norton, and Mr. William Fenton Fletcher Boughey, of the Oxford circuit, to the Recordership of Shrewsbury, in the place of Mr. Benson, appointed Stipendiary Magistrate.

Mr. F. E. Guise, Recorder of Hereford, has been appointed Stipendiary Magistrate of Sheerness. Mr. Guise has received the sanction of the Government to hold the Recordership in connexion with his new appointment.

The Honourable Adolphus Liddell, Q.C., has been appointed Under Secretary of State for the Home Department, in the place of the Right Hon. Horatio Waddington, resigned.

The following have been appointed Assistant Boundary Commissioners under the new Representation of the People Act :—Mr. N. J. Senior, Mr. J. Horne Payne, Mr. Joseph Kaye, Mr. R. C. Palmer, Mr. Hugh Cowie, Mr. W. S. Ollivant, Mr. John Bramston, Mr. John L. Wharton, Mr. F. D. Longe, Mr. J. S. Dugdale, Mr. E. Bullock, Mr. F. W. Gibbs, Mr. P. Cumin, Mr. Frederick Clifford, Mr. Serjeant Tindal Atkinson, Mr. A. Bathurst, Mr. H. C. Merivale, Mr. J. L. Johnston.

Mr. George Lathom Browne has been appointed a Revising Barrister on the Norfolk circuit.

Mr. George Long, of the Chancery Bar, has been appointed Secretary of Presentations in place of Mr. Lushington, resigned.

Mr. Clarke Aspinall, Solicitor, has been appointed Coroner for the borough of Liverpool.

Mr. C. W. Sykes has been appointed Assistant Solicitor to the Official Assignees of the Bankruptcy Court.

Mr. Frederick M. Metcalfe, Solicitor, of Wisbech, has been appointed Clerk of the Peace for the Isle of Ely and Registrar of the County Court; Mr. Freeland Filliter, Town Clerk of Wareham, in the room of Mr. C. O. Bartleet, deceased ; Mr. Leonard J. Deacon, Deputy Clerk of the Peace for Peterborough, in the place of Mr. W. Lawrance Bell ; and Mr. E. A. Grundy, Registrar to the County Court of Bury.

Mr. A. T. Squarey, of Liverpool, has been appointed Solicitor to the Mersey Docks and Harbour Board, in the place of Mr. North, resigned.

IRELAND.—Mr. H. E. Chatterton, Attorney-General, has been appointed Vice-Chancellor of Ireland, under the recent Chancery Act. Mr. Warren, Solicitor-General, has been appointed Attorney-General.

Mr. Michael Harrison, Q.C., has been appointed Solicitor-General in the place of Mr. Warren.

Mr. J. F. Elrington, LL.D., has been appointed Crown Prosecutor at Armagh, in the place of Mr. S. Ferguson.

Mr. John F. Townsend Q.C., LL.D., has been appointed Judge of the New Admiralty Court, and Mr. A. H. Barton, Registrar.

Mr. Abraham T. Chatterton has been appointed Chief Clerk to the Vice-Chancellor of Ireland.

The mastership of the Court of Exchequer has been conferred upon Mr. J. Corry Lowry, Q.C.

Mr. Thomas E. Webb, LL.D., has been appointed Professor of Civil Law in the University of Dublin.

The Right Hon. the Attorney-General has appointed Mr. John George Gibbon, of the Leinster Bar, to be his counsel, in place of Edward Spencer Dix, Esq., appointed a Divisional Justice of Dublin.

SCOTLAND.—Mr. John Hill Burton, advocate and doctor of laws, has been appointed Historiographer to the Queen for Scotland, and Robert Berry, Esq., advocate, Professor of Law in the University of Glasgow.

Mr. John Bartlemore, writer, of Paisley, has been appointed justice of the peace clerk for Renfrewshire.

CONSTANTINOPLE.—Mr. Philip Francis, Legal Vice-Consul, Cancellier and Registrar of the Consular Court in Egypt, has been appointed Consul General at Constantinople, in the room of Mr. Logie, deceased.

INDIA.—Mr. Robert Spankie, of the Bengal Civil Service, has been appointed Judge of the High Court of the North-Western Provinces and Mr. John Connor, Senior Magistrate of Police at Bombay.

LABUAN.—Mr. John Pope Hennessy has been appointed Governor and Commander-in-Chief of the Island of Labuan and its dependencies.

Necrology.

May.

23rd. STUTZER, J. JULIUS, Esq., Barrister-at-Law, aged 47.

July.

20th. MACDOUGALL, Hon. W. C., late Puisne Judge of the Supreme Court of Jamaica, aged 66.
23rd. HARRISON, Hon. S. B., Barrister-at-Law, aged 65.
23rd. SKINNER, WILLIAM HENRY, Esq., Barrister-at-Law, aged 25.
27th. KING, JAMES, Esq., Solicitor.
28th. JESSOPP, F. JOHNSON, Esq., Solicitor, aged 53.
29th. MACAULAY, KENNETH, Esq., Q.C., aged 52.
29th. BROMEHEAD, J. CRAWFORD, Esq., Solicitor, aged 49.
31st. O'MALLEY, HENRY, Esq., Barrister-at-Law.

August.

6th. MACKAY, SHERIDAN KNOWLES, Esq., Barrister-at-Law.
7th. MILLER, HENRY, Esq., Solicitor.
8th. DAWSON, JOHN, Esq., Barrister-at-Law, aged 78.
10th. HARROLD, WILLIAM HENRY, Esq., Barrister-at-Law, aged 41.
15th. GREEN, FREDERICK, Esq., Solicitor.
20th. LOGIE, D., MALCOLM, Esq., Judge of the Consular Courts and Consul-General, Constantinople, aged 45.
20th. HUNT, WILLIAM, Esq., Solicitor, aged 54.
21st. CLARKE, W. H., Esq., LL.D., Recorder of Rangoon.
23rd. BULLAR, JOHN, Esq., Barrister-at-Law, aged 60.
25th. BLAKEY, GEORGE, Esq., Solicitor, aged 52.
26th. PASHLEY, HENRY, Esq., Solicitor.
27th. EARLE, HENRY, Esq., Solicitor, aged 64.
29th. HOWARD, E. IRVINE, Esq., Barrister-at-Law, aged 41.
29th. YOUNG, ROBERT, Esq., Solicitor, aged 51.

September.

1st. Hill, Henry, Esq., Solicitor, aged 65.
2nd. Bore, J. Pearson, Esq., Solicitor, aged 67.
3rd. Pittor, Edward, W., Esq., Barrister-at-Law, aged 37.
3rd. Bartlett, C. Oldfield, Esq., Solicitor, aged 73.
3rd. Home, Robert, Esq., Solicitor, Town Clerk of Berwick-upon-Tweed, aged 75.
4th. Burrell, E. Montague, Esq., Solicitor, aged 45.
7th. Walford, Desborough, Esq., Solicitor, aged 71.
7th. Allen, G. C. G., Esq., Solicitor, aged 30.
10th. Smith, William, Esq., Solicitor, aged 74.
11th. Gardner, Richard, Esq., Solicitor, aged 34.
12th. Home, Drummond Henry, Esq., Barrister-at-Law, aged 84.
15th. Fenwick, H. W., Esq., Solicitor, aged 52.
15th. Oliver, James, Esq., Barrister-at-Law, aged 48.
17th. Blackburne, Right Hon. Francis, late Lord Chancellor of Ireland, aged 85.
21st. Watermeyer, E. B., Esq., LL.D., Second Puisne Judge of the Cape of Good Hope, aged 43.
25th. Bilton, Thomas, Esq., Solicitor, aged 70.

October.

3rd. Waddington, Right Hon. Horatio, Barrister-at-Law, and late Under Secretary of State for the Home Department, aged 68.
7th. Majendie, Ashurst, Esq., F.R.S., Barrister-at-Law, aged 83.
7th. Kingsdown, Right Hon. Lord, aged 74.
8th. Sutherland, Kenneth Leith, Esq., Barrister-at-Law, aged 52.
9th. Moody, William, Esq., Barrister-at-Law, aged 73.
25th. Lawrence, Frederick, Esq., Barrister-at-Law, aged 46.

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QUARTERLY JOURNAL OF JURISPRUDENCE.

No. XLVIII.

ART. I.—CORRUPTION AND COST OF ELECTIONS. THE CORRUPT PRACTICES AT ELECTIONS BILL.—By W. D. CHRISTIE, formerly Minister in Brazil.

THE necessity of immediate vigorous efforts for the general education of our future electors under the new political arrangement has been lately urged anew by several eminent men; and legislation on this great subject cannot long be deferred. But the subject of national education is wide and thorny, and it will be years and years before any new legislation will tell on actual electors, the *futurus populus* now in frocks or swaddling clothes. There is another question relating to the good working of the new electoral arrangement, which lies in a smaller compass, and legislation on which would be immediately operative; this other question is urgent, and the more so as it is one of action on the present generation of new electors; and it will be very much to be lamented if the session of Parliament, which will soon begin, should be lost for legislation to repress corruption and costliness of elections. All reflecting men feel great anxiety for the probabilities of increased activity of corruptors among the large numbers of the corruptible in cities and boroughs, and of increased expensiveness of elections in consequence of the increased numbers

in constituencies. There is no reason to fear that the influences of rank and wealth will be weakened by the change that has been enacted. What is to be feared, on the contrary, is the increased power of money, which always tends in the aristocratic direction. Mr. Mill has early wisely counselled the Council of the Reform League to turn its serious attention to the devising of measures for diminishing the difficulties which stand between a man of moderate fortune and a seat in the House of Commons. Corruption apart, the necessary expenses of an election contest in a large borough—printing, advertising, committee rooms, public meetings, hustings, polling booths, and clerks, public and private, make a formidable total. Increased numbers will tend to increase these expenses. It is fair, however, to say that some provisions of the measure passed last session will tend to save the pockets of candidates, and that the same provisions will also close some outlets for corruption.

The payment of money "on account of the conveyance of any voter to the poll, either to the voter himself or to any other person" is prohibited in boroughs by last year's "Representation of the People Act." Here is an end happily put to cabs and flies carrying voters to the poll in boroughs, a large item of candidates' expenses in large towns, and a source of corruption. This provision was not originally in the Bill; it was added on the suggestion of Mr. Hibbert, member for Oldham.

Another provision of the Act prohibits electors employed for pay by candidates any time within six months before an election from voting: any such elector voting will be guilty of a misdemeanor. This is a heavy blow and great discouragement to paid canvassers,—another fruitful source of corruption. The armies of clerks and messengers which have hitherto preyed on candidates' purses in keenly contested boroughs will now dwindle down to the limits of necessary work. Henceforth the object will be to avoid as much as possible paying electors for work. Hitherto it has been the more

the merrier. This provision also was an addition to the Government Bill, proposed by Mr. Candlish, member for Sunderland.

So far, so good. Let us hope that unscrupulous zeal and ingenuity will not find means of evading or thrusting aside these two well-meant provisions. One excellent proposal by Professor Fawcett, which, if adopted, would have made a sensible diminution of candidates' burdens, and would have been also useful as stimulating to pure conduct of elections, was, unfortunately, rejected by the House of Commons. Mr. Fawcett's proposal was, indeed, rather an extension of a proposal in the Government Bill, than an original suggestion. It had been proposed in the Bill that the expenses of hustings, polling-booths, and persons employed by the returning officer, should, in county elections, be charged on the county rates. Justice and similar expediency obviously required the extension of this proposal to boroughs; and this is what Mr. Fawcett proposed, that, in boroughs as well as in counties, the necessary public expenses of elections should be charged on the rates. Strangely enough, the Government, rather than adopt Professor Fawcett's larger proposal, abandoned their own, and Mr. Disraeli's argument against the Professor's motion was equally strong against his own original proposal. "If these public expenses," said Mr. Disraeli, "are thrown on the constituencies, the next step will be to charge them also with candidates' private expenses." Why this should necessarily be the next step is not apparent; and certainly Mr. Disraeli's remark cannot apply more to boroughs than to counties. The difference between public and private expenses is sufficiently marked, in boroughs as well as in counties. A large majority of the House of Commons was unfortunately influenced to reject Mr. Fawcett's motion, by no better arguments than Mr. Disraeli's inconsequent prediction of "the next step" and a common-place clap-trap appeal to a spurious sense of propriety, which came from Mr. Henley. This respected gentleman said that "he could not help feeling

that the great body of the people would think it a paltry thing to throw this expense on them;" and again, "he believed the great body of the people would feel it was a dirty thing to throw this trifling expense upon them, and to be relieved of the liability at the cost of this feeling would be rather a loss than a gain." So 248 members voted against 142 that they would not be thought paltry and dirty. The proposal thus rejected was one of the most important and best of all the numerous amendments brought forward during the progress of the Bill through the House of Commons; and the objections stated were perhaps the weakest ever uttered in that assembly. What is a serious burden on a candidate would, divided among all contributors to the county or borough fund, weigh with the infinitesimal weight of a feather on each contributor. The expenses in question are incurred by a public officer in the accomplishment of a public function. There is a marked difference between them and other expenses of candidates. The administrators of county and borough rates are necessarily concerned to keep them down as much as possible, and they would be led to combine to use all their local influence for a pure election management, in order to avert a voiding of the election for corrupt practices, which would bring another election and a fresh charge upon the rates. The majority against Mr. Fawcett's motion was so large that there is no probability of a reversal of this vote in the coming Session; it must be a question for the Reformed Parliament.

There is a peculiar enabling and permissive clause in the Act which, it is to be hoped, will not be inoperative, and which is as follows:—

"30. At every contested election for any county or borough, unless some building or place belonging to the county or borough is provided by the justices for that purpose, the Returning Officer shall, whenever it is practicable to do so, instead of erecting a booth, hire a building or room for the purpose of taking the poll. Where in any place there is any room, the expense of maintaining which is payable out of any rates levied in such place, such room may, with the con-

sent of the person or corporation having the control over the same, be used for the purpose of taking the poll at such place."

For the giving effect to this clause, all will depend on the character of the returning officer. If he is disposed to take trouble, and to endeavour to reduce expenses which the candidates have to pay, a considerable economy may be made in counties and large boroughs. The suggestion of turning to account for an election buildings paid for by the public might be further extended. Why should not such buildings be made available for the use of candidates for meetings for the statement of their opinions, and thus help to avert the necessity of holding meetings at public houses?

The connexion between cost of elections and corruption applies further than to the expenditure for corrupt practices. Every considerable item of legal expense opens the way to influence by custom given. But, above all, the fact of large expenditure by candidates carries the idea of seeking a seat in Parliament for personal objects, and the poor voter naturally asks himself if a candidate will pay hundreds or thousands of pounds for a seat, unless he expects to gain something by it, and if he, therefore, may not try to get a few pounds for his children by his vote, and if these few pounds can make any difference to the man who is fixed for payment of hundreds or thousands.

But corrupt practices are the great evil, and there is a common consent of politicians of every creed, that the corruption of borough elections is a crying shame and scandal among us. If it has been so with a ten-pound franchise, what may be expected with household suffrage? Increased numbers are of course to some extent a security against corrupt practices; more money will be wanted; with greater numbers there will be more likelihoood of detection, and with larger totals majorities will be generally larger, and it will be more difficult to overcome them by corruption. There is truth in this; but, on the other hand, majorities may often not be so very much larger, or at any rate beyond being affected by

corrupt practices; a larger number may be bought individually cheaper; and it must not be forgotten that the municipal contests of wards, into which boroughs are divided for municipal purposes, will facilitate calculations of practised corruptors as to what is wanted in one or two wards to make a majority for the whole borough. It is known that corruption has long been rampant in municipal elections; and for corrupt practices at municipal elections there is practically no punishment. As a witness, high in the confidence of the Government said before a Committee of the House of Lords, and again before a Committee of the House of Commons, "The municipal elections are really a nursery for illegal practices." *

Mr. Disraeli has announced that, on the very first day of the coming session, he will move for leave to bring in a Bill for improving the mode of trial of election petitions, and for better prevention of corrupt practices at elections. This looks like being in earnest. The Bill thus announced is, it may be taken for granted, "The Corrupt Practices at Elections Bill," which was introduced by the Government last year, and referred to a Select Committee. The original Bill, and the Bill as altered and reported by the Select Committee, are both before us. The Select Committee evidently considered the Bill with care; in many matters of detail they have much improved it; but one change, made in one of the most important provisions of the Bill, is probably a change decidedly for the worse. The Government had proposed that election petitions should no longer be tried by Committees of the House of Commons, but by lawyer Commissioners, selected for each occasion from a list originally prepared by the Speaker. This proposal might have been improved, but it is very doubtful if the change made by the Select Committee will not produce more harm than good, and neutralize much other benefit of the measure. The Select

* Mr. Philip Rose in Lords' Committee on Elective Franchise, 1860, (1350) and in Commons' Committee on Corrupt Practices at Elections 1860 (1056).

Committee have proposed that the trial of election petitions shall be by Judges of the Superior Courts. It is much to be feared that this proposal, by increase of expense, and by giving election petitions more than even now the character of law-suits, involves more mischief than the good which it undoubtedly contains of a superior tribunal.

The framers of the Government Bill have the merit of having endeavoured to prevent corrupt practices by improving the trial of petitions, and causing them to be tried soon after an election and on the spot. The Government Bill proposed that petitions be presented within two months after an election, and three Commissioners, barristers of at least seven years' standing, be nominated for trial of a petition, within seven days from its receipt; and then these Commissioners, within another fortnight, were to begin an inquiry in the borough or county. The sooner the inquiry is held, the more evidence is likely to be forthcoming, and evidence is to be got more easily, surely, and cheaply on the spot, than in London; the Commissioners would be acute lawyers; and if no other change were made than this, there is no doubt that something effective would be done for repression of corruption by increasing the chances of discovery and punishment. But the object of the framers of the Bill might have been carried out more effectively, and their proposals might have been improved by changes in a direction different from that which the Select Committee have taken. Why require a petition at all, with its concomitant of recognizances for costs, which can only have a restraining effect? Why not provide for an inquiry by a competent lawyer, as a matter of course, immediately after the election, and on the spot? Let competent lawyers appear on the spot, Recorders or County Court Judges, or Revising Barristers, or lawyers nominated expressly for the purpose, immediately after the close of the poll, and hold an open court of inquiry. Then everything would come out; there would be no time for compromises or for spiriting away witnesses; and let the lawyer employed for the inquiry have full powers for making

it completely searching. When immediate searching inquiry is certain, there will be no corrupt practices; and if a little more or less expense in such a matter were of consequence (as it cannot be), in comparison with more or less efficiency, it is very doubtful whether the annual cost of a set of Commissioners who would probably have little or nothing to inquire into, because their coming with full powers is certain, would be greater than that of a system which by imposing barriers of expense and forms, and by making inquiries uncertain, lets in hopes of impunity, and gives occasion from time to time for protracted investigations.

One advantage of the Government plan would have been a diminution of the expenses of counsel, for, as a general rule, counsel would not be brought from London, or at any rate not more than one on each side, for the trial of petitions in the country. If election petitions are to be tried by Judges of the Superior Courts sitting in the country, counsel of repute will necessarily be brought from London on both sides, and very likely two or three on each side. This will swell expenses greatly.

The question of an appeal from the decision of the person or persons appointed to investigate an election, or of its finality, probably presented a difficulty, which the Select Committee thought might best be solved by giving the trial of election petitions to the Judges, without an appeal to the House of Commons. The Government had proposed in their Bill what was very objectionable and universally condemned, to give the House the power of deciding whether or not an election committee should be appointed, on the existing plan, to sit in appeal on a decision of the Commissioners. The inevitable result of this would have been to make motions for Committees of Appeal occasions of party contests, as appointments of Committees under the Grenville Act used to be. To abolish the present election committees for inefficiency or incompetency, and to propose similar committees as tribunals of appeal from the substituted courts of inquiry, is a course of obvious inconsistency. It would be

well to have a power of appeal from the Commissioners proposed by the Government Bill, and it would be necessary to have a competent tribunal to overlook the judgments of single lawyers, employed, as has been suggested in this paper, to inquire after every election. If a Committee of the House of Commons, like the present General Committee of Elections, carefully chosen by the Speaker from leading members of all sections, would not sufficiently serve the purpose, a permanent court of appeal, consisting of three lawyers, appointed by the Speaker, might be constituted; or a mixed commission of appeal, part lawyers, part members of the House of Commons, might be devised.

The main provisions of the Bill, as altered by the Select Committee, which is waiting for consideration in the coming session, are as follows:—

Election petitions are to be presented within twenty-one days after the return; but special provision is made in conformity with an existing sessional order of the House of Commons for petitions on account of corrupt practices, which specifically allege a payment of money or other reward, made by a member, or on his account, or with his knowledge, since his return in pursuance or in furtherance of corrupt practices, and such petitions may be presented within twenty-eight days after the date of the specified payment. Security to the amount of a thousand pounds is required from petitioners. Each petition is to be tried by one of the Judges sitting in open court, without a jury. The trial of the petition is to be held within the borough or county, as it is a borough or county election petition; but power is given to the Court of Queen's Bench to appoint the trial elsewhere, if special circumstances make it desirable. The determination of the Judge as to who was duly elected, or whether the election was void, is to be final. If any charge of corrupt practices has been made in the petition, the Judge is further to report to the Speaker:—

"Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any

candidate at such election, and the nature of such corrupt practice."

"The names of all persons, if any, who have been proved at the trial to have been guilty of any corrupt practice."

"Whether corrupt practices have, or whether there is reason to believe that corrupt practices have, extensively prevailed at the election to which the petition relates."

It is further provided that the Judge "may make a special report to the Speaker as to any matters arising in the course of the trial, an account of which, in his judgment, ought to be submitted to the House of Commons;" and it is added, rather superfluously, "where the Judge makes a special report, the House of Commons may make such order in respect of such special report as they may deem proper." If the Judge has reported that corrupt practices have, or that there is reason to believe that they have extensively prevailed, the Queen may issue a Commission, on a joint address from the two Houses of Parliament, with full powers for general inquiry. It is well provided that the expenses of such Commission shall fall upon the borough or county. When the Judge has reported any persons as guilty of corrupt practices, the report, with the evidence, is to be laid before the Attorney-General, with a view to his prosecuting, if the evidence should, in his opinion, be sufficient. It is specially provided that the Judge is to be received at the place to which he proceeds to try an election petition, "with the same state, so far as circumstances admit, as a Judge of assize is received at an assize town;" the Judge's expenses to be defrayed by the Commissioners of the Treasury, from money voted by Parliament. The Judge is empowered to enforce the attendance of any witness, and examine him, though he may not be called by parties to the petition. No election petition is to be withdrawn without the leave of the Court of Queen's Bench, given on special application after notice in borough or county, and provision is made for substituting other petitioners who may apply to be substituted. The following are new penalties proposed for persons found guilty of bribery by a Judge. A candidate, of whom a Judge

has reported that bribery has been committed by him, or with his knowledge and consent, is to be incapable of being elected to and sitting in the House of Commons for seven years; and if he should be so reported a second time, he shall be incapable of being elected for life. All persons found guilty of bribery by a Judge shall, in addition to the above disqualification, be incapable for the next seven years of being registered as voters, and of voting at any election, or holding any municipal office, and of being appointed and of acting as justices of the peace.

Such are the chief provisions of the "Corrupt Practices at Elections Bill," as reported by the Select Committee of last year. It is still open to much improvement; and we trust that the Government will not feel itself obliged to adopt the Bill as reported, or at any rate that the House will interfere for its amendment in several particulars.

There can be no doubt that election petitions will be better tried by a Judge than by a Select Committee of the House of Commons; and that under the presidency of a Judge on the spot, and within a comparatively short time after the election, there will be greater securities than now for getting out the whole truth about corrupt practices, where an election petition has been presented. But the holding of an inquiry will entirely depend, under this Bill, on the presentation of an election petition. Now, for an election petition, a strong motive, which generally can be looked for only in self-interest, is required to make a petitioner, who must necessarily incur great expenses, and begin by depositing a thousand pounds or finding security for it. It has been already pointed out that the calling in of the Judges to preside at the trial of election petitions will tend to increase expense. No provision whatever is made in this Bill for enabling electors to petition for an inquiry into corrupt practices, the expenses of which may be defrayed by the public. This is a very serious omission, and the more surprising as the Bill proposes to repeal the 5 & 6 Vict. c. 102, which does contain such a provision. That Act, known by the name

of Lord John Russell's Act, provides in the fourth clause for petitions, "complaining that general or extensive bribery has prevailed at the then last or any previous election," which may be presented "after the time limited by the House for presenting election petitions, and within three calendar months next after some one or more of the acts of bribery charged therein shall have been committed," such petitions not affecting the seat, but being only for inquiry into corrupt practices, the Committee to which such petition is referred being empowered to order that the costs of the petitioners shall be borne by the public, if they judge that there was reasonable and probable ground for the allegations of the petition, and the petitioners being required in the first instance to find security to the amount of only five hundred pounds. Now, under the proposed Bill, there can be no inquiry whatever into corrupt practices, unless by petitioners proceeding to upset the election, entering into recognizances for a thousand pounds, and necessarily having to pay their own costs. The repeal of the 5 & 6 Vict. c. 102, is, therefore, so far a decided loss. The new Bill might and should have increased the facilities for inquiry by electors not caring about the seat, but anxious to purify the constituency, and yet not prepared to pay largely for doing so. On the whole, it is to be hoped that the Bill will be improved in the next session, and that a plan of this sort may be enacted; after a general election, circuits to be held by Judges specially appointed, who shall sit in the borough or county town, and hear all complaints of corrupt and illegal practices, and shall have full powers for complete investigation, and similar Judges to inquire after any single election; punishments to be enforced on their decisions; their judgments as to the result of the elections to be subject to appeal to a tribunal, either exclusively legal, or of mixed composition, appointed by the Speaker. Commissions for further inquiry to issue on report of the Judges, confirmed by the tribunal of appeal.

The adjudication of the seat and discovery and punishment of corrupt practices are two distinct matters. The exposure

of corruption should not be made solely dependent on the petition for the seat. If we make inquiry by a competent, impartial judge, armed with full powers, inevitable, corruption at elections will soon be extinguished. If there is a petition affecting the seat, the same Judge, who will always hold an inquiry into corrupt practices, will be competent to try it; his decision being either final or subject to appeal, as Parliament may determine. But let there be the means of inquiry into corruption in all cases, whether there is a petition or not. Expense or hopelessness of obtaining the seat may prevent a petition.

The plan here recommended has been strongly urged by Mr. Allen, one of the Commissioners for the late Reigate inquiry, in an additional separate report. These are Mr. Allen's words, and they are well deserving of attention:—

"Within a specified number of days after every election in a borough or county, while facts are still fresh and party feeling still alive, some competent person might give his attendance in the county or borough in which the election was held, and, if a county, in not less than three of the principal places within it, notice having been previously given that any charges of corrupt practices may be brought before him. In case of any being brought, he should hear the evidence and adjudicate upon it. If he decided that a charge was proved, the consequence, viz., the permanent loss of vote, and the like incapacity to become a Member of Parliament, need not attach at once, but might be suspended until the High Court had had an opportunity of reviewing his decision; but if, within a month after it had been laid before the House, the decision was not reversed, then it should have full force and effect. By some such method as this, other and more expensive modes of investigating corrupt practices would probably be obviated."

Two practical recommendations of some importance, and of obvious utility, are to be found in the Report of the Great Yarmouth Commissioners; and it is surprising that the "Corrupt Practices at Elections Bill," as it now stands, shows no sign of knowledge of either of these suggestions. One is

that the time for prosecutions and actions for offences under the Corrupt Practices Act should be extended: it is now one year from the date of the offence. The Commissioners point out that the year has necessarily expired before the Commission can have inquired and reported, and, therefore, no prosecutions or actions can follow these discoveries. For a Commission, it has been necessary, first that there should be an election petition, then an election committee, then a joint address from both Houses; and then the inquiry necessarily takes some time. By the proposed Bill a Commission will still be the consequence of a joint address from both Houses, made after the report of the Judge; and the year will still be too short a time. The Commissioners observe on the limitation of time to a year:—

"The effect of this section (14 of 17 & 18 Vict. c. 102) is to render all offences, declared or enacted by the Corrupt Practices Prevention Act practically dispunishable, because, unless a private individual should incur on public grounds the expenses of a prosecution, or the risk of an action or trial, it is almost impossible, in the ordinary course of events, that the result of a Commission of Inquiry can be laid before the Attorney-General, in the manner pointed out by the 9th section of 26 & 27 Vict. c. 29, and that a prosecution can be instituted by him in the interests of public morality within the limits of time prescribed."

This suggestion well deserved the attention of the Select Committee. The other suggestion to which we have referred of the Great Yarmouth Commissioners, is a change in the words of the 7th section of the 26 & 27 Vict. c. 29, as to giving indemnities to witnesses. The words are, "where any witness shall answer every question, &c., he shall be entitled to receive a certificate." The Commissioners recommend a return to the repealed words of the 15 & 16 Vict. c. 57, which gave Commissioners a discretion, making the indemnity available for a witness who "makes a true discovery to the best of his knowledge touching all things as to which he is examined." The

present words, as they justly observe, deny all discretion to the Commissioners where a witness has not actually refused to answer questions, but he may have given evasive or incomplete or false answers.

There is a yet greater omission in the "Corrupt Practices at Elections Bill," and that is the omission of all provision for checks on corruption at municipal elections. Unless provisions are introduced to apply to corrupt practices at municipal elections, the experienced bribers and suborners of bribery, the well-known *sodales* of corrupt constituencies, who act under central patronage, may do all their work for the parliamentary contests at the municipal elections, and snap their fingers at the framers of this Bill. The parliamentary electors under the new Act are to be all the municipal electors, and some more. For the municipal elections three years' residence is necessary. For the election of Members of Parliament one year's residence only is required; all occupiers of houses who have resided twelve months are entitled to be registered, and if they cease to reside between the registration and the election they will still be entitled to vote. Then there is also the addition of the ten-pound lodgers. If the municipal elections have hitherto swayed those for Members of Parliament, and have been the nurseries of corruption, these tendencies now will be stronger and more baneful. The evidence of Mr. Philip Rose on this subject before Committees of Lords and Commons has been already referred to; a few extracts from it will now be read with peculiar interest. Mr. Rose is a member of the solicitors' firm which was employed to frame Lord Derby's Reform Bill of 1859, and he held for some time the post, now filled by his partner, Mr. Spofforth, of chief election agent to the Conservative party. There cannot be stronger authority.

"In a vast number of places there is unquestionably a resort to illegal practices at the municipal elections, and that has led to the establishment of a regular machinery in those places, which is made use of at the parliamentary elections; and a very great pressure is

brought to bear upon Members on both sides of the House of Commons who represent those places, to contribute towards the expenses of the municipal contests, it being always held out to them that £10 spent at a municipal contest is far better than £100 spent at a parliamentary contest. I believe there is hardly a case on record of any proceedings being adopted in consequence of a violation of the Municipal Corporation Act by bribery. The municipal elections are really a nursery for illegal practices. My experience is this, that if you find for a few years running one party in the Municipal Council getting the predominance, that party will gradually get the predominance in Parliament: it may be the work of years. It is almost laid down as an axiom by local agents, who say, 'We were able to return our man for the Municipal Council, and we shall be able to return our man to Parliament.'" (Evidence of Mr. P. Rose before Committee of House of Lords, 1860, on Elective Franchise.)

Mr. Rose's remarks before the House of Commons Committee of 1860 on Corrupt Practices, as to the more facile venality of the voters below the ten-pound limit are now full of interest:

"You are aware that the constituency is not the same in the two elections?—No, in the case of the municipal election it is a constituency which is much more easily operated on, the suffrage resting, as it does, on a lower basis; and there is this difference that at municipal contests it is more a question of beer or of a few shillings, whereas at parliamentary elections a higher remuneration is expected."

"Is not the constituency for the parliamentary representation, upon the whole, higher than the constituency for the municipal election?—Yes, but there is a class common to both, and the lower grade of the parliamentary constituency is equally liable to be operated upon as the municipal constituency: the same man who votes at both would probably accept a smaller sum at the municipal election."

Sir George Lewis.] "The vote is of greater value at the parliamentary election?—Yes."

Mr. Walpole.] "Are there not many in the municipal constituency who would not vote in the parliamentary election?—Yes, at present that is the case."

"Was it to that class of people you applied your remark that they

are influenced by beer and treating?—Yes, to the lower grade of both constituencies."

To be forewarned, it is said, is to be forearmed. The Government are here forewarned by a trusted agent and counsellor. Emphatically, Mr. Rose repeated to the Commons' Committee:

"My strong opinion is, that all the efforts which are now being made to check bribery at parliamentary elections will fail for this reason, that you do not attempt to strike at the root of the offence. The real nursery for the evil is in the municipal contests; and those oft recurring contests have led to the establishment of what I might almost term an organized system of corruption in the municipal boroughs throughout the kingdom, which provides a machinery ready made to hand, available when the parliamentary contest arrives."

The Committee of the House of Commons, before which this evidence was given, reported:

"That it has been proved to the satisfaction of your Committee that an intimate connexion exists between bribery at municipal and parliamentary elections, and it is expedient that the provisions as to punishment and forfeitures for the offences of bribery at each such election should be assimilated as far as possible."

Surely the next session will not be allowed to pass away without effect being given to this recommendation. It needs only some addition to the "Corrupt Practices at Elections Bill." The same lawyers might be employed to hold courts after municipal elections, as well as after those for Members of Parliament; or, if it is determined to have special Commissioners for trial of parliamentary election petitions, as the Government originally proposed, or to employ the Judges for trying them, as the Select Committee has recommended, Recorders and County Court judges might then, without much difficulty, be made available for inquiries after municipal elections. Something must be done as to municipal elections, or the "Corrupt Practices at Elections Bill" may be quite nugatory. The witness who has been already quoted, Mr. Rose, being asked by a Peer whether it was not almost impossible to prove

bribery under the Municipal Corporation Act, replied, "I believe that there is hardly a case on record of any proceedings being adopted in consequence of violation of it." It will be the business of our legislators to prevent evasion of these measures against corruption at parliamentary elections, by bribing with impunity at the time of the next preceding municipal contests. It is clear that there should be similar penalties and like summary procedure for enforcing them in municipal and in parliamentary elections. What has recently been done in the case of the Boundary Commission suggests one possible mode of providing for inquiries after elections. A Commission to appoint the inquirers and serve as a tribunal of appeal might be created by Act of Parliament, the First Commissioners being named in it; and with the aid of Recorders and County Court judges there could be no difficulty in finding any further sufficient number of competent judges for local inquiries among such barristers as are lately found, without difficulty, to serve as Assistant Boundary Commissioners. These judges should serve for municipal as well as parliamentary election inquiries. The first set of superior Commissioners being named in the Act, vacancies arising might be filled by nomination of the Lord Chancellor and the Speaker, or by the three Chief Judges of the Common Law Courts, with the concurrence of the Speaker. The object being well understood, and will to accomplish it existing, there should be no difficulty in arranging a suitable plan. Another and still better course would be to take the existing machinery of Revising Barristers, and extend their duties and increase their pay. The Revising Barristers are appointed every year by the Judges; re-appointment is customary, but not necessary. Of the general competency of the Revising Barristers for the duties which they have hitherto discharged there is no question; and, if competent for them, they cannot be incompetent for the additional duties which it is here suggested to assign to them. The Judges who appoint, would appoint henceforth with a sense of responsibility commensurate with the extent of the new duties.

Our proposal is that the Revising Barristers, appointed every year by the Judges, should be appointed not only for revision of the electoral lists, but also for holding inquiries as to corrupt practices, and trying petitions in all cases of elections within these districts during the year, whether parliamentary or municipal. The municipal franchise cannot long lag behind the new parliamentary franchise; they must now sooner or later be made uniform; and the Revising Barristers should also revise the municipal lists. A power of appeal from the Barristers' decisions on petitions is desirable; a competent tribunal of appeal can easily be constituted, with a Standing Committee of the House of Commons, so chosen as to inspire respect, and having legal assessors at its service.

The employment of Revising Barristers for holding inquiries into elections immediately after the event has been already proposed in this Journal by Mr. Serjeant Pulling; * but he proposed at the same time that they should act as Assessors to the Returning Officers in each and every election. For this last purpose they would not be numerous enough. But it will be easy for them to make circuits for inquiries after elections, as they now do for revision of registers.

The payment of a Revising Barrister is two hundred guineas, which includes all expenses. The whole amount of cost for Great Britain and Ireland is a little over £18,000. Double the Revising Barrister's remuneration, or raise it to five hundred guineas: £36,000 or £45,000 a year will not be an unreasonable charge for the purification of constituencies. With salaries of five hundred guineas a year, Judges will have no difficulty in finding practising barristers perfectly competent for the duties, and willing to undertake them. There will be a stress of work for the Revising Barristers in the year of a general election; but in other years there will be much less pull upon them.

The carrying of an effective Bill for the repression of corrupt practices at elections will confer great credit on Mr.

* *Law Magazine and Review*, August, 1866, p. 275.

Disraeli. He will, it is to be presumed, as he did last year in the case of the Representation of the People Bill, take counsel with the House. There are lawyers and other members on both sides from whom he may receive valuable assistance, and who, we trust, will be ready to give it. In a word, the Bill, as it now stands, requires to be carefully considered for amendment in three principal respects:

1. Extension of preventive measures to corruption at municipal elections.

2. Provision of inquiry into corrupt practices, as a matter of course, immediately after elections, and in the locality; such provision to be combined with provision for that of election petitions, and all this probably best effected by the enlargement of the functions of the Revising Barrister.

3. A tribunal of appeal from the judgments on election petitions. A Standing Committee of the House of Commons for election matters will be very useful in many ways, if not absolutely necessary; to receive all reports and see to the necessary action with respect to them. It would be the duty of the chairman of such Committee to move for an address for a Commission of inquiry into corrupt practices in the case provided; at present there is no one to whom that duty appertains. A small number of legal assessors to this Committee would make a tribunal of appeal.

Such being the three main points to be attended to, a few further suggestions may be added.

The requirement of a solemn declaration from every member on his taking his seat as to the total amount of his expenditure and as to there having been no money spent on corruption or illegally by himself, or, to the best of his belief, by any of his supporters, might well be inserted in Mr. Disraeli's measure. Many persons strongly believe in the efficacy of such a declaration. It may not be all-effective, but it must do much good. It cannot do harm; its only effect can be good. The only way in which the efficacy of such a declaration can be impaired is by friends and supporters keeping matters from the knowledge

of the candidate. To meet this the declaration might be so framed as to include a statement that the member has conferred with all the active promoters of his election before making the declaration; and a list of the names might be given in. The active promoters of an election likely to be concerned in the expenditure of money are necessarily few; they are known to the opposite side, and the omission of a known man would excite remark and suspicion. The declaration might be required to be made by the members and by the defeated candidates also before the Judge holding inquiry after the election. The honour of candidates for seats in Parliament can generally be relied on for declarations, truthful not only in the letter but also in spirit; and if they are called on to declare that all their active and confidential supporters authorize them to speak for them also, the cases of deception of candidates by friends are likely to be rare and insignificant.

An enlargement of the powers of Revising Barristers for enforcing attendance of witnesses and production of documents is much needed. By the existing law they have no power except over parish officers, whom they can fine, and over claimants, voters objected to, or objectors, whose presence is necessary for their own objects. No unwilling witness, however necessary, can be forced to attend; and an objector's case can often be proved only by unwilling witnesses. In Lord Derby's Reform Bill of 1859 there was a proposal to increase the powers of the Revising Barrister. His imperfect powers may have been the reason for preserving for parliamentary election committees a power of reviewing what are called "express" decisions of Revising Barristers. It is well known how much uncertainty and dispute have arisen out of this word "express," introduced into the 6 Vict. c. 18, s. 98, for the purpose of removing doubts about a similar provision in the Reform Act (s. 60 of 2. Will. IV. c. 45). The whole of the Act for the Trial of Election Petitions by Parliamentary Committees (11 & 12 Vict. c. 98) is repealed by the proposed Bill, and it is very desirable that it should repeal the clauses 98 of 6 Vict.

c. 18, and 60 of 2 Will. IV. c. 45, which have given Parliamentary Committees a power of reviewing decisions of Revising Barristers. Such repeal will not interfere with the appeal provided by 6 Vict. c. 18, from Revising Barristers to the Court of Common Pleas.

The Bill, as reported from the Select Committee, repeals the 8th section of 26 & 27 Vict. c. 29. This 8th section contains three sub-sections, of which 1 and 3 are clearly replaced by provisions of the new Bill. But it is not so with sub-section 2, which is as follows: "Where any person who has voted at any election is found, by any committee, to have been guilty of bribery or treating at such election, his vote shall be void, and may, upon a scrutiny, be struck off the list of voters, notwithstanding that the name of such guilty person has not been included in the list of voters to be objected to." The power of voiding a vote for bribery or treating materially depends on this provision, which it is proposed to repeal without a substitute. Further, it was this provision of the 26 & 27 Vict. c. 29, which first authorized Election Committees to strike off such votes, though they had not been included in the lists prescribed for notice by the 11 & 12 Vict. c. 98. The whole of this last Act, however, is repealed, including the provisions for lists of voters objected to. If the sub-section 2 were not repealed, what is now binding through it on a Parliamentary Committee would be binding on the new Judges of election petitions, viz., to strike off the votes of persons found guilty of bribery or treating, though notice of objection to their votes had not been given. It will doubtless be competent for the three Chief Justices, under Section 21 of the proposed Bill, to establish as a rule of practice what is now authorized by Section 8, sub-section 2 of the 26 & 27 Vict. c. 29.

Whether the Judges of the Superior Courts try election petitions henceforth, or they are tried by Revising Barristers or others, new rules of practice as to lists of objections will probably be substituted for the repealed clauses of the 11 & 12 Vict. c. 98; and it is to be hoped that an end will be put to

an abuse and absurdity which has grown up in practice before parliamentary committees, of sending in lists of the entire poll of a sitting member who is petitioned against as disqualified, and where, notice of disqualification having been publicly given at the time of the election, the petitioner claims the seat. Still better will it be to introduce into this Bill, which is for the amendment of the law as to election petitions, a clause affirming that the disqualification of a sitting member will of itself have in no case further effect than to void the election. The decisions of Committees on this point have been conflicting; and this point has been one of the objectionable elements of uncertainty for petitioners.* The current of latter decision has been to void the election simply, and not give the seat to a candidate who had only a minority of votes. Such was the decision of the Cambridge Committee of 1866, when Mr. Forsyth was unseated. On the other hand, the present Judge of the Admiralty Court sat in the House of Commons for a whole Parliament, having received the votes only of a minority of the electors of Tavistock, after establishing his opponent's disqualification and public notice thereof given at the time of the election. The reasonable principle is clearly that of the decision in the Cambridge case, that a member not having a majority of votes should not be seated. So long as election petitions are the only practicable means of bringing about inquiries into corrupt practices, it is more important to get rid of all causes of embarrassing uncertainty for petitioners; and the settlement of the law on this point and the elimination of the difficulty, already mentioned, about "express decisions" of Revising Barristers, will dry up two sources of doubt and embarrassment.

* See an elaborate and valuable pamphlet by Mr. Pickering, Q.C., "Controverted Elections and Parliamentary Committees," second edition, 1852; written after the conflicting decisions of the Cheltenham and Horsham Committees of 1848. Disqualification of sitting members, arising out of corrupt practices at a previous election, was alleged in both petitions; equally effective public notice of disqualification had been given in both cases; both sitting members were unseated, but the Horsham Committee seated the petitioner, the Cheltenham Committee refused to do so.

By Section 8 of the 26 & 27 Vict. c. 29, which it is proposed (it is to be presumed mistakenly), altogether to repeal, it has been enacted and made certain that the votes of voters found guilty of bribery or treating are void. The recent editor of "Rogers on Elections" argues that this enactment refers to bribery and treating as defined by the Corrupt Practices Act of 1854 (17 & 18 Vict. c. 182), and that, as in this Act treating only by a candidate is spoken of, the provision of the 26 & 27 Vict. c. 29, which was to amend the Act of 1854, cannot operate beyond the treating by a candidate. His argument is worth quoting:—

"The giving of refreshment at elections is no offence by the common law. The 26 & 27 Vict. c. 29, provides that, when any *person* who has voted at any election is found by a committee to have been guilty of treating, his vote shall be void, and may be struck off on a scrutiny. But it must be borne in mind that treating, as an offence, where it does not amount in effect to bribery, is wholly a statutable one; that the only statutable definition of it now in existence is contained in the 4th section of the 17 & 18 Vict. c. 102, and that that definition applies only to refreshments, &c., given by *a candidate*.

"The vote of a candidate, therefore, who has been guilty of treating within the above section is clearly void, and may be struck off. But such a case in practice can rarely occur. And the extension of the above provision by the 26 & 27 Vict. c. 29, to others than candidates (as would seem to have been the intention of the framers of the clause from the use of the word 'persons') is attended with considerable difficulty, for that Act is an amendment only of the 17 & 18 Vict. c. 102, and can only, therefore, refer to the treating therein mentioned, viz., by a candidate. It certainly seems a strong construction to say that the effect of the two sections together is to substitute the word 'person' for the word 'candidate' in the 4th section of the 17 & 18 Vict. c. 102. But by no other [illegible]tion can the provision in the 26 & 27 Vict. c. 29, as to the [illegible]on of votes of persons (other than candidates) who have [illegible]ty of treating others, be rendered otherwise than practically

[illegible] doubtful whether treating was, before the 17 & 18 Vict.

c. 102, a ground of objection to the vote of the person receiving it, unless it was shown that the elector had been corruptly influenced by it; when of course the vote would be void by the common law of Parliament. The 17 & 18 Vict. c. 102, s. 4, enacts that 'every voter who shall *corruptly* accept or take any *such* meat, drink, entertainment, or provision' (such, that is, as is mentioned in the previous part of the section), 'shall be incapable of voting at such election, and his vote, if given, shall be utterly void and of none effect.'

"Whatever be the meaning of the term 'corruptly' here, the use of the word *such* limits the acceptance of disqualifying entertainment to that mentioned in the foregoing part of the section—viz., that given by a candidate, and 'in order to be elected, or for being elected, or for the purpose of corruptly influencing any one to give or refrain from giving his vote,' or 'on account of such persons having voted or refrained from voting,' or 'being about to vote or refrain, &c.'"*

This argument is worth considering, as also an observation of the same writer, that it is still left uncertain whether the vote of a person found guilty of exercising undue influence on a voter is void.

"A vote unduly influenced is a bad vote by the common law of Parliament. Neither the 17 & 18 Vict. c. 102, nor the 26 & 27 Vict. c. 29 mentioned the effect on the vote of the person who has exercised such undue influence. In the Wareham case (W & D. 91), however, the vote of a person guilty of undue influence was struck off."

The Bill proceeds on the plan of requiring petitioners in all cases to give security to the amount of £1,000. Is there any good reason why those petitioned against, if they defend their seats, or, as those parties are called in the Bill, "respondents," should not be required to give similar security? It would seem, *à fortiori*, just to treat both parties alike, if the respondent, besides defending himself against the petitioner's charges, assumes the offensive and recriminates on the petitioner. The security required from the petitioner is for all costs, charges,

*Rogers on Elections. Tenth Edition. By F. S. B. Wolferston, p. 535.

and expenses which may become payable to any witnesses summoned on his behalf, and to the respondent. Why is the respondent not to give security for what may become due to his witnesses or to the petitioner? The requiring security from the respondent would act not only as a fair protection to the petitioner, but ultimately as an additional check on irregularities on the respondent's side in the election. Provision is properly made in the Bill for allowing other parties to come in as respondents, in lieu of the person petitioned against, in case of his death or his declining to defend the seat, but surely these new parties should, in common justice, be required to give security if the petitioner is required to do so.

These suggestions are offered with a desire to contribute to the efficiency of the Bill which Mr. Disraeli is soon to introduce into the House of Commons, "to amend the law relating to election petitions, and to provide more effectually for the prevention of corrupt practices at parliamentary elections."

Art. II.—REMARKS ON THE COURT OF APPEAL IN CHANCERY.

WE live in times when sweeping constitutional changes are made in the political institutions of the country. It behoves us to look with anxiety at any innovation in our judicial establishments. They are, doubtless, susceptible of much improvement; but hasty and ill-considered schemes, resorted to under some temporary or extraordinary pressure, are to be dreaded, especially when they are constructively stretched beyond their original intention, and, if unchallenged, are likely to become permanent alterations in the practical administration of justice.

It is for the purpose of directing attention to a recent change in the "Court of Appeal in Chancery" that these brief

remarks are made. It is quite unnecessary to say that they are dictated wholly by general views and principles, and are not intended to have any sort of personal application. If anything could tend to deprive them of whatever force they may have, it would be the ability and talent of the judges who for the time being happen to occupy the appellate bench.

Towards the end of the last session of Parliament a Bill, containing only three short clauses, passed the legislature, and received the Royal assent on the 25th of July, 1867, which effected a great constitutional change in one of the highest tribunals of the land. The nature and consequences of this change being of such serious moment to the public as well as to the profession, it is matter of surprise that the measure should have elicited scarcely any special notice in its progress through the House of Commons. The Act is intituled simply, "An Act to make better Provision for the Despatch of Business in the Court of Appeal in Chancery." The first clause is as follows:—

"All the jurisdictions, powers, and authorities of the said Court of Appeal under the said recited Acts,* or under any other Act, may (*except as hereinafter provided*) be exercised either by both the Judges appointed under the said Act when sitting together, or by either of the said judges when sitting separately, or by the Lord Chancellor when sitting with the said Judges or either of them; *Provided that no decree made on the hearing of a cause*, or on further consideration, shall be re-heard before the said judges when *sitting separately.*"

The clause then formally reserves to the Lord Chancellor all his own jurisdictions, powers, and authorities, and this second clause gives to the Lord Chancellor the power to fix the times of sittings, and "also what appeals, motions, petitions, and other matters shall be heard by the full court, and by the said judges sitting together or separately, and by the Lord Chan-

* The Act of 14 & 15 Vic. c. 83, which established the Lords' Justices Courts.

cellor sitting alone or with either of the said judges." The third clause merely provides that that Act and the recited Act should be read as one Act. Now, it will be hereafter shown that the operation of this Act, as interpreted by the Lords Justices, is to enable either of themselves, as a single judge, to sit in appeal upon the decisions of the Master of the Rolls and the Vice-Chancellors, in the majority of cases which are brought under the jurisdiction of the Chancery Courts.

This important alteration in this highest equity jurisdiction has awakened a feeling of apprehension in the profession, which cannot fail, ere long, to extend to the suitors and the public at large. From the time of its first institution in 1851, and during a period of fifteen years, the Lords Justices Court, or "Court of Appeal in Chancery," had always been presided over by *two* judges of very great judicial experience, and of matured legal knowledge. Each of these Lords Justices had, previously to his appointment to that high tribunal, occupied the position of a Vice-Chancellor. He had thus already attained to considerable judicial eminence, and before his elevation to the superior court, had been habitually looked up to with that respect and reliance which an able occupant of the Bench invariably commands. A court so constituted, as was to be expected, had by a long series of valuable judgments, and by its admirable discharge of its functions, become one of the soundest and best appellate tribunals in the country. No small amount of this success is to be attributed to the circumstance that the two Lords Justices constantly sat together, when in their own court of appeal. No person who had practised before them, could have failed to remark the manner in which the two minds, in their interchanges and mutual assistance, worked together for good. It is impossible to overrate the advantage of this interchange of thought and opinions, which exists when a plurality of judges preside in any court. It is needless to dwell upon it. It is witnessed every day in our courts of common law. The wisest and ablest judge, when sitting alone, however unimpassioned and strictly conscientious,

cannot at all times be sure of taking the correct view of a case, often most complicated in its facts, or of coming to the right conclusion in the mass of case law and statute law with which he has to deal.

This is an inherent infirmity to some extent existing in our equity courts of first instance. This peculiarity in the constitution of those courts, while a plurality of judges are required in our courts of Common Law, has engaged the attention of able writers, and the origin of it has been traced to the position and power of the Lord Chancellor in the earliest history of the office. When the first Vice-Chancellor was appointed in 1813, the country had become so accustomed to a single judge sitting in Chancery, both in the Lord Chancellor's Court and at the Rolls, that the expediency of appointing more than one judge in a subordinate equity court was never suggested, although the measure was opposed by several well known members of the House of Commons of that day, and gave rise to warm debates at the different stages.

The present is believed to be the first occasion on which an attempt has been made to create a new court with a single judge as an appellate tribunal from the courts of the Master of the Rolls and Vice-Chancellors. It cannot be considered otherwise than a very questionable step, and, in the opinion of many, is an unwise deviation from established usages. It may be said, on the other hand, that the Lord Chancellor sitting alone has always constituted an appellate court. But so much of imposing prestige has surrounded an ancient institution like the Lord Chancellor's Court, presided over, as it has been, by many eminent men whose names have illustrated the history of their country, that it has ever carried with it a weight and authority which cannot be expected to belong to any novel appeal court similarly constituted. It is therefore an exceptional instance, and not altogether a satisfactory one, when a Common Law Chancellor is appointed. It ought not to be regarded as a precedent, when you are establishing a modern Court of Appeal.

That two separate Puisne Lord Chancellors, created only yesterday, should possess any portion of the moral influence which had for ages been enjoyed by the real head of the law, would be contrary to the well-known tone and tendency of English feeling. Earl Russell, when he introduced to the House of Commons the Bill for creating the Lords Justices' Court in 1851, alluding to a proposition which had been made to enable a single Vice-Chancellor, at certain times, to sit as an appellate judge, said:—

"To this plan the objection occurs, that although the name and authority of the Lord Chancellor carry such weight that he may well sit alone, yet if we had a Judge of no higher authority or title than the Master of the Rolls or Vice-Chancellor to whom the appeal was made, the opinion of one subordinate Judge against another would not satisfy either the public or the profession."

The force of this passage is not in the circumstance of the single Judge being, in a sense, a subordinate Judge elevated into an appellate court. It is obvious that a tried and experienced Judge, though in a sense subordinate, would be infinitely preferable to any advocate, whatever might be his standing, taken directly from the bar and placed, all at once, on an appellate bench where he is to exercise, single-handed and so far uncontrolled, the power of reversing the judgments of authoritative and eminent Judges, before whom he had just been acting as counsel, and whose decisions may have been long looked up to with approval and confidence. It is worthy of grave consideration whether a Judge of an appellate court should not always be taken from the Bench and not from the Bar. The true meaning of Lord Russell's words, above quoted, was "that the opinion of one Judge against another would not satisfy either the public or the profession." This is the common-sense aspect of the matter, and it will probably not be long before it is made more palpable. Lord Westbury, then member for Aylesbury, in the course of the same debate, said,

"He considered the noble Lord's (Lord J. Russell's) proposition of value, because there would be an appeal in Chancery, no longer

from one single mind to another single mind, but, to a plurality of minds. Even if a division should arise between the appellate Judges, there would remain the judgment of two minds."

This proverbial uncertainty of the law is aggravated, and the spirit of vexatious litigation is greatly encouraged, when the appeal is from one Judge to another Judge sitting alone. The chances are such as to make the administration of the law a kind of legal lottery, in which a defeated, reckless, or vindictive suitor is ever ready to take a ticket, the price of which is estimated simply by the extra fees and costs of a second hearing. This, of itself, is no small mischief, but the more substantial evil lies deeper, in the unsettling of the law which must inevitably result from the many perplexing conflicts of opinion between two separate Judges, especially when it may so happen that the nominally superior tribunal is regarded as the inferior in learning and judicial experience.

A further appeal is, no doubt, open to the House of Lords; but *non cuivis homini contingit adire Corinthum*, and in a vast number of cases pecuniary considerations prevent the unsuccessful suitor from reaching the Corinthian court of our temple of justice, and he is obliged to put up with the last drawing of the legal lottery.

It will be remembered that, in 1866, Lord Cranworth introduced a Bill (afterwards withdrawn) to make the Master of the Rolls the senior Lord Justice, and to appoint a fourth Vice-Chancellor in lieu of the Master of the Rolls. The principal ground upon which the proposed change rested, was the high rank of the Master of the Rolls, standing, as he does, next to the Lord Chancellor in Chancery precedence as well as in antiquity of office, which rendered it apparently improper and unfitting that his decisions should be open to reversal by the Lords Justices who were of inferior rank to himself. This view had reference to the state of the court when the Lords Justices sat together, and there was, at all events, the dignity and authority of two Judges against one. If Lord Cranworth's reasoning was entitled to sufficient weight

to justify his intended alteration at that time, surely it would apply with double strength when the judgments of the Master of the Rolls for the time being may be overruled by a single Lord Justice who never previously held a judicial office, and who, it may happen, will mainly owe his elevation to the pernicious habit which has made parliamentary position and party allegiance the chief recommendations to the Bench. Lord Cranworth, however, assented to the late Act, according to the statement of the Lord Chancellor on introducing it to the House of Lords.

In addition to the advantage which was anticipated from two Judges presiding in the new court of appeal, it was considered that great benefit would result from the Lord Chancellor and the Lords Justices frequently sitting together, and that the "full court," so constituted, would be a most satisfactory appellate tribunal.

This very desirable object was clearly contemplated by the Act of 1851. Sir R. Palmer, in his masterly speech in Parliament, on 23rd Feb., 1867, stated that "it was originally intended that the Lord Chancellor and two Lords Justices should sit together as one court, with power, however, of sub-division when occasion required."

It has long been a matter of great regret and complaint that this admirable appeal court of three Judges so seldom sat. Had it held periodical sittings, the number of appeals to the House of Lords would probably have been diminished, and the amount of sound and settled law increased. Many applications were made to the Lords Chancellor for the time being to have the full court held. Such requests were usually discouraged, and only complied with on some few occasions, as appears by the following "return." In the year 1865-6 the full court sat only 14 days, while the Lord Chancellor sat 74 days, and the Lord Justices 127 days. The number of rehearing appeals, appeal petitions, and appeal motions disposed of by the two appeal courts was 158, while the number of such matters, during the same period, heard by the full courts, was only 4.

It is now proper to advert more particularly to the Act of last session, to the circumstances under which it was passed, and to what will be the nature and effect of it. The courts of appeal had become so burthened with arrears that it was almost hopeless to expect the disposal of them within any reasonable time. It was felt to be imperatively necessary that some plan should be discovered for relieving the pressure. The principal cause of the obstruction in the appeal courts was the formidable number of what are called "winding-up cases." This winding-up business in Chancery is of comparatively recent growth. The quantity of it in times of speculation becomes enormous, and the ordinary machinery of the court is often scarcely able to bear the strain thus brought upon it. There is almost enough of this description of legal administration to justify the creation of a distinct tribunal. It is generally originated by some summary process, and the numerous cases decided are not set down in the Registrar's office amongst the appeals which stand for hearing, although they are printed in the court papers of the day. These matters doubtless involve large property, and affect rights and liabilities of great importance. But, nevertheless, they are somewhat of a temporary character, and, from their intimate connexion with the mercantile world, imperatively call for early and expeditious determination.

It was mainly with a view to the removal of the special obstacle caused by the multitude of these cases that the late Act was devised. It was never deliberately contemplated by Parliament that nearly all the appellate business of the Court of Chancery was to be brought under the absolute jurisdiction and control of a newly created tribunal, to consist of a single judge. It will be observed that the Act expressly provides that no decree made on the hearing of a cause should be re-heard before the Lords Justices, when sitting separately. The meaning of this proviso must have been to prevent a single Lord Justice from sitting in appeal, from decree which had been made on the solemn hearing of suits by the court below.

The intention was to confine the novel and anomalous jurisdiction to interlocutory, summary, and comparatively subordinate appeal business. On the 12th July, 1867, when the late Act was originated in the House of Lords by the Lord Chancellor, he said that "In the present state of arrears it was absolutely necessary to get rid of a quantity of business which was overwhelming. It was, therefore, proposed by the Bill that certain duties might be taken separately, but the Lords Justices were not to sit separately on appeal."

His Lordship, by the word "appeal," which he is reported to have used, must have referred to the exception in the statute, which excludes from the jurisdiction of a single Lord Justice all decrees made on "the hearing of a cause," such being the description of appeal business set down as "appeals." The effect and extent of this precautionary exception, and its value as a safeguard to the suitors, must obviously depend on the construction which is put on the words "hearing of a cause." To understand this it will be necessary to refer for a moment to the manner in which causes are brought to a hearing. According to the old practice of the court, answers were always put in to bills of complaint, and replications thereto were filed. Thereupon the cause was at issue, and evidence adduced, and, after proceeding through certain formal stages, it was set down for hearing. By the Chancery Amendment Act of 1852, sec. 15, the tedious machinery of answers and replications might be dispensed with, and causes be brought to a hearing by the simple process of a motion for decree. The former practice was not wholly abolished, and is still resorted to in some cases, but the result of the alteration is shown by the parliamentary return for 1865-6. In that year the number of causes set down for "hearing" on motions for decree was 1,139, while those set down under the old formalities was 257. Now, the hearing in the one class of cases is in all respects as solemn, formal, and complete as in the other; there is no substantial reason why a distinction should be made between them, and the decree pronounced in all alike are, "decrees

made on the hearing of a cause." But this appears not to be the view taken by the Lords Justices in the construction put upon this excepting proviso of the late Act.

In a case of *Baxendale* v. *McMurray*, which had been heard before the late Lord Justice Turner and Lord Cairns, the noble and learned Lord, after the lamented death of his colleague, gave judgment, and the following short note appears in Law Reports 2, ch. 793.

"July 29. The appeal was this day placed in the paper to be disposed of by the Lord Justice, Lord Cairns sitting alone; but a question having been raised whether, under the 30 & 31 Vict. c. 64, an appeal from a decree made on motion could be heard by a single Lord Justice, it was arranged that the case should be opened again *pro formâ*, on the 31st, before the Lords Justices Cairns and Rolt, that the order made might be treated as the order of both."

"July 31. Their Lordships both stated it as their clear opinion that the words 'decree made on the hearing of a clause' in statutes 30 & 31 Vict. c. 64, s. 1, did *not* include a decree made on motion for decree."

Their Lordships, however, said that as the above arrangement had been made in that particular case, though before the point had been fully considered, it would not be departed from. It will be seen, by reference to the Parliamentary Return before stated, that the effect of this decision is to make the restrictive proviso in this late Act comparatively valueless, and, as already said, to bring nearly all the more solemn appeal business under the sole determination of a single judge.

It is difficult to understand how such an important measure should have been allowed to pass without encountering any opposition, or even raising any substantial discussion. This may be partly accounted for by the disinclination of the legal members to take any hostile course on a Bill so introduced from the House of Lords, and partly from the prevalent impression that the excepting proviso would render it, to a considerable extent, harmless, and that the proposed novel

jurisdiction was, in reality, only intended to meet a temporary and pressing emergency. It would have been better had such a novelty been expressly made temporary by enactment, and a general feeling now prevails that early in the next session of Parliament a Bill should be introduced to repeal the Act *in toto.*

There is no doubt that an improvement in the equity appellate jurisdiction is absolutely necessary, to prevent the serious accumulation of arrears in future, but it ought to form part of some comprehensive and well matured scheme, embracing the whole judicature of the country.

The Royal Commission on this subject, recently appointed, comprises several names which are a guarantee, in themselves, for the careful consideration of this great national question, and justify us in anticipating with confidence that such a scheme will, before very long, be laid before Parliament. In the meantime, all crude and experimental changes in our judicial establishments are to be most earnestly deprecated, as fraught with danger to the rights and property of the community.

J. H. P.

ART. III.—ON THE REMNANTS STILL EXISTING IN THE LAW OF EVIDENCE OF THE PRINCIPLE KNOWN AS INCOMPETENCY ON THE GROUND OF INTEREST. *By* FREDERICK R. FALKINER, Q.C., *of the Irish Bar.*

SOME years ago a case was sent to me on behalf of a gentleman called to answer in an action for damages. My duty was, as pleader, to prepare his defence. He was a well known clergyman of the Presbyterian Church. The damages claimed were several thousand pounds, a sum large in itself—relatively to the defendant's means immense—but the pecuniary gravity of the charge was insignificant compared with its moral and

social menace. My client was a young man; he stood high in the estimation of his congregation and the world, as one who lived up to the standard of his calling—a religious teacher of strict morals and unstained life. With the plaintiff's family, who were members of his branch of the church, he had been on terms of intimate confidence. Shortly before the action he had been called on to take part at a religious meeting held in the town where the plaintiff resided, and was staying as an invited guest at the plaintiff's house. A few days after his return home the action was commenced, charging him with guilt in the person of his late hostess, a young lady of spotless reputation. No man was ever called to answer a charge threatening ruin more complete, or which, if sustained, would brand with a more complete stigma of disgrace. In the very discharge of sacred functions—whilst teaching others, himself so castaway—the professor of Christian ethics, outraging hospitality after a fashion to shock the instincts of barbarous tribes—the confidential friend, using the influence his sacred character had given him to betray where even professed libertines are wont to spare. The case was stated to me with the seriousness the occasion suggested, but with the confidence of assured innocence, showing no alarm as to the possible result. The defendant and the accused lady, though deeply shocked and wounded to be the subjects of such a scandal, were stated to be most anxious for a speedy trial when they might vindicate their innocence in public and on oath. The plaintiff admitted he had no personal knowledge of the guilt he was alleging. A heated imagination had been wrought on till its phantoms had become its only realities. The tainted evidence on which the charge rested was such as, even if unbroken on the wheel of cross-examination, could not live an hour if weighed against the oaths of the lady and gentleman it sought to implicate. I leave to any man's generous sense of wrong, to any man's love for right, the feelings of these imperilled persons when they were informed that neither one nor other would be permitted to open their lips in refutation of whatever falsehoods might

be trumped up against them; that their sole reliance must be on the intrinsic weakness of the plaintiff's evidence, or the chance of proving its falsehood by the usual tests of cross-examination and comparison. I postpone the sequel of this story, but ask the reader to dwell for an instant now, as I did then for many an hour, on the unknown peril in which the fames and destinies of these two persons were placed. Suppose this case to go forward to a false verdict, founded on testimony, irrefragable because unanswered, and which could yet have been shown by the testimony of the victims to have had not more of substance than the plausible mountain and likely lake upon the landscape painter's canvas; and have you not, in this nineteenth century, an immolation to false law as shocking as when the young children in the East passed through the foul fires of Moloch, whom ignorance and prejudice pronounced to be a god?

This case set me thinking on the rule of evidence by which my client was made incompetent to give testimony in the above case. And as it is still a rule, and may any day work an irreparable wrong of the first magnitude, I wish now to state the reasons why I think it should no longer exist in the common law of England. The rule is itself but a portion of a remnant of a principle long venerated by English jurists, known as "incompetency on the ground of interest." Once lauded as an instance of the sublime wisdom of our jurisprudence, this principle has now been exploded as a sad specimen of its occasional fatuity. Though a witness were of the integrity of Aristides or Cincinnatus, as unswervable from the path of truth as the sun from his course in clear heaven,—though he were the sole human being having knowledge of the fact on which he was called to testify,—as exclusively so as if it were something that had occurred in Eden before Eve's time and he were father Adam—his evidence could not be heard if to the extent of a few sixpences he was what the law deemed interested in the result of the cause. This insane doctrine, so far as it is a general rule, has been abrogated with the approval of all thoughtful citizens, and the tardy assent even of the

citizens without thought who first sought to uphold it. A small remnant still abides, which I wish to see abolished. So long as this remnant was portion of a general rule, it stood supported by choruses of parrot wisdom, entrenched in the citadel of time, bristling with old reasonings that looked like arguments, till anyone ventured to use them, like the partizans on a show castle wall, awful to the cockney tourist, but truly formidable only to the rash artillerist who might dare to fire them off. What was an instance is now an exception, and like all exceptions must be justified by the affirmant, for the burden of proof has shifted. Yet, I cheerfully assume the burden, maintaining that no reason exists for the exceptions which did not exist for the general rule. This requires some closer scrutiny of the doctrine which made witnesses incompetent on the ground of interest. Bentham, assailing it with a bitterness unparalléled in philosophic inquiry, turned upon the judges from the law which bound them with as wild injustice as when the sufferers in 1848 blamed the Government for the potato blight. He averred that the sagacity that had defined the rule was as much below that of a peasant making rules for his cottage family, as the scientific sagacity of the same peasant was below that of Newton. Nor in this, perhaps, was he far wrong, but he deliberately attributed its origin and retention to the avarice of the judges, corruptly interested in the badness of the laws, undeterred by such names as Mansfield and Ellenborough, who adorned the Bench of the times in which he lived. The rashness recoiled on himself, and for many years condemned this original thinker, with his cherished love for justice, to the neglect that usually clings to a reputation for extravagance. On the contrary, the idea in which the rule originated was not ignoble. It was an attempt to apply the maxim—"The fountain of justice must be ever pure." There is a natural human tendency towards self-interest; it is often stronger than the tendency to veracity; the testimony of an interested witness comes with a suspicion branded on it by human nature. *Therefore,* it should never be admitted;—so

runs the theory. Chief Baron Gilbert even states that there is more reason for disbelieving such evidence than for believing it.

The premises of this logic are true, the conclusion monstrous. The fallacy assumed that when such testimony is rejected, evidence sufficient for the purposes of justice, free from such suspicion, shall be forthcoming. It might be reasonable for mankind to burn up all wheat fields mixed with tares, and so save the trouble of sifting the harvest, if the unmixed fields would meet the world's demand for bread. Napoleon would never have conscribed Young France if his veteran conquerors of Europe had been immortal. But by the nature of things when we examine unknown facts, whether laws of nature or affairs of life, so long as they are in doubt, we can never safely leave any source of knowledge unexhausted. Our man-made law, by systematically excluding his nearest sources of knowledge, shared the fate of all artificial devices, substitutes for natural law, and was about as wise as the man, who, knowing the sun's rays come refracted to his vision, should insist on going blindfold, and groping through his labour by touch, rather than run the risk of an optical delusion. And grotesquely did justice grope about, so long as she applied, or thought she applied, this principle. Human interests creating bias are so multitudinous and subtle-formed, that, if wholly banished from her courts, justice must sit, not blind and lame, as she is described, but self-blindfolded and self-spanselled. So she made rules limiting her rule, and thereupon did the dame appear straining at gnats and swallowing camels, after a fashion to make angels weep. The bias of love, fear, hatred, passion, revenge, party spirit were allowed to revel through her halls as in Collins' ode;— Direct money interest and the mutual sympathy of married persons were the decimated exiles.

The vagaries of this inconsistency would fill volumes, for the orbits of injustice, like the motions of the polypus, defy geometry. Your only witness might be excluded for some small money interest in the verdict, even though he had

stronger indirect leanings the other way, while your adversary could poll against you his brothers, his sons, his myrmidons, nay, the suborned testimony for which he had paid. The aged litigant might not testify in defence of the estate, which soon, in all events, must elude his grasp, but his adversary's youthful heir, to whom the future seems unbounded, may perjure for the winning of it, uncontradicted. Lucretia might not testify for Collatinus, but her namesake of the Borgias might swear for her paramour to her fancy's limit. The husband cannot speak for his wife, but the lover may for his lady-love, towards whom his bias, in fact, compared with his bias for self interest, he thus expresses:—

> "A man had given all other bliss,
> And all his worldly wealth for this,
> To waste his whole heart—in one kiss
> Upon her perfect lips."

And the injustice did not rest with the exclusion of evidence the parties sought to give. The rule was traded on by wrong-doers, who would frequently defend the wrong, because they knew the law would shut out proof of the right, and that their own consciences could not be searched for the admissions which must have followed their own examination. Thus the law operated directly against the innocent, and in favour of the guilty, the saddest failure which human justice can exhibit. And all this was suffered, notwithstanding the experience in every trial, that interested evidence when admitted, was not necessarily believed, but carried its antidote with its bane, for the deflecting interest was always known to the tribunal, and was always subjected to the tests I have mentioned, of cross-examination and comparison.

At length society would endure those inflictions no longer. The army of reformers, marching to their promised land, came to the ramparts of this Jericho, where dwelt the false gods of prejudice and obstruction; and the walls fell down before the blare of truth's trumpets. In 1843, Lord Denman's Act* was passed. Its preamble is worth attention:—

* 6 & 7 Vict. c. 85.

"Whereas the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, *and it is* desirable *that full information as to the facts in issue*, both in criminal and civil cases, *should be laid before the persons who are appointed to decide upon them*, and that such persons should exercise their judgment on the credit of the witnesses adduced, and on the truth of their testimony."

By this statute the axe was laid to the root of the tree, and the rule was abolished in the case of all witnesses who were not in effect parties to the cause, or their wives or husbands. In 1850, Lord Brougham carried his famous Evidence Act,* by which he emancipated the testimony of the parties to the suit. Following up these victories in 1853, the veteran leader, with his Evidence Amendment Act of that year,† invaded the sanctity of British homes, by allowing husbands and wives to testify for each other in civil cases, if they chose. The paradise of common sense has so far been reached; but snarling at its gate was a triple-headed Cerberus, for whom medicated cakes, in the form of three exceptions, were deemed expedient.

The framers of these enabling statutes, to secure their passing, were obliged to leave untouched three cases of disability, and the Matrimonial Court has decided that it is bound by the one which applies to causes tried before it. The cases are—1. Parties to actions for breach of promise of marriage. 2. Married persons in criminal proceedings, brought against either of them. 3. Married persons and parties to the suit in proceedings instituted in consequence of adultery. It is manifest these exclusions all directly violate the great principle announced in Lord Denman's preamble, declaring it desirable that full information on the facts in issue should be laid before the persons appointed to decide upon them.

As to the case of Breach of Promise, surely it is emphatically the form of action in which the actors should personally appear

* 14 & 15 Vict. c. 99. † 16 & 17 Vict. c. 83.

on the scene. I designedly use a stage metaphor, for usually in these trials courts assume the aspect of a theatre. Stage effect is, perhaps, in some degree pardonable in the conductors of these melodramas and high comedies; but except it be for the purpose of making this essential, I cannot understand why the rule of excluding the testimony of the parties should here exist. The injured plaintiff can neither describe her feelings nor detail her injuries herself, so her ardent counsellor does this for her. Fearless of sober fact interfering to cast its wet blanket on his burning rhetoric; undeterred by any apprehension that former love passages, elicited on cross-examination, may exhibit his fair client as a more experienced personage than a novelist would choose for heroine; knowing that the deeply injured lady can only sit in court, like Niobe, all tears, he flings the reins to gallantry, and dashes across the field of fiction. As no concrete plaintiff is to appear, he produces a specimen of abstract womanhood, clothes it with all feminine virtues of nature and accomplishment, decking it like the lay figures in the court milliners, whose cane bosoms and steel hearts are concealed in all the trickery of lace and moire; and as his plaintiff is set forward a fictitious angel, a deserted Ariadne, fit mate for a demigod, so is the defendant in his hands a fictitious demon. Let me illustrate this by reference to the world-known trial, not less perfect for its infinite fun, than for its faithful satire of injustice in the name of justice. Who that knows as we do (what the jury who decided his cause never were allowed to know) the real character of the dear old Mr. Pickwick, can endure with greater patience than that immortal defendant himself the apostrophe of Serjeant Buzfuz "Of this man Pickwick I will say little. The subject has but few attractions, and I, gentlemen, am not the man, nor are you, gentlemen, the men to delight in the contemplation of revolting heartlessness and of systematic villany." But the danger is not merely of hyperbole, unchecked and operative in results; from the very nature of the action it is one in which the exclusion of the parties may exclude the only witnesses of the

truth. When there are no written records of the truth, then must the best evidence of the promise rest in the hearts of the persons who gave and accepted it. These bargains are not usually made *in market overt*, before witnesses, when the proposal is a whisper and the acceptance a sigh, and the contract seal is redder and softer than sealing-wax; and perhaps the cruellest of all these perfidies are those when the silent stars alone were witnesses of the *consensus animorum*. I have been in two cases of this kind in which the defendant put the plaintiff on proof that any promise had been given; in one of them we failed solely in consequence of our inability to examine either plaintiff or defendant. I say *either*, because we were quite confident the defendant would never have resisted the action at all, but that he knew he had never *committed* love with his pen, and that he could not himself be called to own the soft impeachment on his oath. In the other an unexampled scene was witnessed. The counsel on each side consented (as I have never seen done before or afterwards), that our respective clients, contrary to the law, should be examined. The defendant was an elderly bachelor; he admitted to sixty. In his examination in chief, he swore with great emphasis and some gesticulation—"A' never kep company with her, and a' swear a' never paid her any attentions!" He was very sturdy, and the jury began to look doubtfully towards the plaintiff and her case. In cross-examination the first question asked was—"Mr. H., did you ever kiss the plaintiff?" No one who saw it will forget the comicality of the face when this question was asked him. No reply. Question repeated. A pause of fully sixty seconds in a breathless court, broken by the witness in a voice of indescribable slyness—"My Lord, am I bound to answer that question?" "*Solvuntur risu tabulæ*"—and the plaintiff had her verdict. But, more graphically than in any instance of my own experience, we have, in the great leading case of *Bardell* v. *Pickwick*, an illustration of the many-sided injustice of this exclusion. The only real depositaries of the truth, Mr. Pickwick

and Mrs. Bardell, were out of the question, so, as you remember, the evidence against the defendant was the description by third persons of the scene when that plump lady had fallen into the good man's arms. The cause of her emotion was a question of Mr. P. "Mrs. Bardell, do you think it a much greater expense to keep two people than one," which she understood for a proposal; but which the defendant, if allowed to explain to court and jury, would have shown referred to his intention of hiring Mr. Weller. And I may sum up my argument by asking my readers to conclude with me that had the parties been examined, the verdict would have been the other way, and the speculation of those friends of humanity, Dodson and Fogg, have proved a failure.

As to the second exception, which incapacitates married persons as witnesses for or against each other in all criminal cases, I am at a loss to see why it should survive the repeal of the rule as to civil causes. When we recollect the habitual companionship which matrimony in fact necessitates, we have no difficulty in conceiving the numberless occasions in which the husband and wife must be the sole spectators or ear witnesses of things, the subject of inquiry in courts of justice. This experience led to the alteration of the law in non-criminal proceedings, but the self-same experience points to the numerous criminal trials in which the exclusion has worked, or may work, flagrant wrong. Given any circumstance of which you are simply told that a husband or wife, and one second person, were sole witnesses, and asked to guess who that other was, the doctrine of chance tells you the odds will be largely that the second witness was the wife or husband of the first. Suppose a married couple to be travelling. In the railway carriage the husband is pillaged by a gang of those industrious gentry who voyage nowadays with dresses and addresses so superior to their honest neighbours. The train stops, and the fashionable brigands, to forestal prosecution, give their victim into custody. *His* mouth is closed because he is the accused, and his only witness is compelled to equal silence

because she is his interested wife. Precisely analogous occasions may occur under the roof of any home. However suspicious the defence of an *alibi* may be, we know the greatest judges have justified Mr. Weller senior's opinion of its potency, for, if true, it is the most conclusive defence of all, and, when true, can often be only proved by the prisoner's wife. Indeed, a man can give no greater evidence of his innocence than to pass his time *tête-à-tête* with his partner. I will not multiply instances; but the present disgeared working of this rule seems to complete the argument for its abolishment. The very same cause of complaint may, in a variety of cases, be the subject either of a criminal or civil proceeding. Assaults, libels, misdemeanours as to money or property, may often be indifferently complained of in an action for damages or a prosecution. In the one court the wife may testify, in the other she must not, yet every one knows the primitive consequences of a civil verdict may often heavily outweigh a judge's sentence. I do not propose that a wife or husband should be *compelled* to testify against each other. In this I would leave the law as it stands, and so preserve the righteous policy which keeps sacred the confidence of married life.

This brings me to the third exception by which the parties interested in proceedings taken in consequence of conjugal infidelity are held incompetent witnesses.

Little consideration suffices to show that this is the case in which the exclusion may work the cruellest wrong. Here the incompetent witnesses must always have the surest knowledge on the question in issue. When the charge is false from mistake or concoction, they must frequently be the only witnesses qualified by certain knowledge to prove the truth. They are always the persons most vitally interested in the event, and have therefore in natural justice the highest right to be heard in explanation of ambiguous facts alleged against them. What more tyrannical injustice than to threaten the status, fame, and destiny of a fellow subject with living misery, and ever living disgrace by evidence that he or she in some

careless hour has been heard to speak in such and such a way, and to refuse the threatened one to appear and show with the simple conclusiveness of truth that the conduct suspicious or seemingly convicting, was not merely ambiguous but innocent. Here, as in almost all questions which touch the deeper interests of men and women, we can find in the great dramatist our aptest illustration of the argument. Take that, perhaps greatest, story ever told in which Shakespeare makes a charge of conjugal infidelity the theme of his master treatment. Who has not stood in tears by Desdemona's couch, lying in her white beauty, yielding her pure life, sweet as the perfume of crushed violets, to the hands of her loving murderer? Who has not beheld with more awe-struck pity the infinite despair of him—

> "That loved not wisely, but too well;
> "Of one not easily jealous, but being wrought,
> "Perplexed in the extreme; of one whose hand,
> "Like the base Judean, threw a pearl away
> "Richer than all his tribe; of one whose subdued eyes,
> "Albeit unused to the melting mood,
> "Drop tears as fast as the Arabian trees
> "Their medicinal gum."

Have your captive sympathies, as they beheld the deluge of tragedy pouring upon the world around Othello, ever allowed you to reflect on the evidence which drove him to let loose its floods? He had made himself the tribunal in this proceeding instituted in consequence of adultery. What evidence did he admit? The demi-devil Iago, recounting conversations he had with Cassio; some expression of Cassio overheard and wholly misinterpreted; and the circumstantial corroboration of the handkerchief. What evidence did he reject? Desdemona, fairest personation yet created by idealizing power of truth and chastity, fulfilling all conditions of the pedant canon—having surest knowledge of the truth, and yearning most to speak it. She tenders her testimony and offers the corroboration of the co-accused. "No by my life and soul, send for the man and ask him!" But had Othello

been an English lawyer he could not have acted more in accordance with the English Law. They were the respondents. They must not be heard :—

> "For to deny each article with oath
> "Cannot remove or choke the strong conception
> "That I do groan withal."

Cassio, an embodiment of bluff integrity, is rejected, and yet his explanation of that obscure language which to Othello brought conviction of guilt, would have carried instant conviction of innocence, and of Iago's demi-devilry; and the conclusive evidence of the handkerchief (become light as its own cambric web) would have blown away before the breathing of a few simple words. There was one other witness—Emilia, the faith-worthy friend, who had never left her mistress' side in all the period through which the accusation reached. Her corroboration as to the handkerchief, heard, alas, too late, did, in fact, convince when all was over; but, quite rightly, would our jurists say, her testimony was rejected, for was she not a married woman, and would not her testimony go to convict her husband of perjury and conspiracy; therefore she never would tell the truth. And yet Emilia is the first boldly to confront her lord, and in the name of justice to brand him as a "most pernicious caitiff." Thus gigantic sorrow is wrought simply because this inquiry is conducted on strict principles of English jurisprudence. Yet Shakspeare intended to describe, not the action of truth-searching sagacity, but of jealousy driven frantic by infamous fraud, to which trifles light as air were confirmations strong as proof of Holy Writ. And, in his other play, which turns on a like narrative of marital suspicion—"The Winters' Tale"—King Leontes betrays to assassination his friend and guest, consigns to sixteen years of mutual banishment himself and queen, "that dearest, sweetest creature," casting forth to crows his baby daughter, because in the madness of his jaundiced fancy he has determined to act alone on the circumstantial evidence of doubtful words and gestures, and to shut his ears to the denials of Polixenes and Hermione. They were interes-

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ted witnesses, yet their testimony, if listened to, would have dissipated his doubts. And here also the procedure of the common law was insensibly adopted, not by judicial foresight, but, as the poet tells us, by "*Tyranny* together working with his *jealousies*." Both these plays also strikingly illustrate the fallacy of assuming that interested evidence will be received as disinterested. Desdemona and Hermione both protested, and in vain. Hermione thus clearly expresses the intrinsic weakness of interested evidence in the abstract:—

> "Since what I am to say must be but that
> Which contradicts my accusation, and
> The testimony on my part no other
> But what comes from myself, it shall scarce boot me
> To say—Not Guilty."

The testimony carried this intrinsic weakness, though, if tried and compared by the ordinary tests, it would have been conclusive.

In justification of retaining the exclusion in this form of action, it has been observed on high authority, that in such cases the tendency to perjury is almost irresistible; but so far as this refers to perjury in self-exculpation, the objection is precisely the same in all cases where persons are permitted to testify in furtherance of their deepest interests; and though, no doubt, the tendency to perjure in exculpation of the co-accused is different in kind, it is manifest that here also the objection goes to the weight and not to the admission of the evidence. In tracing the origin of this exception, I incline to attribute it to a passage in Lord Denman's speech for Queen Caroline, in which he justified the course taken by her counsel in omitting to call Bergami; and yet from that passage it appears that by the law of Parliament they might have produced Bergami had they thought right, and therefore Lord Denman's remarks only go to show the weakness of such testimony, and not its illegality. Further, this less selfish bias to conceal the truth is such as must occur in numberless cases as the law now stands. I recollect hearing of a case tried in

Galway some years since, in which a person, whom I will call Jeremiah Sullivan, was asked if he had been guilty of impropriety with the plaintiff's daughter, whose character was assailed by the defence. "Upon my oath," said Jerry to the examining counsel, "I never was, and upon my oath if I was I'd give you the very same answer;" on which the plaintiff's counsel observed in reply, that "though the witness was plain Jeremiah Sullivan, he was one of nature's gentlemen." Trials of this kind are certainly oftentimes worth little, but *for that very reason* they are comparatively harmless when untrue, whereas when true they would frequently carry with them the internal indicia which truth, closely examined, is rarely found to want.

But to any reasoning in favour of this exception there is one answer, which seems to me unanswerable, and which I discovered in the case mentioned in the opening of this paper. In the difficulty before described, we were asked if we could devise no means by which our client should have an opportunity of clearing himself on oath. After consideration this expedient was adopted. We commenced an action for slander at our defendant's suit against the plaintiff in the first action. The slander alleged was the accusation, the subject of that suit. We knew no technical defence dared be taken in our new proceeding, and, in fact, defence was taken justifying the slander on the ground of truth. The two causes proceeded apace, to be tried in the same court, before the same judge, probably before the same jury, the same question, viz. the guilt of our client, being the sole issue triable in each. But with this startling anomaly, that in the first action neither of the accused could be a witness, whilst in our action both of them assuredly would. This stratagem, if it is to be called one, was completely successful. The earnest of innocence our course had indicated led to a calm re-consideration of the original charge; its groundlessness was made apparent, scandal and misery averted, and happiness restored. But what more complete exemplification of the anomaly and injustice of the

rule can be given, than the reflection that the same jury might have been forced on their oaths to find guilty in the one case from absence of evidence, and in the next hour to acquit on the self-same issue when the excluded testimony was before them.

It will be remarked that I have said nothing here on the great subject so often mooted, whether prisoners should be allowed to give evidence in their own behalf. For my own part I have little doubt as to how this question ought to be, and ultimately will be, decided. But it is, doubtless, open to grave difficulties, requiring separate and substantive treatment.

Perhaps some apology may be due for the narrower reach of my subject, but it seemed to me that he who aims at a practical result should, if possible, write not wholly as a theorist, but with views and convictions in some degree founded on his own experience of those systems in their present working, in which he would suggest amendment. And, after all, no subject can be deemed too minute or technical, the discussion of which may conduce, even in little, to the triumph of truth over falsehood, of right over wrong. Should the consequence of the change for which I have contended be to remove some of the shackles that still fetter the free action of the justice of our country; to lessen, even for a few litigants, some of that delay, vexation, and expense which our philosophers have deplored, and our great poet has placed prominent among the several ills which flesh is heir to,—to aid in the establishment for our courts of judicature, free trade in truth,—the advocate, however unsuccessful, will have been justified in his selection.

ART. IV.—PARLIAMENTARY GOVERNMENT IN ENGLAND.

On Parliamentary Government in England; its Origin, Development, and Practical Operation. By ALPHEUS TODD, *Librarian of the Legislative Assembly of Toronto.* In 2 Vols. Vol. 1. London: Longman & Co., 1867.

AT no period could the appearance of a work on parliamentary government in England have been more opportune than at the present time. The changes which have taken place in our electoral system must unquestionably produce, sooner or later, important results affecting the character of the House of Commons, and of the entire legislature. No one having any claim to be considered a political prophet has as yet ventured to predict what those results will be; but amongst thinking men, in general, there is a strong though undefined feeling that, whether for good or for evil, the changes that await us are likely to be momentous in so far as legislation is concerned, and that, in all probability, our system of parliamentary government will be subjected to a severe trial. Of course it is possible that notwithstanding any changes in our legislation and national policy, our method of parliamentary government may remain unaffected—that we may become more democratic, but still adhere to our old constitutional principles and practice. But there is no certainty that this will be the case; on the contrary, there is every reason to expect an opposite result. The manner in which the Reform Act of last session was carried through Parliament by the Ministry, was something entirely new and unheard of. It would appear as if the axe had even now been laid to the root of the old system, and a new mode of government had been already inaugurated. How far such a change may be safe and

convenient, is a question on which a good deal may be said on both sides, and we hope to have an early opportunity of entering on the consideration of this most important matter, and of endeavouring to estimate fairly the probabilities of the future.

Meanwhile, we have to deal with the portion of Mr. Todd's work now before us, in which the relation between the Executive Government and Parliament is stated and illustrated with great ability and learning. From the author's connexion with the legislature of the two Canadas, his attention had been for many years directed to the various proceedings connected with parliamentary government. Having been frequently consulted, from his position as one of the librarians of the Legislative Assembly of Canada, on questions relating to this subject, and having in this way accumulated extensive materials, he has been induced to undertake the composition of the present work. Whatever disadvantage Mr. Todd may have laboured under from his residence at a distance from the seat of the British legislature, his industry and research have supplied him with the most extensive and accurate information respecting our parliamentary system, while his thorough grasp of the "appropriate ideas" on this matter has enabled him to apply his vast knowledge with ease and effect to the elucidation of the important subject of which he treats. His views are obviously those of a constitutional Whig; but he shows no trace of party spirit, and both in defining the principles of parliamentary government and in reporting the different proceedings by which those principles have been illustrated, he never exposes himself to the slightest charge of deviating from the most perfect fairness and exactness of statement. Some, indeed, may think that his estimate of the system is too high, and that his views are rather narrow and exclusive; but no one will question the sincerity of his convictions and his scrupulous regard to truth. Whether that system is to remain in its present condition or is to undergo considerable alteration, if not an entire revolution, the present work will always have a high value, as a well-arranged and trustworthy

record of the origin, development, and practical operation of parliamentary government in England up to the present time.

It is justly observed by Mr. Todd in his preface that no work on the British Constitution has supplied "the particular information required to elucidate the working of 'responsible' or 'parliamentary' government," and that "all preceding writers on this subject have confined themselves to the presentation of an outside view, or general outline, of the political system of England." The theory of the Constitution, as expounded by Blackstone and De Lolme, and other writers of a later date, rests on the basis that the sole executive authority is possessed by the Sovereign, and that the legislative authority is divided between the Sovereign, the House of Lords, and the House of Commons. This was no doubt the doctrine and usage of the Constitution which prevailed before the era of parliamentary government, and it is still the correct legal statement of the fundamental principles of our constitutional system. But during the last hundred and fifty years the mode in which these principles operate has been entirely changed. The exercise of every branch of the royal prerogative is criticized without restraint in both Houses of Parliament, but the Commons have not put in force the right to withhold supplies since the Revolution of 1688. The Crown has not exercised its veto on measures which have received the sanction of the two Houses of Parliament since the reign of Queen Anne, and all important legislative measures are now submitted to Parliament by the Ministers of the Crown, with the express authority of the Sovereign; and it is a recognized function of the Ministers to undertake the oversight and direction of the public legislation of the country, and to guide and control the two Houses of Parliament with respect to every measure which the Cabinet has agreed to introduce.

The last session of Parliament, however, has witnessed a remarkable change in the manner in which Ministers have proceeded with respect to a measure introduced by themselves, and whether this was a mere exceptional instance, or the be-

ginning of a new order of things, remains to be seen. But up to that time the practice had been, as we have stated above, and the general result of the modern system was such, that the legislative and executive powers of the Constitution had been able to work harmoniously together, and that the conflicts which formerly arose between them had been entirely unknown. The forms of the ancient Constitution had remained unchanged, but the mode of action of its forces had undergone complete alteration. Mr. Todd has stated this in a very able and lucid manner, and he adds:—

"This wide discrepancy between theory and practice, between the ordinary functions of the several branches of the legislature as defined in our old constitutional text-books, and the modern usages in respect thereto, affords unmistakable proof that the Constitution itself has really undergone a material alteration within the last 150 years, albeit these changes, for the most part, have been unnoticed by political writers. Formerly, the obsolete privileges above enumerated were regarded as so many proofs of an advanced system of 'checks' and 'balances of power' whereby the different parts of our complex political system were maintained in equipoise. They now remain as mere indications of ancient landmarks, which have ceased to be effectual restraints in the existing development of our Constitution."—Vol. i. p. 6.

The essential character of the change which has been effected in the working of the English Constitution consists in the transference of the force of the State from the Crown to the House of Commons. The influence of the Crown and of the Peerage is exerted in the House of Commons directly, as Mr. Todd states, by means of those members who obtain seats for the express purpose of supporting that influence, and indirectly, we may add, by means of the general impression in favour of the existing state of things, which is of powerful effect in English society, and to which our parliamentary representatives are subject no less than the rest of the community. Thus the three co-equal elements of the constitution, the monarchy,

the aristocracy, and the commonalty, have been, as Mr. Todd says, "effectually, if not formally, incorporated into the Commons' House of Parliament." The first great step in effecting this result was the introduction of the Ministers of the Sovereign into Parliament, which took place in the reign of William III., for the avowed purpose of explaining, defending, and carrying into effect the measures of Government, whereby the monarchical element made itself felt in the House of Commons. The direct influence of the hereditary aristocracy was produced by the means which they and the holders of landed property possessed of influencing the smaller constituencies in returning representatives to Parliament. The Reform Act of 1832, although it disturbed, did not essentially alter, this state of matters, and all the elements of the constitution have, up to the present time, continued to work together in the House of Commons.

But Mr. Todd is strongly of opinion that this system will be jeopardized by further democratic reform, and that "the preservation of the English constitution, in its integrity, will entirely depend upon the principle on which the forthcoming Reform Bill shall be based." This was written before the session of 1867, and it is just possible that Mr. Todd may consider the scheme of parliamentary reform which has now become the law of the land, as many of its supporters do, as an eminently Conservative measure. But for the present we waive this question and all others of a speculative character, and shall confine our attention to what gives its value to the present work, viz. the explanation of the operation of parliamentary government.

Having considered, in a preliminary chapter, the general character of parliamentary government in England, and the chief points of contrast between our modern political institutions and those which were in operation prior to 1688, Mr. Todd introduces the more practical part of his treatise by an outline of the leading events in English history which elucidate the origin and progress of our present political system, and

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by a summary of the constitutional history of the successive administrations of England from 1782 down to the present time. The author then treats of the position of the Sovereign in relation to parliamentary government, the responsibility of Ministers, the right of the Sovereign to select the Ministers of State, the proceedings on the formation of a new Cabinet, the mode of communication between the Sovereign and the Ministry, &c. In the chapter on "The Royal Prerogative in connexion with Parliament," which forms the larger portion of the present volume, Mr. Todd investigates the prerogative from a constitutional point of view, in reference more particularly to the control of Parliament over the exercise of the same by the Ministers of the Sovereign. He examines in detail the leading prerogatives of the Crown which are now exercised upon the advice of responsible Ministers, and points out the authority of Parliament in relation to such prerogatives so exercised. After defining the limits of parliamentary supervision and control in respect of the several branches of the prerogative he adds in connexion with each a selection of precedents in illustration of the views stated in the text. These precedents are well selected, and form a most valuable portion of the work, not only as showing the soundness of the statements of the author on the different matters connected with the subject of which he treats, but as affording a most useful and compendious digest of cases relating to the authority of Parliament with reference to the prerogative as exercised by Ministers. By these cases the working of our parliamentary system is clearly illustrated, as they relate to all the essential matters that come within the functions of Parliament as part of the governing system of the country, and show both what those functions are and the limitations to which they are subject.

From the great extent and variety of the questions treated of by Mr. Todd in connexion with this subject, it is impossible for us within any reasonable limits to give a summary of the valuable and interesting information which this part of his

work contains. All that is practicable for us at present is to select a few of the matters discussed by him, as important in themselves, and as illustrative of his mode of treating the different questions which his work embraces.

The first subject discussed is, the relation of Parliament to the prerogative which concerns the general executive authority of the Crown in the administration of public affairs. This prerogative may be considered as including, in a certain sense, every other, and the remarks of the author with reference thereto, and the authorities cited, are accordingly of general application, and have reference to any question that may arise out of the constitutional relations between the Crown and Parliament. The great principle which governs the relations between the Crown and Parliament in matters of administration is, that Parliament may approach the Sovereign with advice or remonstrance upon all affairs of state, and in regard to any grievance under which any subject of the realm may be suffering. But as the true responsibility of Ministers depends upon their freedom in exercising the lawful authority of the Crown, it is essential that they should be maintained by a predominant party in the legislature, who are prepared, on general grounds of public policy, to approve their acts, and support their measures. Under ordinary circumstances, the opinions of either House of Parliament are thus constitutionally expressed by the degree of support they afford to Ministers in the conduct of the Government, and it is inexpedient and unwise, therefore, as a general rule, to interfere with their decisions as to the details of administration, except in cases of manifest neglect or misconduct. These views are supported by the authority of Burke, Pitt, and Fox, and of Lord Derby, Lord Russell, Lord Palmerston, and Mr. Cobden; and then we have a long series of precedents in illustration of the doctrine stated by the author, the last being the resolution carried in the House of Commons, upon division, against the Government, relating to the plans for the Palace of Justice.

After having thus stated and illustrated the general principles

which govern the relations between Ministers and Parliament, Mr. Todd proceeds to explain the practice of Parliament in the appointment of select committees to inquire into administrative questions; the practice with regard to the granting or withholding, by the executive, of information desired by either House of Parliament; and the circumstances which may require the interposition of Parliament to restrain the illegal exercise of executive authority, in relation to Orders in Council and Royal Proclamations, Minutes of Committees of Council, and other departmental regulations, contracts entered into by public departments, and illegal or oppressive acts by individual ministers. On all these matters the author supplies us with much valuable information, and his views throughout are sound and constitutional. In all these cases, it may be observed, there are limitations to the power of Parliament, but those limitations are only such as the necessary conditions of an executive Government, situated as ours is, must impose.

We pass over what is said as to the prerogative of the Crown in matters ecclesiastical, and in respect to the army and navy. The observations on the prerogative of pardoning offenders can only detain us for a short space. While it is admitted that Parliament is fully entitled to express its opinion on the exercise of this prerogative, it can only be in exceptional and extraordinary circumstances that its direct interference is justifiable, and such is the general feeling in the House of Commons. Even when questions are put to the Government as to this matter, they exercise their own discretion as to whether they deem it expedient to reply to such questions or not. It is obvious that there is scarcely any matter within the jurisdiction of Parliament in which it is less desirable, in ordinary circumstances, that it should interfere with the executive than the execution of the sentence of the law on criminals. Whatever may be the objection to the Home Office as a Court of Criminal Appeal, it would be infinitely stronger to the House of Commons acting in that capacity. In the former, there is the possibility at least of some-

thing approaching to judicial calmness and impartiality; in the latter, it would be in vain to expect any such qualities. It is to be hoped, therefore, that Parliament will continue to follow the course which it has hitherto adopted in declining this function.

The next matter treated of is the royal prerogative in the administration of justice. In the official report of the Lords' proceedings on the trial of Mr. Hastings, drawn up by Burke, it is claimed for the Commons of Great Britain in Parliament assembled that it is "one of their principal duties and functions to be observant of the courts of justice, and to take due care that none of them, from the lowest to the highest, shall pursue new courses, unknown to the laws and constitution of this kingdom, or to equity, sound legal policy, or substantial justice." Express power is given to the two Houses of Parliament, by the 12 & 13 William III., c. 2, and 1 George III., c. 23. to address the Crown for the removal of judges from office, who are otherwise declared to be irremovable. But, to prevent undue encroachment on the independence of the judicial office, Parliament has prescribed practically certain limitations in the exercise of this high function. No charges can be entertained against any one, except on some distinct and definite ground. The charges preferred should be submitted to the consideration of the House in writing, that full and sufficient opportunity may be afforded for the person complained of to meet the accusation against him. It is irregular to bring before Parliament any matters which are undergoing judicial investigation or are about to be submitted to courts of law. Complaints to Parliament in respect to the conduct of the judiciary in the decisions of courts of justice should not be lightly entertained, and Parliament will only interpose, as stated by Lord Palmerston, in cases of "such gross perversion of the law, either by intention, corruption, or incapacity, as make it necessary for the House to exercise the power vested in it of advising the Crown for the removal of the judge."

But Parliament has a right to demand full information upon

all matters affecting the administration of justice, and papers on this subject, when moved for, are usually granted as a matter of course. It is not, however, the practice of either House, as a general rule, to ask for copies of legal opinions given by the law officers of the Crown to the executive government, nor is it customary for Government to lay them before Parliament should they be asked for. They are considered as confidential communications. The same rule applies to communications between law officers of the Crown respecting particular trials, to the judges' notes taken at a trial, and to coroners' notes.

When it is shown from circumstances afterwards brought to light that an innocent person has been unfortunately convicted, the Government are bound to afford every facility to enable such person to re-establish his innocence, but the principle has never been acknowledged that he is entitled to claim pecuniary compensation either from the Government or from Parliament. The two recent cases of Mr. W. H. Barber and Mr. W. Bewicke are not in reality adverse to this view, as the former was considered at the time as one of extraordinary hardship, and in the latter the committee refused to award anything to Mr. Bewicke for the miscarriage of justice in his case, as they did not consider such to have arisen through the default of the persons engaged in the administration of the law, and they also declared their inability to accede to the proposition, that persons who have been convicted in due course of law by evidence subsequently proved to be false, are entitled to compensation out of the public purse. As, however, Mr. Bewicke's property had been forfeited on his conviction for felony, and the produce, which was below its real value, had been handed over to him after his pardon without any further compensation, the committee suggested, for the favourable consideration of the Crown, whether the full value of such property at the time of such forfeiture should not be restored to Mr. Bewicke, *minus* the net produce of the sale already paid over to him.

The true rule, we submit, would seem to be that when an

innocent person has been convicted through the default of those charged with the administration of the law he ought to receive compensation, but that when such person has been convicted in due course of law by evidence which is afterwards found to be false, he is not so entitled. Government does not guarantee the credit of witnesses and the intelligence of juries in criminal more than in civil trials; and where a miscarriage of justice takes place in any prosecution from a defect in either of these respects, all that public duty requires is the pardon of the person unjustly convicted, with full restitution of any property forfeited to the Crown.

With respect to that branch of the royal prerogative which regards the Sovereign as the fountain of honour, no interference by either House of Parliament should ordinarily take place, although exceptions may arise which would justify their advice and recommendation in regard to the exercise of this prerogative. In the granting of charters to corporations, the prerogative in former times was of very wide extent, and implied an absolute legislative power on the part of the Crown, but the progress of our political institutions has gradually restrained its authority in this particular within recognized limits, and now no charter conferring political power or franchises in Great Britain or her colonies can be granted by the Crown without the concurrence of Parliament. In respect to public officers; in the creation of offices, in the appointment to offices, in the control of persons in public employ, and in the remuneration of such persons, Parliament exercises authority. Although the Sovereign may create new offices, yet he cannot create them with new fees annexed to them, nor annex new fees to old offices, nor grant ancient offices in other manner and form than has been usual, nor create an office that is inconsistent with the Constitution, or prejudicial to the subject, nor grant a judicial office for a term of years or in reversion. In the appointment to offices, if the person appointed be qualified for his post, it is acknowledged to be the privilege of the Administration to give the preference to their political friends and supporters. But

to this there are numerous and important exceptions, as in the church, in the army and navy, and in judicial offices. Touching the last Mr. Todd says :—

"With the exception of the office of Lord Chancellor, which is political and ministerial, and of the posts of Chief Justice of the Common Pleas and of the Queen's Bench, which are usually conferred upon the law officers of the Crown, no such principle would be permitted to prevail in England as that seats upon the Bench should be given to political partizans. In Ireland, it is true, a greater laxity on this point has prevailed, and while the Derby administrations, in 1852 and 1858, afforded examples of promotion from the Irish Bar of political opponents of the Government, yet, no doubt, in Ireland promotions to the Bench have been made in general, by both sides, on party grounds." Vol. i. p. 383.

In all matters connected with public officers, where the office has been legitimately created, Parliament has no right to interfere, except in cases of manifest abuse and corruption, but when such arise they may institute investigations, declare their opinion as to the manner in which the prerogative has been exercised, and appeal to the Crown to redress the grievance, or proceed to remedy it themselves by an Act of legislation. And it is agreeable to usage for inquiries of Ministers, or desultory conversations to take place, in reference to the appointment and control of office holders, in particular instances, when a direct motion on the subject would be objectionable. Various precedents, serving to explain and confirm the statements made by the author with respect to this matter, are given. These precedents show under what circumstances parliamentary interference with this branch of the prerogative has hitherto taken place.

The great field, however, on which Parliament exercises its authority is the important matter of supply and taxation. On this subject there are many popular misconceptions, but the true doctrine may be thus briefly stated :—The Crown is charged with the management of all the revenue of the country

and with all payments for the public service. It belongs to the Crown therefore to make known to the Commons the pecuniary necessities of the Government, and the Commons grant such supplies as are required to satisfy these demands, and provide by taxes, and by the appropriation of other sources of the public income, the ways and means to meet the supplies which are granted by them. The Crown has no concern in the nature or distribution of taxes; and the Commons do not vote money unless it be required by the Crown. The foundation of all parliamentary taxation is, its necessity for the public service, as declared by the Crown through its constitutional advisers. It is therefore a standing rule, that no money can be voted by Parliament for any purposes whatsoever, except at the demand and upon the responsibility of Ministers of the Crown. In like manner, any proposition for the levy of a new tax or duty, or even for the repeal of an existing import, should emanate from the Government. Subject, however, to these restrictions, the right of taxation and the granting supplies for the public service, belong exclusively to Parliament, and in various cases the House of Commons has modified to some extent the financial propositions of the Government, although the rejection of the financial policy of an Administration has in certain circumstances been regarded by them as a token of their having forfeited the confidence of the House.

The general rules above stated are those by which the House of Commons is guided in dealing with this important matter. The practice of the House in granting supplies and in the appropriation and control of the public expenditure, involves a variety of details which are explained with great clearness and accuracy by Mr. Todd. His account of parliamentary control over the issue and expenditure of public money contains a large amount of valuable information which is not to be found in a collected form in any other work. The respective functions of the Exchequer, the Treasury, the Board of Audit and the Standing Committee on Public Accounts

are fully described, and the value of the different checks on improper expenditure which these supply is fairly estimated, but of course from the nature of the subject with which the author deals in this part of his work, we are precluded from attempting to give any account of the important information which is there presented.

Mr. Todd next proceeds to consider the control exercised by Parliament, in connexion with the branches of the prerogative wherein the Sovereign represents the State in its dealings with foreign nations. Under this head are comprehended the right of declaring war and making peace, intercourse with foreign powers, the right of making treaties, and interference in the internal concerns of foreign nations. The limits of parliamentary interference with the exercise of the prerogative in each of these matters are briefly stated and illustrated by examples, according to the general plan of the work. We do not think it necessary to follow the author through this part of the subject, but shall content ourselves with quoting an important statement with respect to the right of the Crown to dispossess itself of territory, without the assent of Parliament. The matter is not free from doubt, and the doctrines which have been stated by high authorities have not been universally accepted.

"For a discussion of the question as to how far it is competent for the Crown to dispossess itself of any portion of its dominions without the assent of Parliament, see the debate on the Address moved in the House of Commons in relation to the Royal Proclamation issued in 1854, abandoning and renouncing all sovereignty over the Orange River territory, and its inhabitants. This question, so far as regards the right of the Crown to surrender to a foreign state a part of its territory, was supposed to have been settled in the affirmative on the authority of Lord Chancellor Thurlow, but Lord Campbell disputes the correctness of the dictum of his predecessor.* The point has again risen in reference to the Ionian Islands, and has been argued by Earl Grey in favour of the Crown, also by Lord

* Campbell's Chancellors. Vol V. pp. 555-556.

Palmerston, and Sir R. Palmer (Solicitor-General) to a similar effect, with an exception in the case of newly discovered territories which had been settled by British subjects, when the laws of this country having been introduced therein, the cession could not take place without the consent of Parliament. Or, in the case of conquered or ceded countries, if Parliament had legislated concerning them, the Solicitor-General was of opinion that the concurrence of Parliament might be necessary to their relinquishment." Vol 1. p. 614.

The general results of the inquiry as to the control exercised by Parliament over the executive Government, have been very clearly summed up by Mr. Todd in the concluding paragraph of the last chapter of the present volume. We give the following extract from it as distinctly setting forth the true nature and character of parliamentary government in England.

"We have now passed under review the principal prerogatives of the British Crown, and have endeavoured to point out, in the light of precedent, and with the help of recognized authority in the interpretation of constitutional questions, the proper functions of Parliament in relation thereto. We have shown that the exercise of these prerogatives has been entrusted by the usages of the Constitution to the responsible Ministers of the Crown, to be wielded in the King's name and behalf for the interests of the State, subject always to the royal approval, and to the general sanction and control of Parliament. Parliament itself, we have seen, is one of the councils of the Crown, but a council of deliberation and advice, not a council of administration. Into the details of administration a parliamentary assembly is essentially unfit to enter; and any attempt to discharge such functions, under the specious pretext of reforming abuses, or of rectifying corrupt influences, would only tend to greater evils, and must inevitably result in the sway of a tyrannical and irresponsible democracy." Vol 1, p. 620.

We need scarcely say that we look forward with much interest to the appearance of the second volume of Mr. Todd's work. Among other matters of great importance, the origin,

modern development, and present position in the English Constitution of the Cabinet Council will be there discussed. It is the existence of this Council which renders possible, and gives its character to, our system of parliamentary government. As long as the former remains unchanged, there does not seem to be much likelihood of any very great change in the latter; but an alteration in the constitution of the Cabinet Council would give an entirely different character to the functions of Parliament. What may be the probability of such alteration taking place, and what the results from it would be likely to be, we may take an opportunity of considering after the publication of the second volume of Mr. Todd's work.

Art. V.—THE ADMINISTRATION OF THE POOR LAW.

UNTIL some radical measure of reform has been accomplished in the manner of administering the Poor Law, the same outcry which has echoed for years past against its administration will justly continue.

It is possible to indicate within the limits of a brief paper the points to be secured in order to ensure a proper treatment of the pauper population, and a conviction by them that the workhouse is a refuge, and a kindly refuge, for honest and unavoidable poverty. At present too many of the poor consider it a foul and neglected Bastille.

First, we want an improvement in the status of the guardians. In many small unions the nomination and election of these functionaries are considered as matters of no interest. At present the *modus operandi* in regard to the election of guardians is as follows:—Before the 15th March the clerk to the Board of Guardians prepares and signs a notice, which is printed and circulated, containing the number of guardians to be elected for each parish in the union, their qualification, the persons by whom, and the places where the

nomination papers in respect of each parish are to be sent, and the last day for sending, and the days whereon the voting papers will be delivered and collected, and the time and place of the examination of votes. Any voter may nominate for the office of guardian any person or persons (not more than the number of vacancies) legally qualified.

In many instances this is a mere form. The writer knows one small town wherein the whole of the guardians were nominated by one ratepayer the evening before the papers were sent in, no one else taking any trouble.

In place of small tradesmen and fussy persons of half education, redolent of self-sufficient vulgarity and determined "to keep the rates down," it is needful that people of education, fortune, and leisure, and members of the learned professions, should take on themselves the office. Surely, to look after the well-being of the poor and unprotected, and to make the lot of deserving poverty less hard than it now is, is as noble an ambition as to be an alderman or a town councillor and talk inflated nonsense for re-publication in the local newspapers. The office of a Poor Law guardian is one demanding a combination of firmness, humanity, and tact, and is one which it is most difficult to fill perfectly. Yet this office at present falls in most cases to the lot of the people who are least fitted for its demands. The higher classes—the men of leisure and refined education—shrink from the labour. Professional men will not give up their valuable time, and thus the smaller shop-keepers and the noisy self-aggrandizing rate-payers have almost supreme rule over their poorer brothers.

Hence is it that so little sympathy or comprehension of human needs are found in Boards where the office is shunned. The hardness of heart, the petty tyranny, the callous indifference to filth, neglect, and mal-administration, the irritation at the demands of the press, the obstinate stolidity which refuses to ameliorate evils, and the ostrich-like self-deception which characterize Boards of Guardians formed from men of low type, are all too well known to newspaper readers. The

result whereof is that the average guardian considers his highest duty consists in "keeping the rates down." Such disgraceful disclosures as those of Farnham arise from this cause. The infernos that some of the London workhouses are arise from this cause. The hatred of the poor to the "union" arises from this cause, and your average guardian seems to become more hardened than ever when the press tells him his duty and the voices of humane men cry shame.

Briefly, therefore, our first point of reform consists in the election of a superior class of guardians and the regular attendance of the *ex officio* guardians. The power given by the 35 Geo. III. c. 49 to any Justice of the Peace, himself to visit or by warrant to empower any physician or the officiating clergyman to visit the workhouse, should be remembered and continually used; moreover, as every Justice for the division is an *ex officio* guardian for the union, he should make it a practice of sitting at the Board as often as possible and seeing for himself and influencing, so far as he could, the proceedings.

Secondly, a little access of wisdom to the ratepaying mind is needed. The crass ignorance which too often approves of the penny-wise and pound-foolish barbarities of guardians, is a deadly foe to the proper administration of the Poor Law. Ratepayers should learn—whether by Whitehall declarations or by the teachings of the local newspapers—that stinginess and neglect, filth and over-crowding are most expensive in the long run. To bring the poor to such a condition of mind that they prefer the prison to the poor-house is simply suicidal. The moment such an idea is generated all principles of right and wrong are abrogated, and the very end and effect of punishment destroyed; the essential point of legal teaching is that while no poverty justifies crime, no crime exists but deserves far severer consequences than does honest poverty.

Thirdly, classification is wanted. A broad line separates the really deserving poor and the idle tramp. These latter

ought to be (as in about fifteen counties they now are) treated in a different manner, and tested far more rigidly than the real paupers for whom the workhouse is meant. In point of fact it is to the police superintendent, not to the workhouse master, that the real "tramps" ought to be handed over for their night's lodging. Further than this, the sick poor should be classed entirely away from the sound paupers, should be in an infirmary, and should be under the authority of the doctor merely—he being often the most prized and potent consoler and authority to whom the poor look for solace in their duress in the workhouse. The scheme adopted under the Metropolitan Poor Act (which is a monument to Mr. Gathorne Hardy) ought to be extended, or, to some extent, copied, throughout England.

Fourthly, a more vigorous exercise of power by the Poor Law Board—the central authority at Gwydyr House—is imperiously demanded. The bugbear of fools, especially your ultra-British fools—centralization—has been so attacked with measureless abuse for years past that there are signs of a reaction, and it is the duty and province of the Poor Law Board to make its authority enforced and respected, not to deal in the *brutum fulmen* of mere "recommendations." It cannot be too widely known, or too often impressed on the Board itself, that any person wilfully neglecting or disobeying the rules, orders, or regulations of the Board may be fined by two justices, on conviction, five pounds for the first offence; for the second, any sum not over twenty, nor under five pounds; and, for a third offence, any person may be indicted for a misdemeanor, punishable with fine and hard labour (such fine not to be *less* than twenty pounds). The Poor Law Board should use its powers freely and pitilessly. Its inspectors ought to be made to do their work vigorously, and should have power (as a workhouse master said to the writer) not to recommend, but to enforce, improvements. Now the Poor Law Board has certain ample powers to make rules for the management and relief of the poor, to carry into effect the

4 & 5 Will. IV. c. 76, and they may alter these rules. Since they can make rules and punish disobedience by the aid of the magistrates, why is it they do not use their strength? The press endlessly urges them so to do; the people of humane minds ask them so to do; the poor in those workhouses which neglect, brutality, and stolid stupidity turn into torture-houses, cry to them to do so. If the Board want further powers it is certain Parliament will readily grant them.

Far too much deference to the local Boards of Guardians has been shown; far too much timidity with respect to "interference with self-governments;" far too little sympathy with the poverty-stricken sufferers who have died amid the nameless shame, filth, and neglect. How long had the infernal system lasted before all London was horrified a few years since by the revelations from its workhouses? Administrations, professing liberalism and love of the people, had been almost uninterruptedly in power, and what had they done?

Superior guardians, sympathy from the ratepayers, (and sympathy in this case is sense,) classification, and the energetic action of the central Board are what we need if we would render England christian towards her pauper population. "Poverty is no crime," said poor Mrs. Nickleby, and yet it seems necessary every day to repeat such a truism. Sympathy is wanted above all. It is the ability to feel what is the lot of these poor brothers and sisters of ours that alone makes men fit to administer the Poor Law. It is possible to sympathize and to pity, and yet to sternly discourage idleness, vice, and fraud. Our dear England yields to no land in her nobility of spontaneous charity. Rivers of gold roll forth every winter for those who need assistance. The magnitude and numbers of the subscription lists filled to overflowing in a week, sufficiently attest every year the existence of open-handed benevolence.

Yet were the Poor Law properly administered, no such irregular methods of making up for regular neglect would be needed.

No remedies but searching and wholesale ones will cure the neglect and false principle which have been fostered for years past. Such remedies will meet the approval of every thinking and true-hearted man. History tells us that no State is safe where the extremes of wealth and poverty exist. In the interests of humanity, of decency, of morality, of common honour, we are bound to make real provision for our pauper population. It is not needful, in order to avoid making pauperism pleasant, to run into the other extreme, and make poor-houses intolerable to any but the hardened vagabond. Honest and unavoidable poverty constitutes a claim on the State not to be granted either grudgingly or brutally. The law is fair enough, but it requires to be administered properly and, above all, conscientiously. Happily, in many districts, this is done, but there are many, it is to be feared, wherein the old dogged obstinacy still holds sway. The system of out-door relief, too, should be put on a strict but liberal and consistent footing. Thus, by attention to all the points to which allusion has been made, the Poor Law may be administered in a manner which shall combine due attention to the interests of the ratepayers, with proper regard to the interests of the helpless poor.

WILLIAM READE, Junr.

ART. VI.—LAW REFORM AND LOCAL JURISDICTION.

NEVER in the history of our country has the spirit of reform been so widely spread. It is common talk, a n "common is the common place" that we are upon the eve of great changes. It is certain that in the department of the law, we are not only upon the eve of great changes, but that the day of change has actually dawned, and the spirit of hope within us all presages that the day of change is, and shall be, the day of improvement.

It would be idle to discuss the question of law reform, without prefacing our observations with some remarks upon the spirit which animates the minds of law reformers. All reform, law reform pre-eminently, is the child of necessity. Nothing in law reform ever is done until circumstances compel the doing, but that necessity may operate from very different causes, and the nature and result of the change effected, will depend upon and vary in character as the disturbing necessity varies. The necessity which has arisen at the present time for law reform, is one which arises *ab extra*. Taken broadly, the spirit of the law is one which is sanctioned by the spirit of our times. It fails in administration, it is not easily got at, its remedies for our social diseases can only be applied at great cost and labour, and serious, often fatal, delay ensues.

Hence it comes that at the end of long and weary years, the whole subject of law reform is approached from the *suitors'* side. The interests of the profession in both its branches are not considered; it may be said, at the present time, that those interests *appear* wholly ignored. The interest of the suitor is the one to which the legislator and the public writer can alone look. The law was made for the community, for the suitor, not for the practitioner, either in the aggregate or the segregate.

Let us for a moment look back, and see what aspect the question of law reform presented some year or two ago, when the pressing necessity for change became obvious, and the subject could no longer be trifled with.

When changes, great and important, became not only imminent but also inevitable, there appeared to be three parties each prescribing their own nostrum for the cure of the evil. It is hardly necessary perhaps to say by the way, that our remarks apply, and apply only, to the Common Law Courts. We are not prepared to discuss the requirements or the shortcomings of the Court of Chancery, and, so far as we know, no immediate change is contemplated therein.

The first faction (we give this faction the first place, not because

it comprised the most capable or most influential of our law reformers, but simply because it happened to make the most noise), raised a hubbub for more judges to do the work of our superior courts. The second prayed for some measure which should relieve the 'superior courts' from the task of disposing of a number of small causes which, it was admitted, were utterly unworthy of those dignified tribunals. The third party, conservatives in name although the truest reformers in heart, were of opinion that possibly it might be necessary not only to appoint new Common Law judges, but that some sweeping measure in addition must be passed, before the litigation of the country could or would be satisfactorily dealt with. They thought, however, that some evidence should be given as to the nature and character of the change to be made before any change was actually made, and furthermore they were of opinion, that as there was a wide-spread feeling that courts for special objects should be constituted, *e. g.*, a court for the trial of Patent cases, local Courts of Admiralty, courts for mercantile matters, and others, it would be advisable that those who advocated change in this special direction should have at least a hearing.

We thought and we still think that these last had the clearest insight into the question, and into the great and inherent difficulty which ever has surrounded and ever will surround the whole question of reform in the administration of the law.

While the current periodicals were full to overflowing of what doubtless were intended to be harrowing tales of the misery that the suitors in the superior courts had to undergo, great agencies were at work almost as it were in silence, for the purpose of effecting alteration in the administration of the law. The Law Associations of our great towns were at work, so were the Chambers of Commerce; great pressure was brought to bear upon members of our legislature, and when Parliament met in February of last year rumour was busy in announcing the wonderful things that were to be done. Had the crop borne any proportion to the blossom, the most gluttonous law

reformer we think would have been satisfied; a Prothonotories Bill, an Admiralty Judge Bill, a Judge Chambers Bill, a Bill to confer upon the County Courts a £500 jurisdiction in Admiralty matters, a County Court Bill, and, last and not least, a Bankruptcy Bill, were the measures, or some of them, before Parliament.

The session wore on, and the interest of the country being concentrated upon the great conflict of representative reform, the subject of the law dropped to a large extent out of sight. It is true that Sir Roundell Palmer's speech, one remarkable for breadth rather than depth, attracted attention, but little or nothing came of that, and the session came to an end, two statutes only, relating to the subject matter of this paper, being added to the statute book.

Last year, in the February number of this magazine, an article upon the seeming necessity for more Judges to do the work of the Superior Courts appeared; in that article we made three suggestions, namely, that a Royal Commission should be appointed to inquire into the constitution and organization of the Superior Courts, that an economy should at once be effected in judicial labour at Judges' Chambers, and that a measure should be passed increasing the jurisdiction of the County Court.

The Judicature Commission is appointed, and has commenced its labours. The Act for the better Despatch of Business at Judges Chambers, (30 & 31 Vict. c. 68,) is in operation. The County Court Amendment Act, 1867, (30 & 31 Vict. c. 142), is in force.

Before we pass on to our immediate subject let us say that it must not for a moment be supposed that we approve of the County Court Amendment Act of 1867, as it stands; we have already* commented upon it, and we repeat that the

* In the August Number for 1867, p. 316. We would here call the attention of our readers to the preface of Mr. Gilmour's work, "the County Court Act, 1867" (Horace Cox), where will be found a very able commentary upon the Act and its merits, if any, and its shortcomings, which are many.

drafting of the Act is lamentably bad; let us express however, our hope, that the measure is but tentative, and is itself but an augury for further change.

What may be the effect of the Act upon the Superior Courts is a question on which at present it would be premature to express any decided opinion.* The Act has produced in more ways than one a perfect panic in the profession. A glance at the law papers for the months of October, November, and December, 1867, will convince any one that its first effect was to create a wide-spread feeling throughout attorneydom that the palmy days of the law were ended. "We shall all go to the workhouse," said some sapient gentleman at Chambers to Mr. Justice Lush, and the *Times* quoted this oracular statement. So lately as January 2 of the present year, the *Standard* predicted that the Act would greatly interfere with the "emoluments" of the profession, and then the article, after some paragraphs intended to alarm the lawyers, winds up by saying that "good and cheap law may be a watchword, which will prove at once acceptable to the litigant and profitable to the professional advisers,"† a somewhat inconsistent conclusion!

* We may say that at the sitting of the Liverpool County Court, on the 2nd of January, Mr. Blair, the Judge, made some observations as to the effect the Act would probably have in the Liverpool district. That learned Judge seemed to think that the effect in his district would not be to increase materially the work of his court, at all events the better class of it. This he attributed to the existence of the Liverpool Passage Court. Our own view coincides with that of Mr. Blair, but we may say that we have lately examined with some care the new rules, orders, forms, and allowances for costs and charges, and we certainly think that the effect of the latter will be to *attract* a considerable quantity of work into the court.

† An examination of the scale of costs, just alluded to, will prove, we think, that to the litigant the County Court is not a "cheap" court, and we would also call attention to the *Pall Mall* of Dec. 23, in which appeared a review of Mr. Weatherfield's "County Court Law," (Smith and Co., 1867,) where this subject of costs in the County Court is very clearly and ably dealt with. The expenses on the Equity side of the County Court, so far as the court fees are concerned, appear to be monstrous. We would call the attention of our readers to a letter which appeared in the *Law Times* for January 18th wherein it is stated, that in a small foreclosure suit, the taxed costs amounting to £85 12s. 3d., the Court fees were no less than £41 12s. 3d.

Great alarm was caused by a rumour that it had been decided that the 5th section of the Act was already in operation. That section is as follows :—

"Section 5. If in any action commenced after the passing of this Act in any of her Majesty's Superior Courts of Record the plaintiff shall recover a sum not exceeding £20 if the action is founded on contract, or £10 if founded on tort, whether by verdict, by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the Judge certify on the record that there was sufficient reason for bringing such action in such Superior Court, or unless the Court or a Judge at Chambers shall by rule or order allow such costs."

When, however, it was discovered that Mr. Justice Lush (to whom the world of attorneys' clerks and agents owe a public apology for even *thinking* so able a Judge should be so poor a lawyer) had not decided anything of the kind, and when the decision in *Wood* v. *Riley* in the Court of Queen's Bench* was published in the Weekly Notes, then things took a turn for the better, and men could talk calmly over the Act and its seeming consequences, and a correspondence was commenced in the *Law Times*, *Standard*, and *Law Journal* as to the effect of the Act upon "advocacy in the County Court."

This is doubtless an important question, but one not within the scope of our present paper, and we can only refer our readers to the letters of Mr. Edward Clarke, in the *Law Times* for 14th and 21st December, 1867, and to the correspondence at large.

We may say, however, that if there be any evil in this measure to the Bar, it is one that must cure itself. The best advocate, be he barrister or be he attorney, will be the advocate where both have audience, and we do not see, if we may

* *Wood* v. *Riley*. Weekly Notes for November 30th, 1867, p. 277. In this case it was held that none of the provisions of the County Court Act, 1867 (30 & 31 Vict. c. 142), could be of any force until after the 1st of January, 1868, for it was expressly provided by Section 36 that the Act should not come into operation until that date.

so express ourselves, that the balance of the two branches of the profession will be disturbed in any appreciable degree.

There is another point which, so far as we know, has escaped public attention—it is this: the County Court has already an equitable jurisdiction, and it has been rumoured that the Judicature Commissioners will report strongly in favour of the fusion of law and equity. We think the recommendation of the Commissioners * premature, but at the same time we think that the jurisdiction which has lately been conferred upon the County Court, if it work satisfactorily, may lead to the fusion in time of the two great branches of our jurisprudence in the superior courts; but be this as it may, even as at present, the more general acquirements of solicitors will be of great use to them in the County Court, and if the Bar is not "to go to the wall," but is to compete on anything like equal terms with their brethren of the other branch of the profession, they will have to be educated more generally than they are at present, and then a class of men will be gradually trained who, in the fulness of time when a fusion is not only desirable but practicable, will be able to discharge the duties of advocates, to adopt the old phrase, on "either side of Westminster Hall."

We do not think, therefore, that the Act of 1867, so far as advocacy in the County Court is concerned, will effect very much change. It may, and will, probably, bring young barristers into the business, but these will only swell the ranks of the local bars at Liverpool, Manchester, Birmingham, and other great business centres. But the Act will beyond question, for a time at all events, affect two important classes of legal practitioners, the London agents and those who practise

* It is to be hoped that the Commissioners will not emulate their brethren of the Digest Commission, and after months of travail bring forth a report such as that the gist and essence of which is contained in Mr. Godfrey Lushington's, the Secretary's letter. *Vide Times*, December 3rd, 1867. If the Commissioners wanted specimens of a "Digest," why not go to the fountain head at once? Are not Mr. R. T. Harrison and Mr. Fisher both alive, and in the maturity of their powers? Are there not many reporters, men of ability and intense industry, who would be glad to work with or under such leaders?

as pleaders in chambers. These two classes are mutually dependent, and what affects the London agent, either for good or for evil, will, *pari ratione*, affect the pleader.

Thus much for what has been done, and, passing from the past, it is now our duty to examine what would appear to be in all probability the character of the next change we are to experience in the processes of reform.

That the measure of 1867 is inadequate to, and utterly behind the necessities of, our times, we think clear, and in this opinion we are confirmed when we examine the reports and memorials of the great law societies and chambers of commerce of our country. It was once said "that we were a nation of shopkeepers," and if this be a true description of us, it naturally follows that as a nation of shopkeepers we must have courts easy of access to the suitor, and cheap and expeditious in process, to determine the innumerable questions which daily arise in a commerce so vast as ours.

In looking over these reports we have been much struck with the breadth of view they exhibit, but, at the same time, it is impossible to avoid remarking how completely absorbed each chamber or law society is in the wants of each of their particular and immediate districts. This is hardly to be wondered at, but, whilst this is so, it is hopeless to look to them for any catholic measure.

Although we are not advocates for any special or particular measures of reform to suit special and particular districts, it is probable that difficulty might arise in preparing any general or uniform system of tribunals, and this difficulty arises from the fact that the trading and commercial pressure is unequal, and varies immensely over the whole business area of the country.*

* Take the case of Lancashire. In the year 1865 it appears that 530 causes were entered for trial in Lancashire alone, exceeding by 54 all the causes entered on the Oxford, Norfolk, Western, and Welsh circuits. In 1866 the number was less, 485. There was, however, a general falling off on all the circuits, but the proportion would be about the same. Out of 28,000 plaints entered in the local Civil Courts of ancient jurisdiction, upwards of 10,000 were entered in the Lancashire courts, nearly as many as were entered in the Sheriff's Court of London (11,002), and out of upwards of 864,000 County Court plaints about one-tenth were entered in Lancashire.

This is a difficulty which has struck several of the societies who have reported and deliberated upon the question of law reform either generally or particularly with reference to the necessity for commercial and maritime tribunals.

Taken broadly, however, the result of our examination of the reports drawn up by these important societies, commercial and legal,* has been to convince us of the soundness of the opinion expressed in them, that opinion being, that the County Court system should be the basis upon which reform in the administration of the law is to be effected. We use the phrase "County Court system," not in its precise and now understood meaning, but in the sense of a district or local court system, such as that which obtains in America or in France, and probably the latter system would be the better model to copy. As we have said and shown, the business pressure varies immensely over the whole area of the country. In many parts of the country the local courts appear to be rather in front of their work than behind, while in other parts the tribunals are in arrear, and wholly inadequate to grapple fairly with the litigation of their districts.

While it may be conceded that the County Courts deal with the mass of small debtors with a certain amount of success, work of a more important kind wholly escapes them, for not only does the business pressure vary immensely, but the description of the work to be done varies. On the shores of the Tyne and the Tees innumerable cases arise out of the shipping which crowds the ports of Newcastle, Tynemouth, North and South Shields, Sunderland, Hartlepool. Here maritime matters form the staple of the work. At Liverpool the same, only perhaps to a greater extent, the number of ships "going foreign" being much larger, while in the centre of the king-

* Our best thanks are due to Mr. Blood, the secretary of the Liverpool Chamber of Commerce, for his courtesy in furnishing us with copies of many valuable papers, and also to a learned member of the Liverpool Law Society, through whom we were permitted to peruse several important memorials and Parliamentary reports and papers.

dom, from Birmingham north-west and north-east, we have the coal, iron, and manufacturing districts, the very workshops of the kingdom to deal with. To save the expense of a resort either to the Admiralty Court in London, in matters maritime, or to the Superior Courts, all kinds of devices are resorted to for the arbitration and settlement of commercial disputes. Under the articles of the Cotton Brokers' Association of Liverpool, disputes relating to dealings in the great staple are to be referred to arbitration, and we believe that there are many such friendly courts established throughout the northern districts, but these tribunals having no legal existence whatever, and being powerless to enforce their judgments or awards, are not and cannot be satisfactory.

The desire seems to be to economize the local and now existing tribunals. There are already courts, judges, officials, and the trappings and machinery of justice. The County Court system is elastic, and, were adequate powers conferred upon the courts, we believe they would work well.

Our readers are doubtless aware that there are scattered, up and down the country, "local courts" other than the County Courts, borough, hundred, and manorial courts, thirty-four in number,* including the court of the Sheriff of London. Some of the courts substantially exist only on paper, *e.g.* in the Colchester Borough Foreign Court sixteen plaints only were entered in the year 1866; in the Newark Court of Record 19; in the Oswestry Court 5; in the Ipswich Guildhall Court 4. By far the most important courts in this list are the Court of Passage at Liverpool, and the Courts of Record of Manchester and Salford. In our judgment the whole of these courts should be swept away, the only one which can claim an extension of existence is the Court of Passage,† and that,

* Such of these courts as are not of record, are virtually abolished by the 28th section of the Act of 1867. See ss. 28, 29, 30 & 31 Vict. c. 142.

† Were this court to be abolished, even at the price of compensation to its officers, the cost would be trifling; for from a Parliamentary return just published, we find that the expense of maintaining this court amounted to £1,200 only, including the assessor's salary of £500 per annum.

upon the ground that the feeling in Liverpool is very strongly in favour of that being the local Admiralty Court.

There can be no doubt but that the position of Liverpool is anomalous; it is London in everything except vastness, and no town of the empire, the metropolis alone excepted, can compare with it in commercial and maritime importance. As it was the desire of the Liverpool Law Society to adapt the provisions of the Admiralty Jurisdiction Bill, 1867, to the Court of Passage, it was proposed to insert a clause in the Bill conferring upon that court "all such civil and maritime jurisdiction with all powers and authorities relating thereto, as for the time being belongs to the High Court of Admiralty." As the Bill dropped, nothing of course was done, and although it is no part of our intention in discussing the general question of reform in the law, to enter into the claims put forward by those who advocate the prolonged existence of the Court of Passage, we may say that in our judgment, the effect of the County Court Act of 1867 will be very much felt in this court; it will probably remove many speculative attorneys' actions now brought there, and thus clear the way for a better class of business in the court; but should the general measure for conferring upon the County Court an Admiralty jurisdiction pass into law, we cannot see any just cause why there should then be two courts, (the County Court and the Passage Court), exercising concurrent* jurisdiction in the port of Liverpool.

We base our case in advocating the claim of the "County Court" to be the court of first instance in all cases, not only upon the recommendations of the various Chambers, but also for another reason, which, to many engaged in commerce, might appear to be the more important reason of the two. That reason is, that there is no local or even circuit tribunal

* The good folks of Liverpool, who have claims *ex contractu* to the amount say of £ 30, have *four* courts to which they can resort—viz. the Superior Court, the Common Pleas at Lancaster, the Court of Passage, and the County Court.

for the trial of what are now termed Admiralty causes; all matters of this kind must be tried in London.

The Admiralty Bill of 1867 was a step in the right direction, but only a step; to this branch probably the most important civil causes that are tried belong, and cases of a weighty character in such a department of law should be tried on circuit.

Within a very short period the jurisdiction of the County Court has been materially increased as well as amended. In 1865, an equity jurisdiction was conferred upon them. Bankruptcy and Admiralty will, in all probability, shortly follow. The Act of 1867 must, in some measure, although to what extent may be a matter of doubt, improve the class of business transacted there, and the tendency at the present time, beyond question, is to make them the "Nisi Prius"* courts of the country.

Originally the County Court was a mere court for the collection of small debts, it was established to enable the poor creditor to sue his poor debtor at a trifling cost and without incurring the expense of professional, that is, legal assistance; its machinery was adopted, and, speaking generally, the judges and officials were chosen and appointed for this their special function, and whether it has been successful or not we need not ask; but assuming that it has been successful, it stands to reason that being constituted and appointed for one purpose, it cannot be expected to answer another; if its duties are not only varied in degree, but also altered in kind, it is but only fair to adapt the existing machinery to suit the new work. Not to speak irreverently, to put "new wine into old bottles," is not wise; and it is idle to say that the County Courts are not fitted for the work which it is now intended they should do, because no man, above the level of an idiot, ever supposed that they were.

* We have already recommended to our readers the sketch, at once clear and comprehensive, of the changes made in the administration of our laws, and of the progress, step by step, that the County Court system has made, given in the preface to Mr. Gilmour's "County Court Act, 1867."

It therefore appears to us that what we may expect very soon to see, is the County Court with a certain and limited jurisdiction, in equity, * Admiralty, bankruptcy (perhaps unlimited), beside its already existing jurisdiction in what we may call common law matters; but, further, we think that even greater changes than these which we have indicated are contemplated.

Lord Cranworth has already presented a Bill, entitled "An Act further to facilitate Proceedings in the County Courts," a short and a pithy one; it is as follows:—

"Whereas it is expedient to give further facilities to plaintiffs bringing their actions in the County Courts, and to prevent delays by permitting certain cases to be heard in chambers: Be it therefore enacted, &c., &c."

By Sec. 2—

"The County Court shall henceforth have jurisdiction to hear and determine all pleas of personal actions, whatever may be the amount of debt or damage claimed, which may now be brought in the superior courts of common law: Provided always that the defendant in any action in which the debt or damage claimed exceeds £50, shall be entitled to sue out a writ of *certiorari*, to remove the same into any one of the superior courts of common law at Westminster, but shall not, if he obtain judgment, or the action be discontinued, or the plaintiff be non-suited, be allowed any further or other costs than he would have been entitled to recover had the cause been determined in the County Court, unless the Judge who tries the cause, or the court into which it was removed by *certiorari*, upon being satisfied that there were good grounds for such removal, shall otherwise order."

By Sec. 3—

"Judgment may be had by default after personal service in certain cases."

And, by Sec. 4—

"The Judge may sit in chambers in certain cases."

* The term "Admiralty" had a very wide meaning under the Bill of 1867; a great many matters not peculiarly Admiralty matters were included in it.

If it be contended that things are hardly ripe for such changes—we answer that the test, after all, is the necessity of the thing, and if the litigation of the country is increasing,* as increase it must with our increasing wealth, population, and trade, and with the spreading intelligence of our times, although the State cannot offer premiums for the waging private war, or afford undue opportunity for litigation, it is nevertheless bound to see that justice is done between man and man—the administration of justice being the first and highest office of civilization.

We concede, nay more, it is part of our case, that the County Court, as originally constituted, and as at present existing, cannot grapple with the mass of litigation which is about actually to be entrusted to it, or will, in our view, regard being had to the existing tendency of public opinion, before very long be confided to it. To enable the County Court to deal with that litigation it must be reconstructed.

Until the Judicature Commission publish their report, any suggestion made or any opinion offered must be in some degree in the dark. As at present the business of the County Court is managed, it is idle to suppose that important matters will be tried, or that rich suitors will resort there. To quote the *Pall Mall Gazette* of December 23, 1867:—

"The real mistake has been, and still is, the mixing up of cases which ought to be kept separate. It is only right that poor creditors should have a court where they can express their claims without the intervention of professional men. It is another matter to compel

* A great increase in the business of the superior courts is apparent. The number of writs of summons issued in 1866 exceeds the number in the preceding year by 14,063, 133,160 against 119,097, as compared with 1859, the year in which the number was lowest since the commencement of the statistics. The increase in 1866 amounts to 46,890, or nearly 55 per cent. There are 38,000 appearances entered in 1866, as against 33,723 in 1865; and there is an increase of upwards of 10 per cent. in the number of judgments entered in the three courts of Q.B. C.P. & Ex., the number of judgments in 1866 being 42,316, as against 38,440 in 1865, an increase of 3,876. As compared with the average for the five years, 1859—1863 inclusive, the increase in 1866 amounts to 22·2 per cent.—*Judicial Statistics*, 1866, *Part* 2, *pp. ii. iv., etc.*

richer creditors whose time is often of more value than money, to have recourse to the same tribunal. If they are so compelled, they should, at least, have the same facilities afforded them as are afforded by the superior courts."

The method, then, of doing the business of the Court should be revised, and it is necessary that the Registrar of the Court should have certain judicial functions. The power under Section 4 of Lord Cranworth's Bill, that we have already quoted, namely that the Judge should sit in Chambers, is very necessary, and the Registrar should be also empowered to sit in Chambers, in fact, he, or some other official, should have kindred powers with the Chief Clerks in Chancery. It is not to be expected that barristers or attornies can sit three or four hours while John Stokes, and Mary Noakes, and Tim O'Brien, and Mary Ryan are engaged in debating what to them is no doubt an important matter, how 4s. 6d. or 2s. 10d. can be paid, if those sums be due. There must be days set apart for hearing the weightier matters of the law.

We only allude to this, for although it is mere matter of detail, yet it is important in the last degree, as without such arrangements the County Court will never rise from a court of small causes. In a few courts some such plan obtains, and, doubtless, a Committee of County Court Judges could frame rules as to the mode of transacting the business. In fact, the mere debt collecting business of the court should be kept entirely distinct from what may be termed the contested and litigated business.

But, further, we think that before the County Court takes its position as the court of *first instance,* the most important subject for discussion and examination is, the nature of the procedure: in other words, the process, practice, and mode of *pleading* which is to obtain in it.

The statute establishing the County Courts in 1846 formally expressed the opinion of the legislature that "it was expedient that one rule and manner of proceeding for the recovery of *small* debts and demands should prevail throughout En-

gland;" and we think that in contested cases (the debt collecting being quite distinct), the procedure should be assimilated to that under the Acts of 1852, 1854,* and 1860. We know of no reason why this should not be done. We know of many in favour of it.

It is impossible to try issues of fact without some clear way of raising them. The clear and simple rules of pleading of now-a-days tend to shorten the proceedings, and the plaintiff and the defendant are on equal terms. It is not so now in the County Court. The plaintiff often fights in the dark, and it would be idle to expect many cases to be tried in the County Court,† so long as the parties have not the right of submitting distinct and separate issues for the decision of the tribunal.

To these two subjects, the mode of conducting business, and the necessity for a procedure modelled on that of the superior courts, we have alluded, merely to show that we fully admit the necessity of reconstruction, if the County Court is to be the tribunal of first instance in all cases. There should be a cheap and easy mode of removing causes involving grave questions of law or of fact from the inferior courts, the court of first instance, to the superior courts, and then the necessities of the case would be fairly encountered.

One word as to the Admiralty jurisdiction with which it is now desired to invest the County Courts. It would be easy to subdivide our courts into certain Admiralty or maritime districts. In 1856, a memorial was presented to the Board of Trade, in which it was proposed that the coast should be divided into seventeen districts. We think there would be no need to make so many jurisdictions. We should propose that from the Tyne and Tees southward to the Humber, should be one;

* On the 18th of December last, by an Order of Council, the enactments of the Act of 1854 relating to equitable defences, discovery, and the attachment of debts after judgment, were extended to the County Courts.

† Under the order of the court, pleadings *might* be used in all contested cases, but in all cases, say above £50, they should be used compulsorily. In all contested cases the *practice* of the inferior should be identical with that of the superior court, so far as possible.

from the Humber to the Thames a second, perhaps the Cinque Ports should be included; and probably the southern seaboard would furnish work for a third court; while the western coast, from Cape Cornwall to the Solway, would afford room for two courts—the one to sit at Bristol, the other at Liverpool. Admiralty matters should be removed, on good cause being shown, into the superior courts, to be tried on the circuit.

Changes such as these would gradually pave the way to the ultimate division of the country into legal districts, as we have before said, either on the American or French plan, but while our courts, their system and procedure, their quaint and worn-out machinery and constitution, exist as at present, reform seems hopeless.

No doubt, with heavier responsibilities* and larger duties to perform, the County Court Judges may ask higher rank and emolument, and before the country can claim the services of men fit, as Judges, to preside over tribunals exercising such manifold powers, the country must be prepared to pay them.

It is humiliating to read the comments of foreign lawyers and merchants on our maritime code, or, rather, on our want of any maritime code worthy of our boasted civilization. It is a scandal to us as a nation that the avenues to our courts are blocked, and that for many cases there is no fit tribunal whatever in existence. We hail, therefore, what seems, as it were, the dawning of a better day, when justice may be administered easily and speedily between the suitors in our courts.

* The avidity with which the press seizes upon any opportunity for an attack on the County Court Judges, is remarkable. It is matter for regret that circumstances have undoubtedly occurred, tending to throw ridicule upon two or three of this judicial body. That some of them take a very humble view of their duties, is manifest, but we should see a great change were these Judges to perform their duties before a more important and critical audience than they at present do. The reverence due, and paid, to the high office of Judge in our superior courts, is one not due to the ermine alone; these great officers perform their functions in the "fierce light" of public opinion, under the eyes of those with whom they have competed, and subject to the criticism of the most critical body of men—the bar—that intelligence, scholarship, learning, and independence, can combinedly produce. Without this check upon them, the superior courts would be nothing.

Much has been said of a "code," much of a "digest," and Royal Commissioners are investigating many of the departments of our law; we attach far more importance to the Judicature Commission than to any, as a revision or re-organization of our courts, of their process and constitution, we believe is the first step to be taken in the process of reformation. When a reasonable and rational system of tribunals, apt for their particular work, is founded, we may talk of other things—of a code, of a digest, of a maritime code, and of maritime or any other special tribunals, (at present the great maritime nation has *one* Admiralty Court, in a corner of the kingdom, sitting at Westminster, the offices of which are in some hole and corner back streets of the city,) but until we have our laws administered so that litigants can get at them, the vast field of discovery in which other nations have reaped so much glory, must lie all unexplored before us.

If the plan we have suggested be a good one, and at all events it is sanctioned by the opinion of our times, and actually advocated by those familiar with the business of the country, Why, may we ask, should our laws, which in their spirit have advanced "step by step with the necessities of the great people whose liberties they have fostered and guarded," be longer divorced from an adequate and worthy administration?

Art. VII.—ON THE UTILITY OF OATHS.

By Edward Gardner, LL.B.

THE subject of oaths and declarations taken in various departments of the State has latterly attracted the attention of Parliament; and during the session 1865-66 a Commission was held to inquire what oaths, affirmations, and declarations are required to be taken or made by any of Her Majesty's subjects in the United Kingdom other than those taken or made by members of either House of Parliament, or by prelates or

clergy of the Established Church, or by any person examined as a witness in a court of justice, and to report their opinion as to the dispensing with or retaining and altering such oaths, affirmations, and declarations. To the report made by the Commission, are appended 300 closely-printed pages of oaths and declarations taken by the holders of different offices on their appointment to them, and to these many others might be added which the Commissioners seem to have missed. Passing over the report itself, which appears to be fully concurred in by one only of the five Commissioners who sign it, we come to the dissent of Commissioners Lyveden, Bouverie, Lowe, Maxwell, and Milman, who seem to have brought their great intellects to the examination of the question in a truly philosophic spirit. They come to the conclusion that by far the greater number of the oaths into which they had examined, ought to be abolished, and the rest changed into some convenient and distinct form of declaration:—

"The imprecatory forms of oath in common use," they say, "appear open to very grave objections. Such oaths seem to assume that God's vengeance may be successfully invoked, and God's help declined or accepted by frail and fallible man, or made conditional on the truth of his assertions or the fulfilment of his promises—notions which seem inconsistent with the teachings of religion and of reason."

The limits of this article do not admit of detailing the arguments of these five dissentients. To those who would wish to pursue further the study of the subject opened up by the Commission, and who may not be inclined to adopt the views set forward in this paper, a careful perusal of the dissent referred to is earnestly recommended.

A glance at three hundred closely printed octavo pages of oaths and declarations taken by members of Her Majesty's household, officers of public departments, of courts of justice, by soldiers, sailors, and volunteers, by county, borough, and parochial officers, by recipients of the different orders of

knighthood, by members of universities, colleges, and schools, of traders' guilds, of various incorporated societies; a glance at these is surely enough to set us thinking on the wholesale swearing that seems to be required in almost all the public relations of life; and to the catalogue are to be added several oaths and declarations that have been omitted, also those taken by members of both Houses of the Legislature, by the prelates and clergy of the Established Church, and by jurors and witnesses in courts of justice.

History tells us that oaths were taken in the earliest ages of which we have any records; and the compilers of legal history, wholesomely impressed by precedent, assert that, "however absurd or perverted by ignorance and superstition, an oath has in every age been found to supply the strongest hold on the consciences of men, either as a pledge of future conduct, or as a guarantee for the veracity of narration." * Under some of the deductions from and abuses of the civil law, of which the middle ages were fruitful, heathens, Jews, and other persons, whose opinions ex-cathedra fulminations then stigmatized infidel, were declared incompetent to be witnesses in courts of justice. The giving of evidence the old lawyers considered rather a right than a duty, and consequently incompetency was a fitting punishment on the holders of obnoxious opinions —a punishment in which frequently the innocent Christian was included, who, having a suit to maintain, happened to have only the evidence of rejected witnesses on which to rely. And Sir Edward Coke, not free from the bigotry of his time, is found to declare that an infidel (*i.e.*, any one who was not a Christian) could not be a witness: "All infidels," he says, "are, in law, perpetual enemies, for between them as with the devils, whose subjects they be, and the Christian there is perpetual hostility and can be no peace." About the year 1745 a better spirit seems to have dawned upon our tribunals, and in a celebrated case † then argued, it was decided that the words

* Best Ev. § 56.

† Omichund v. Barker.

"so help you God" are the only material part of the oath, which any heathen who believes in a God might take as well as a Christian. Consequently, the kissing the Evangelists—with or without a cross on the cover—in England and Ireland; the uplifted hand in Scotland, the touching the Brahmin's hand and foot in India, the placing the forehead on the Koran in Constantinople, and the breaking of a saucer in China, are all mere forms surrounding the great substance "so help you God." But our cousins on the other side of the Atlantic seem to be wandering away from what we may call the imprecatory sanction of the oath, for their books say that witnesses are not allowed to be questioned as to their religious belief—not because it tends to disgrace them, but because it would be a personal scrutiny into the state of their faith and conscience foreign to the spirit of free institutions, which oblige no man to avow his belief.* With them the curious anomaly could not have happened, which was made patent to the British public a few years since, in a case brought by a man called Maden, in an English County Court.† His only witness was his wife, who, on being examined on the *voir-dire*, stated that she did not believe in a God or in a future state of rewards and punishments. Her evidence was rejected because she dared to speak the truth; had she lied and professed the necessary belief, her testimony must have been received. The Judge had no sympathy with the witness, but, assuming to be an authority in religion as well as law, he told her that she must take the consequences of her disbelief in the loss of her property, the subject matter of the suit.‡ Happily, Atheists are rare; were they however more numerous, the interests of justice must long since have demanded the admission of their evidence. Truth is what a court of justice desires; the exclusion

* 1 Greenleaf Ev. § 370.

† Rochdale Co. Ct., Feb. 1861.

‡ Her mother was the defendant; she had neglected the religious instruction of her daughter, and thus took advantage of her own wrong.

of the honest infidel will not secure it, and the dishonest will not hesitate to profess the necessary qualifications for giving evidence.

Having taken this hasty glance at the history and nature of oaths, let us for convenience divide them into the same classes as those adopted by the five dissentient Commissioners whom I have already named. We have then :—

I. Oaths, to the breaking of which no penalties are attached by law, and

II. Oaths, to the breaking of which the law does attach a penalty.

I. Of the first class are (1.) oaths of allegiance, and (2.) oaths of fidelity in the discharge of duties.

(1.) As to the oaths of allegiance the dissentients with significant brevity state, that—

> "In peaceful and prosperous times they are not needed; in times of difficulty and danger they are not observed. Contemporary history affords abundant proof of the inefficiency of political oaths, whether taken by the people to their rulers or by the rulers to the people."

It is the duty of all subjects to bear allegiance to their rulers, and the anomaly is a curious one, discoverable no doubt in all societies, of requiring a man to swear to perform that duty, which he not only ought to be presumed, but which the very fact of his being a subject compels him, to observe to his Sovereign. Somewhat similar is the peculiarity remarked by a surprised Frenchman of certain of our Irish brethren joining together and agreeing to be loyal; agreeing to be what they ought to be, agreeing to do their duty, and therefore considering themselves worthy of all praise, as faithful observers of political morality. Ordinary civilians are not called on to take the oath of allegiance, yet it behoves them to be equally as loyal as the soldiers who swear an oath, which even when they hear they hardly understand.

(2.) Then as to the oaths of fidelity in the discharge of

public duties; they have never stopped the unworthy at the threshold, and the worthy did not require them to quicken their sense of duty. Such oaths seem to be in the nature of contracts, which might be entered into in a manner much more satisfactory than by embodying them in their present form. With a writer of the year 1834, quoted by the Commissioners, it is only common sense to hold that—

"No man should ever be called on to promise to do what he is bound by the duties of his office to perform, on the contrary, it should, in every way, be declared that every man has already promised to do his duty by the very act of accepting office."*

There are two motives, or, to use a perhaps more correct phrase, two sanctions for the observance of the class of oaths we are now considering, namely, the sanction of interest and the sanction of religion. Now, if an enlightened self-interest does not impel to honesty in the discharge of a duty, it is very questionable whether the religious sanction will secure faithfulness in the office. The oath will not generate a conscience, and, where this is wanting, happiness here or hereafter ceases to persuade, and Hell offers no terrors. Even a tendency to superstition, which we too often shamelessly encourage, can have no place in one devoid of the moral sense. Worldly gain, present or prospective, is the sure reward of faithfulness. But, it may be said, a little wrong, scarcely possible of detection, may be done with advantage to the wrong-doer, and in such case self-interest inclines to the doing of it. The proposition may be questioned; but admitting the force contended for, the moral sense of right and wrong should be potent to resist the temptation, and, if it be not so, an oath cannot strengthen the weak conscience. As to the sanctity of the oath (a phrase which is scarcely intelligible) in what does it consist, since the practice is recognized of taking the oath as a matter of form, and disregarding its whole spirit? Oaths and declarations taken by officers of the army against the payment of money

* J. Endell Tyler, "Oaths," p. 68.

for commissions may be mentioned; these, however, common decency abolished some years ago, and the Report points out some other oaths which were, and are, taken not to be observed. Examined from whatever point of view, an oath must be found not to possess in itself any sanction whatever for the due observance of the duty sworn to be faithfully performed.

II. Passing away from oaths of office we come prepared in some degree for an examination of judicial oaths, or that class of oaths to the breaking of which penalties are attached by law.* A witness is sworn in a Court of Justice to tell the whole truth; should he lie, a temporal punishment is imposed on his being found guilty of the offence, and further, say the clergy, he has earned punishment hereafter for having laid perjury to his soul. We shall not stop to examine the feeling of certainty or uncertainty as to this latter reward, that may be present to the mind of him who swears falsely; the question is not one of any importance to the object aimed at in this paper.

Stripped of the legal sanction, this class of oaths is very similar to that we have been considering. It is every one's real interest to speak the truth,† and should any motive induce one to swerve from it the oath has no charm to prevent if conscience be dead to the sacred character of truth itself. If motive and conscience be acting in contrary directions, the repetition of no formula can give power to the latter. A lie is a lie on the street or on 'Change, as much as in a Court of Justice, and why should its utterance be considered more heinous in the one place than the other? As great interests depend on the honest dealing of man with man as on speaking truly before a judge and jury. But if we exalt truth in the

* With this class the Commission was not concerned.

† It being more easy to tell the truth than a lie, some writers speak of a natural sanction for truth, meaning that it is more natural or easy to draw upon the memory than the imagination. "From the mouth of the most egregious liar," says Bentham, "truth must have issued at least one hundred times for once that wilful falsehood has taken its place." (Ev. 82.)

one case by investing it with a sort of specially made garment, of necessity its position in the other case is altered, and it becomes a less crime to tell your neighbour such a lie as may enrich you and impoverish him than to swear falsely to some insignificant fact in a Court of Justice. A lie, we are in effect told, is not so bad a thing in our every day contracts, but in a Court of Justice it is something awfully wicked. Yet wherein does the difference consist? A lie has been told in the presence of God as deliberately in the one case as in the other. But truth has received in a Court of Justice a fictitious importance, and the tendency outside is not to stamp a lie with the severe condemnation which it really merits. In the desire to secure veracity in our tribunals the interests of truth generally have been overlooked, they have been completely lost sight of, and society suffers in all its dealings in order that a result may ensue, which deeper investigation into the subject must prove to be not obtained. In ordinary dealings, and in ordinary conversation, we frequently find individuals not only pledging their honours, but willing to give their oaths as guarantees of the correctness of their assertions, and our common experience teaches us that when such guarantees are offered those individuals are lying most. A show of candour too frequently indicates its complete absence; and when we hear a man prefacing his statements with the phrase "to tell you the truth" as a sort of advance guard, we may look out for being deceived in some way or other. Assuredly the injunction "swear not at all," possesses more meaning than the heated controversies of sects have allowed us to perceive. A keen observance of human nature on the part of the Founder of Christianity, which is manifested again and again in other philosophic reflections, prompted these words; and the attempt of Paley* to show that they were inapplicable to judicial oaths entirely fails principally because he misapprehended their meaning. "Let your communications be yea and nay, for whatsoever is more than these cometh of evil,"

* M. & P. Philosophy Bk. III, P. 11, c. 16.

these words show the idea present to the mind of the speaker that truth is disserved by the addition of an oath. Were truth sacred in the market place, its character would not, and could not, suffer when uttered in a Court of Justice. Rid truth in the latter case of its unwholesome surroundings, let it stand out in its own abstract greatness and importance, and we shall be sure of truth being spoken in the street, and consequently more sure than at present of securing it in our tribunals.

Supposing, however, the proposition incapable of proof that truth suffers by being considered something higher when uttered before a wig and gown than it is when spoken in other relations of life, still the taking of an oath can only be justified on grounds of expediency. It must be shown, first, that the religious sanction is of avail where simple and unaided conscience would be weak and insufficient, and, secondly, that our lives and properties are really protected by the notions which people are supposed to entertain upon being put through the oath formula. Parenthetically it may be observed that with the legal sanction we are not at present concerned; that in some shape must always be maintained. The history of the law of evidence would furnish us with curious information on this subject, but to one only of its chapters need reference now be made, namely, to that which tells of the times when men, so far mistrusting each other, feared to examine parties in a cause, or even any persons interested, however remotely, in the result; and when justice was but too often defeated from the absence of any one who could testify to the matter in dispute save the plaintiff or defendant, and neither could be a witness. "*Nemo in propriâ causâ testis esse debet*" we borrowed from the civil law. "If the rules of exclusion," says Taylor, "had been really founded, as they purported to be, on public experience, they would have furnished a most revolting picture of the ignorance and depravity of human nature." At the commencement of the present century, Jeremy Bentham called attention to the absurdities of our system of evidence, and but 16 years have passed since complete justice in this respect has

been done to that shrewdest of jurists. In 1833 interest ceased to be an objection to a witness; ten years later the person who had committed a crime was no longer excluded from the witness-box. In 1846 the English County Courts began to experiment on the evidence of plaintiffs and defendants and their wives, but it is was not till 1851 that, the experiment having proved successful, Lord Brougham was able to induce Parliament to let in such evidence in almost all cases. Nor is the day now far distant when the mouth of a prisoner can any longer be kept closed. Yet, when Bentham's views began to be accepted, there were not wanting false prophets in abundance, who foretold the committal of the most dreadful perjuries.

Without entering into the various views as to what constitutes the essence of an oath, its supposed advantages cannot be more strongly stated than in the words of John Pitt Taylor. He says:—

"The wisdom of enforcing the rule, which requires witnesses to be sworn, cannot well be disputed; for although the ordinary definition of an oath—viz. 'a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth' may be open to comment, since the design of the oath is, not to call the attention of God to man, but the attention of man to God; not to call upon Him to punish the wrong-doer, but on the witness to remember that He will assuredly do so; still it must be admitted that by thus laying hold of the conscience of the witness the law best ensures the utterance of truth." (§ 1247.)

Again we are brought back to conscience as the something which is to be laid hold of for securing truth; it is the witness' conscience which is to be affected, and hence the meaning of the question—"Do you believe that oath binding on your conscience." We have seen, however, that the moral faculty is not supplied with new strength by the administration of an oath. It is our common experience that the religious sanction of the oath does not deter a dishonest witness, though the legal

penalties for perjury undoubtedly frequently do. It is but seldom, too, that the witness pays any heed to the officer of the court who performs the duty of swearing the witnesses; his mind is full of other thoughts, and if perchance he should give marked attention to the hurried words spoken by the officer, the jury receives his evidence with caution. A witness is never shaken by being reminded that he is on his oath, nor does the question—the resort of the "powerful feebles"—"by the virtue of your sacred oath do you swear so and so?" at all frighten him. Litigants frequently know, frequently imagine, that certain witnesses could, if they would, give certain evidence; they have been unable in conversation to get the desired admissions, but they seem to think that the swearing book has a magic spell. Despite the advice to the contrary of their lawyers, they have these persons placed in the witness-box, and the result is the usual one. A too frequently recurring illustration of this is in the examination of defendants to prove shop-debts due by them to the representatives of deceased traders, where the deceased was the only other person who could have given evidence.

That it is the regard for truth itself, unclothed with mystic rites, which secures reliable evidence in our tribunals, receives additional corroboration by resort to negative proof. For instance, we are often informed that the Judges of courts established by the British rule in various countries over the earth are continually puzzled to discover in those localities, where mendacity is the normal condition of the people, the real facts of the cases they are called upon to decide. Before a class-fellow from the halls of this college,* now a Judge in India, the following case was presented:—The plaintiff, a money-lender, complained that he had agreed with the defendant to lend him 100 rupees, that he had given him 20 on account, and that the remaining 80 were to be given on his coming and executing the bond for repayment, but the defendant never returned to execute the bond, and he refused to pay back the 20 rupees

* Queen's College, Belfast.

advanced. The defendant replied that he had required a loan for a few days, that he had signed a bond to the plaintiff for 100 rupees, but only received 20 on account, the plaintiff saying that he would give him the remainder on the following day, but, in the meantime, defendant discovered he could do without the loan, so he repaid the plaintiff the 20 rupees lent, and got back his bond, which he produced. Each party set forward witness after witness in support of his case, the Judge adjourned again and again, and, at the time I heard the story, was unable to come to any decision. Olden times would have suggested "wager of law," some ordeal, or the "decisory oath," and the Judge under the civil law would have exercised his discretion, and administered the "suppletory oath." * But who shall say that truth would any the more have been discovered? It is not a little remarkable that the great foreign jurist Pothier, in speaking of these additional oaths, said:—

"I would advise the Judges to be rather sparing in the use of these precautions, which occasion many perjuries. A man of integrity does not require the obligation of an oath to prevent his demanding what is not due to him, or disputing the payment of what he owes; and a dishonest man is not afraid of incurring the guilt of perjury. In the exercise of my profession for more than forty years, I have often seen the oath deferred, and I have not more than twice known a party restrained by the sanctity of the oath from persisting in what he had before asserted." †

Had it occurred to that great jurist, when he used these words, that oaths in general might be dispensed with altogether, the very same view he must have applied to the entire class, which he held with reference to the limited and extraordinary class then under his consideration. Perhaps, too, the earnest student of our great English jurist would discover that he questioned the utility of all oaths.‡

* The civil law permitted litigants to tender the "decisory oath," the one to the other, he who refused it lost his cause. It was the Judge's privilege in doubtful cases to administer the "suppletory oath" to either party.

† Obligations, by Evans, s. 831. ‡ Bentham, Evidence, bk. 2, c. 6.

The opinions, however, of great jurists need hardly be quoted for judges and juries who are supposed, next after the witness, to be impressed with the oath taken by him, throw aside altogether the consideration that the evidence has been sworn to; and in their decisions they are wholly guided by the credibility of the facts, which, in their eyes, receive no additional confirmation from the oath, nor does the oath, on the other side, lend to the opposing statements any strength whatever. And this seems to have been always the case, for we find one of our oldest law books in ordinary use, speaking of the "demeanor of the witness and his manner of giving evidence as oftentimes not less material than the testimony itself." *

Our lives and properties are not protected by the oath, nor does its imposition affect the conscience; on grounds of expediency therefore it fails to be serviceable. Moreover, we have seen that the interests of truth generally are prejudiced by the fictitious importance attached to an oath. On an examination of the question, then, both negatively and positively, the conclusion is forced upon us that public policy demands an alteration in the swearing laws. There is hardly a sin against society which is not referable to a disregard of truth; society may make laws to punish and deter, but the root of the evil remains untouched; we lop off branches and hope to preserve the dying tree; it is useless, the old story repeats itself. Let us follow however in the footsteps of an enlightened religion, and proclaim the securing of truth to be the great object of earthly laws. By truth we do not mean the metaphysical mirage often discoursed upon, but real, earnest, substantial truth, that we can lay hold of, and assure ourselves that this fact is real and that one indisputable, that this man's word is his bond and that man's honour unimpeachable. Let it be our object to secure truth in all relations of life, and then will be attained the end of all laws—that men should live happily together.

* Starkie, Ev. 547, 822, 4th ed.

ART. VIII.—LEGAL ETHICS OF THE FENIAN STATE TRIALS.

IN another subdivision of this number we have collected the correspondence between the prisoner's counsel at the late special commission in Manchester, and Mr. Justice Blackburn, on the subject of the pretended privilege of persons under arrest for felony or treason, or rather of persons sympathizing with such, to murder constables having them in charge, under informal warrants, or even under warrants of which neither the formality nor the informality can be ascertained. We have added to the collection a most remarkable paper on the same subject, from the pen, it is said, of Sir E. Vaughan Williams, late Justice of the Common Pleas, which appeared in the *Times* newspaper, a day or two before the close of the year. That exhaustive exposition, the concise but clear statements of Mr. Justice Blackburn, and the approval of the whole body of Judges, will doubtless fail to dissipate the crotchets of a few weak minds, which cannot grasp the difficulty of applying to the simplest of cases the clearest of precedents. There will continue to be those who conceive, that every member of a confederation of armed assassins, who carries about with him a loaded revolver for use in the prosecution of the common design, in a country where the Texan habit of wearing such weapons has not yet been adopted or even permitted, is in precisely the same case with a gentleman in a court dress, of which a rapier is a necessary part; or with a beau of the last century who always, at home and abroad, carried the same appendage by his side, and was sometimes, upon sudden heat, provoked to draw it. Like Fluellen in simplicity, but unlike him in care and prudence, there will still exist such drawers of comparisons between men of Macedon and of Monmouth. Of such reasoners it may be said, as of the

poor, that "they are always with us," and "they shall never perish from the land," because of our sins, which, doubtless, deserve that chastisement. But all the rest of our race, and here we shall not pay our Transatlantic cousins the ill compliment of making them an exception, will heartily and readily rejoice over the vindication which common law and common sense have thus received from learned and impartial judges, against the dull perverters of both.

Yet the satisfaction will not be unmingled with a certain sense of shame that such a vindication should have been needed. It is not pleasant to think that other nations are laughing at us. For the Fenian trials have presented more than the ordinary amount of this touch of the ridiculous, by which, according to the satirist, all "res humanæ" are beset. It was, indeed, most ludicrous to hear these rowdies from over the sea lifting up their voices, in person and by deputy, on the side of law, order, and the sacredness of life. A very "flebile ludibrium" indeed. If only our silly people at home had had the wit to laugh, not cry, over the melodrama, or the discernment to hiss from the stage the mummers, who even now are trying to give it a new run in town or provinces.

Since we are to believe these people, we must believe: (1.) That the combination of the 11th September last, which was meant to result, and did result, in the dastardly assassination of an honest constable, by the hands of some Forty Thieves armed with revolvers, and deriving all their courage from the knowledge they had that he was entirely unarmed and at their mercy, was nothing more than one of those charming eccentricities which, in Irishmen, are not only pardonable but natural, and therefore innocent—a doctrine which, to do them justice, is not their own, but borrowed from the second-hand ethics of the school of Arrah na Pogue, Colleen Bawn, and such like mysteries of modern drama: (2.) That every man who would put down their pastimes, is to be presumed to be acting without lawful warrant and in his own wrong, and therefore at his own peril: (3.) That it was the duty of the

Judges of the land to have so dealt with the latest (but one, alas!) of such outbreaks of the playful Irish humour, and the duty of society at large to have seen that their Lordships did so deal with it:—and (4.) That the Judges in particular, and society in general, having grievously neglected to walk in those ways, the bonds of allegiance to Law and Order are for ever snapped asunder, and all and sundry are admitted to that state of things, which arose when there were no judges in Israel, and every man did that which was right in his own eyes. The Clerkenwell massacre, in short, was the natural and inevitable consequence of the hanging at Manchester of the three brutal murderers of poor Brett. It was a just reprisal on the part of their pals, for the verdict of the jury, the sentence of the court, and the execution of that sentence by the hands of Calcraft.

All this is so loathsome and revolting, that one cares not to do more than record it, for the edification of posterity. But, as already observed, there comes into view now the absurd and laughable side of the position taken by our pro-Fenian critics. Brett is not proved, they say, to have had upon him, when murdered, a formal felony warrant for the detainer of the two caitiffs, Kelly and Deasy, then in his charge, and for whose rescue from his custody that murder was planned and carried successfully into effect. That they were charged with felony is admitted; that there was probable ground for the charge is not denied; that he had no formal warrant to detain them is not asserted, much less made out. The case against Brett is simply as above stated; that the formal warrant is not now to the fore—it having been inadvertently destroyed immediately after his murder—and it must, therefore, be presumed that he had no such warrant; because the maxim, as already hinted, of pro-Fenian jurisprudence is, "Contra pacis custodem omnia præsumuntur." It makes nothing to the case, they say, that there was good secondary evidence of the contents of the destroyed original. It is of still less consequence that, at the precise moment of the murder of Brett, he was acting not

immediately under that warrant, but under the common-place authority of a magisterial remand, *pendente examine* of the two alleged felons. Least of all things, in their eyes, is that legal consideration which the mere character of peace-officer in this peace-loving land has hitherto been allowed to confer upon the person of him who bears it. "Contra pacis custodem omnia præsumuntur," is the maxim of the rowdy school of Hiberno-American jurists.

To the contempt of our English people, these ravings of the ignorant and vile would have been left by us, but for the regretted sanction which they appear to have received from some members of our own Bar. Far be it from any Englishman to set bounds to the latitude of defence, or to the liberty of the counsel who defends; and, least of all, where the issues are those of life and death. If the (undated) document which bears the signatures of "W. Digby Seymour, Q.C.; Michael O'Brien, S.L.; Ernest Jones; James Cottingham; and Lewis W. Cave," and which was laid before Blackburn and Mellor, J.J., after the sentence of the Manchester murderers had been left there, it would not have been within the competence of any man to blame the zeal of those who laid it. They had failed to convince the Court and jury at the trial, and they had every right to renew the attempt, however desperate, whilst yet there was time, and to avail themselves of whatsoever grounds—no matter how technical and hollow—which seemed open, whereon to question the finding or to arrest the execution of the judgment. And the worst that would have been said of that particular document, had it been allowed to rest there, would have been that which Mr. Justice Blackburn said of it in his reply to Mr. D. Seymour (20th November, 1867), that "it contained nothing that was new to the judges, but it put all the authorities in the light most favourable for Mr. D. Seymour's clients." All else would have been forgotten; all; even to "the cordial shaking of hands" with the condemned murderers in the dock; a public scandal, imputed, by certain newspaper reports, to some of their counsel, by the

rest to all; and not disclaimed to this hour by any one of those gentlemen.

But that was not to be. On the very day which witnessed the despatch of the learned Judge's reply (20th November, 1867), Mr. D. Seymour, "having his permission to publish it,"—and to that there could be no objection—thought fit to do so in the form of an appendix to a circular letter from himself to the London newspapers of the same date, in which he declared "his matured and deliberate conviction to be that the opinion of himself and his learned friends was law" (and implicitly that the "opinion" of the presiding Judges at the trials—concurred in, as appears from Mr. Justice Blackburne's reply, by "the other Judges," after the expiry of the Commission (unanimously "concurred in, according to the Secretary of State),*—was *not* law;" that the impropriety of their refusal to respite the execution of the convicts, and reserve for appeal the question of the alleged informality of Brett's proceedings, "*must* occur, to *every lawyer*, and indeed to *every citizen uninfluenced by prior opinions, or, it may be, prejudices;*" and that, in so refusing, they had alike departed from precedent and from *the protective vigilance* and *impartiality* which had always characterized the administration of the criminal law in England." There is no exaggeration, surely, in suggesting that, by the circulation of that most unhappy appeal from the ministers of justice, to the not equally qualified multitude without the sanctuary, "the administration of the criminal law in England" was brought into imminent peril of hatred and contempt amongst the Queen's English subjects; and the unreasoning hostility of a very large body of her Irish subjects to the administration of that law in any shape was hugely fomented and strengthened.

To Mr. D. Seymour himself—for none of the other counsel, so far as it is known, have adopted the terms of his letter to the public press—the answer is of the simplest:—for assertion,

* Speech of Secretary Mr. Hardy, M.P., (21st November, 1867), in reply to Mr. Maguire, M.P. (*Morning Star*, 22nd November, 1867).

without argument, can be met only by a return in kind. In his own words he may be told that "every lawyer, and every citizen uninfluenced by prior opinions or prejudices" deplores the untoward and unseemly assumption of which he has been guilty in drawing *ad aliud examen* the solemn determination of the law by the mouths of its ministers. But the so-called exposition of that law, contained in the written argument of himself and his fellow counsel for the convicts, was entitled to a less summary treatment, and it has not been so treated. It deserved a deliberate consideration, and it has received that consideration, not only from the two learned Judges to whom it was addressed, but, as we have already seen, from all their brethren of the Common Law Bench. And it has been utterly, finally, and to the satisfacton of "every lawyer and every citizen, uninfluenced by prejudices," refuted and condemned. For the second time in the year which has just passed away, the people of England have been able to congratulate themselves that, in the same matter of the heretical teachings of Club Law, or, in Carlylean phrase, the Mights of Man,—

"The bane and antidote are both before them."

The summer of 1867 witnessed the burning up of one soul-destroying sham:—the winter has witnessed another; and on both occasions the righteous anger of the judiciary inspired the blast which kindled the conflagration. The terrible delusions of the Jamaica or Market Drayton School about Martial Law, as preached by the Adderleys and Finlasons, were, in so many words, put forth by the Fenians at Manchester, to justify their own errors and their own practices. The law has pronounced upon both the same condemnation. If only the injustice of party had not intercepted the consequence, in the former case, of that condemnation!

And whilst the orderly and loyal are effectually reassured, let us trust that the wretched disturbers of their peace will be as effectually deterred by that timely vindication of English law and justice. It is painful to think that it was called for;

that there existed at so late a date, to use the language of Sir E. Vaughan Williams, so much likelihood that "the recent acts of violence to constables engaged in the arrest of persons charged with treason felony would be repeated for want of a clear understanding of the law." That the likelihood existed, there can be no doubt. But we hope that, in the presence of this lesson which the ignorant have now had, that danger has for ever passed away. We hope it, not only in the interest of their possible victims, but in their own. Again to borrow the words of the same learned exposition, "the safety of both officers and accused persons" is concerned in that. The conclusion to which its author has come is one which cannot be too often inculcated upon the minds of all the inhabitants of this realm, —of true men and thieves, of loyal men and traitors, of peaceful Englishmen and rowdies from foreign parts—that "a person charged with treason felony, wheresoever found within the kingdom, may be taken and detained for trial upon probable cause of suspicion, without warrant; and that, if he resists to the death a known officer of the law, he will be guilty of murder."

Other considerations of a somewhat more important kind than those miserable quibbles about the techinal wording of a warrant, have surged up in the course of the same trials, which are exciting attention upon both sides of the Atlantic. "The morose and violent President," as miscalled by our contemporary the *Révue de deux Mondes*, which makes no allowance for adventitious excitements whenever it forms an estimate of its man, is making capital out of one of those questions for the November election. Flesh and blood, according to Andrew Johnson, can abide no longer the European doctrine of "nemo potest exuere patriam," nor even that of his own country, which inculcates the revertibility of allegiance upon resumption of the domicile of the birth. The White House strongly recommends that the attention of Congress be directed from the President's mis-doings to that question or any other, which promises a rupture,—perhaps a war—with England, or with France, or

North Germany, or any other country of the "Old World;"—Russia of course excepted, which is not European at all, but Asiatic. Down to the date of the despatch of the last telegram, the foresight of Congress had not been so far over-reached by the dark sayings, nor its sobriety so far affected by the seductions and stimulants, thus liberally supplied by the eccentric President, as to fall into his trap. Re-construction goes on, thank God! and in a few months the place of Mr. Andrew Johnson will know him no more.

Still, the controversy which has thus been opened upon Lord Stanley, "though it appear a little out of fashion," is a something to be grappled with, not a feather to be "doffed aside and bid to pass." We might have thought that a more graceful way of presenting it would have been preferred, but, since it is otherwise, we must even deal with it as it comes, and settle it, if we can, for ever. There will be practical difficulties,—great difficulties withal,—in the way of a final settlement; for, after all, we shall have to rely upon the good faith of nations, too prone to cast upon our own good faith injurious and undeserved imputations. Still it is so evidently for our interest to meet them half-way, nay, if they will not make advances, to meet them upon their own frontier, and there to yield up the whole "Clanjamphrey" of loafers, and outcasts, over whom they seek, and we altogether eschew, to extend the ægis of protection, that we really see no insuperable obstacle to a satisfactory arrangement. The English people are not, and never were, enamoured of the doctrine of Lord Keeper Egerton, and Sir Edward Coke, commonly called "the rule in Calvin's case;" and it is shrewdly suspected that if those carpet-jurists were allowed to leave their appointed place, and re-visit Whitehall, they would find, to their disgust, that even the courtiers are now-a-days of the mind of the people of England. Let other nations, which need the raw material of labour, and are not squeamish as to their methods of "using it up," compete, each with the other, for the happy privilege of natural intercommunion with the dregs which our society has

worked off. We need no such help, nor such defenders. We may marvel at their taste who covet and claim any one, from amongst the whole drove, even as the bold Duke of Burgundy marvelled, according to Sir Walter Scott, at the prayer of Tristan L'Hermite, in one such case, and only one, on the part of the King of France:—

"So please your Majesty and your Grace, this piece of game is mine, and I claim him. He is marked with my stamp. The fleur-de-lis is branded on his shoulder, as all men may see. He is a known villain, and hath slain the King's subjects, robbed churches, deflowered virgins, slain deer in the royal parks——"

But, even as the bold Duke interrupted that claimant at this point, there is not a true man in England but would blithely do the same, and tell Mr. Andrew Johnson, "Enough! enough! he is our cousins' property by many a good title."*

It may, therefore, be very safely prognosticated, that as soon as the mode of operation has been settled between those high contracting parties, Lord Stanley, with the hearty assent of the English people, will feel no difficulty at all, in enabling Mr. Andrew Johnson to enter into fruition of the undivided allegiance of every fugitive from justice within the Union, so far as Her Majesty has any claims upon him; but without prejudice to his right to shift his allegiance again to somebody else, and so on, *toties quoties*, with every change of domicile; a contingency which, if experience be worth much as a guide to judgment, is not unlikely to be both frequent and sudden of occurrence.

There remain yet two questions to be settled between the same authorities: the validity, namely, of the rumored protestation from the cabinet of Washington against the power of the Queen's courts of justice, to sentence criminals tried and found guilty before them of crimes done or attempted here, but hatched within the jurisdiction of the United States. It seems

* Quentin Durward, chapter xxxiii. (Abbotsford Edition) Waverley Novels, vol. viii. p. 287.

to have been gravely argued (if not by Mr. Seward, then by some one more officious organ of the President), that crimes of that category are "extra-territorial" in the largest sense of the word. In the United States they *cannot* be tried, because they are crimes committed, if at all, against a foreign power, and in the United Kingdom they *must not* be tried, because wheresoever else they may have been brought forth or miscarried, they had the inappreciable honour of being conceived in the United States, or some one of the territories thereof. It were the merest waste of time to condescend to one syllable of protest against a pretention so absurd as this. When it comes officially before Lord Stanley, it will surely be treated according to its demerits.

Very nearly the same is to be said of the other question submitted, or to be submitted, by Mr. Adams to the Foreign Secretary of State, but which, it is surmised, will be even less hurtful to England than those breechloaders, which the President has lately restored to the doughty assassins, for service once more in Canada. That question is meant to raise one of the most monstrous pretentions that ever crossed the Atlantic:—the claim, namely, of every Irish felon to be tried by a jury *de medietate linguæ* here for crimes committed here, if only the United States have honoured themselves by making him a citizen. The pretention is not without its supporters on this side of the water. But, strange to tell, they are the same persons whose fury waxes to a white heat, whenever the cynical sneer of Lord Lyndhurst against the "aliens" of Ireland, is disentombed from the grave of departed epigrams. "Justice to Ireland!" has ceased to be the cry. Neither "Justice" nor "Ireland" is now the puppet of those spoiled children, for ever crying for the moon. They have taken it into their crazed brains that they ought to be aliens without the disabilities of aliens, and with all the rights of natural-born subjects. Alien enemies, with the privileges of that character, yet with perfect exemption from the laws of war. Alien friends, with permission to violate every honourable observance

due from such, and yet with the right to partake, under the mis-used name, of every immunity which the hated law of England, far exceeding in her haughty bounty the largest theory ever dreamed by sophists of the comity of nations, has, from the earliest days of the monarchy, bestowed upon the "stranger within her gates;" and, having once bestowed them, has held sacred even in the worst of times. To state the pretention is to expose the madness of it; for surely none but madmen could have conceived it, and it will find favour with none but those whom disease or drink have bereft of reason.

We are told that "American citizens," that is to say, certain outcast Irishmen, convicted of treason and treason-felony by the verdicts of loyal Irish juries, "are now immured in English dungeons," and that "if we do not release them we must fight America." The explanation of the insane bluster is said to be, that the juries which tried them *were* Irish juries, and not mixed juries, and that they were therefore unduly convicted and condemned, and so the law of nations has been violated in their persons, and the holy right and duty of intervening for their protection has descended, like "Astræa redux," upon the shoulders of Mr. Johnson's cabinet. It is, perhaps, not worth while to tell the ignorant declaimers, in their turn, that the law of treason was ever an exception to the privilege, even in the case of aliens in blood, "improper judges," quoth Blackstone, (iv. Com. 352) "of the breach of allegiance," and that no jury *de medietate linguæ* was, in such a case, ever allowed by our law, although sometimes granted by a grace of the Crown, (2 Hawkins, c. 43, s. 47,) even higher than the region of technicality.

Let us say, then, that they mis-state at once the origin and the nature of the privilege, who suppose it to be claimable on the part of the expatriated subjects of Great Britain. The origin:—for it is unknown to the law of nations; it is peculiar to accursed England alone; it is the mere creature of a municipal law, introduced by a Plantagenet king, or tyrant, if that name be liked better. The nature:—because,—as its name imports,

de medietate linguæ, — (which, for the convenience of our critics, may be here translated into the vernacular, "of moiety of language,") the privilege was contrived, not by way of balancing Frenchmen against native Englishmen, but simply with the humane purpose of securing to the culprit, if possible, the presence, in the jury-box, of a body of persons not strangers to his speech, whether or not themselves of his nation or of some other nations, and, in the latter case, aliens to his own nationality. The Act is still in the statute book, (28 Edw. III. c. 13), and he who runs may read :—

"In all manner of inquests and proofs," such is its purport, "although the king be party, the one half shall be denizens and the other half aliens, if so many aliens or foreigners be in the town or place, that be not parties nor with the parties; and, if there be not so many aliens, then shall there be put as many aliens as shall be found in the same which be not parties, nor with the parties as afore is said; and the remnant of denizens which be good men, and not suspicious to the one party nor to the other."

The office of juror was in those days very different from what it is now. Then the juror was a witness or compurgator, as, indeed, in this very statute the phrase by which the entire jury is denoted is "inquest and proof." At present every juror is a judge; and no juror a witness. Yet the law is unchanged. The existing Jury Act (6 Geo. IV. c. 50) re-enacted the statute of Edward III. almost in as many words, and further provided (s. 47.) that no alien juror should be challengeable for want of a freehold or other qualification required by the new Act. What place, then, is there in this jury system for the foot of the Irish traitor, naturalized or not naturalized in a foreign land? He cannot invoke the law of nations, for that law knows the "mixed jury" not. He cannot invoke the letter of the statute-book, for to that statute-book he is known, not as alien, but as "felon in law," or "felon outlaw" only, because of his natural allegiance. He cannot invoke the spirit of the statute, for the language which he

habitually uses, or mis-uses, to the damage of himself and the country which gave him birth, is the English language; the tongue of his own race, moreover, to the shame of that degenerate people be it said, being entirely unknown to nearly every man, woman, and child amongst them above the peasant class. And, as it is extremely probable that every alien within this realm qualified to be his juror, be the nationality of that juror what it may be, is just as ignorant of the Erse, as he himself is, it is impossible to imagine that the Parliaments of Edward III. and George IV. had the case of the expatriated Irish culprit in their view, when they were considering how to secure to the foreigner upon his trial "a moiety of his own language" upon the inquest.

But now the question has been raised, and some decision has to be taken upon it, as well as upon the other question already noticed, that of the indelebility of allegiance. No thoughtful citizen will be sorry for the coincidence of those two necessities. The policy of that celebrated rule in Calvin's case, *nemo potest exuere patriam*, was always doubtful, and is now out of date. The jury, *de medietate linguæ*, was in its day a most useful and merciful corrective of the policy which, occasioned —(perhaps justified)—by the wars of succession between the houses of Plantagenet and Valois, had, in the course of the preceding fifty years, been gradually shutting out aliens from the common law equality of rights and functions amongst "all men resiant within the realm." Nevertheless—

Tempora mutantur: nos et mutamur in illis.

The alien has regained by statute (7 & 8 Vict. c. 66) much, —and but for the bungling way in which a later Act (26 & 27 Vict. c. 125) is worded, would have regained the whole,—of that equality before the law, of which he had been deprived by a series of enactments, commencing with an Act of uncertain date, (which, in the common editions, is entered as of the seventeenth year of Edward II., but according to the Record Commissioners, without authority), is the first in that series. It is, at all events, certain that the enactment in

question, Statutum de Prærogativâ Regis, is not older than the latter end of the reign of Edward I. (Statutes of the Realm, vol. i. p. 226 *a*). We seem to be resuming the liberality of practice in the striking of juries, which distinguished the common law down to the passing of that statute. Alienage is not once mentioned in Britton, whose work shortly preceded the enactment, amongst the causes of challenge which he enumerates,* nor indeed is there any mention of alienage as cause of any disability whatever in his book. The disabilities in question are in the course of repeal, if the repeal already attempted has been ineffectual. But the jealousies which gave them birth have vanished long ago, and there is no fear of a revival. It is notoriously the practice, even now, for aliens to sit as jurors in ordinary cases. In the dominions of the Crown, beyond the Four Seas of these islands, the character of alien excludes no man from any jury list; and, of the working of that equal system in the administration of justice to all the Queen's subjects, not one complaint has ever been whispered. There is much reason to hope that Parliament, when the report of Lord Enfield's committee is completed, profiting of the experience gained as well here as in those remote provinces of the empire, will not disdain to declare by law that which is even now the practice of our courts here, and to restore to all aliens domiciled within the realm their common law capacity to take the same part in all jury trials with their natural-born fellow subjects. But when that is done, why should the anachronism of the clumsy privilege of the jury, "de medietate linguæ," be allowed any longer to encumber the statute-book?

Six aliens, as the law now stands, are to be on the jury of every alien criminal claiming the benefit of the Act, and not being a criminal under charge of treason. They need not be his countrymen. It is possible that every man of them may turn out to be the native of some country with which his own country is not on good terms. It is even probable that every

* Britton: Liv. II. c. 21. f. 135. 1 *a*.

one of them may have accepted a British naturalization, and done his best in a variety of ways to get rid of the alien element within him, thereby approving himself to be in fact no better deserving of the confidence of the alien at the bar than any other subject of perfidious Albion. It is by no means unlikely that every man of them is a stranger to the prisoner's tongue. And it is much more than likely that not one of them has ever heard of him before, not at least so as to enable him to speak favourably of his antecedents. But supposing all these chances to be in the criminal's favour, of what value will they be to him, unless the aliens come into the jury-box with the deliberate intention of frustrating the inquiry and shielding the culprit? Compurgation by jurors is abolished, and the verdict is not, as in days of yore, their testimony to character, but their judgment upon the facts of the charge. As for the function of interpretation, that surely will be far better discharged by one of the skilled and sworn interpreters with whom we are so familiar, and whom those days of yore knew not.

In point of fact the mixed jury itself had fallen pretty well into desuetude amongst ourselves when all this stir began before the Dublin Special Commission. It is very clear that the object of the movement was twofold: (1.) In the event of the claim being allowed, to swamp the jury-box with pretended aliens, that is to say with our own fellow subjects, Irish by blood, birth, and breeding, but each hailing from the United States of America, and pledged to acquit their brother conspirators:— And (2.) if the claim were, as it has been, disallowed, to make a grievance out of that; which, in time, might, with Mr. Johnson's help, be made a *casus belli* between the two countries. Between those two objects, it is difficult to pronounce by which of them the true end of the "mixed jury" was most completely and openly controverted and set at nought. But if, as seems too probable, it is to base uses like these, and to none other, that the institution is in future to be applied, surely now the time is come, when the reasons for deeming it useless for any good purpose ought no longer to escape the

attention of Parliament; now, when to that sufficient argument for repeal there is added the probability of its being made a very effectual means of domestic and international mischief.

The writer is encouraged to submit these views to his readers, by the reception accorded to them on the 13th ult., from the Jurisprudence Department of the Association for the Promotion of Social Science, and by the timely appearance, only three days later, of the letter to the *Times*, signed "Historicus," on that subject, by Mr. Vernon Harcourt, who had himself taken part in the proceedings of that meeting. Other indications might be mentioned, of a growing desire amongst all thinking people, to settle the law of justiciability of at least crimes of state—wheresoever perpetrated—upon the triple basis, of the jurisdiction of the English Courts over the offenders, if found here,—the abolition of the jury *de medietate linguæ* in all cases,—and the recognition of the acquirement of the character of alien, by a natural-born subject, duly naturalised abroad.

If the adoption of those amendments into our jurisprudence should prove to be one of the results of the impression, produced by Fenian outrages and pro-Fenian declamations upon the minds of our English public, we ought to feel abundantly comforted. It will go far to console sober men under affliction at the noisy counter-demonstrations from "special constables," and "abhorrers," not always, as the Deptford Police Court testifies, themselves persons of unsuspected patriotism and unblemished loyalty to English law.

T. C. Anstey.

Art. IX.—THE LATE EDWARD JAMES, Esq., Q.C., M.P.

DIED at Paris, on Sunday, November 3rd, 1867, aged 60 years, Edward James, one of Her Majesty's Counsel, and Member of Parliament for the city of Manchester.

Without a single symptom of decay, hale, vigorous, elastic, he had, with the close of the Liverpool assizes in August, closed a year of extraordinary exertion and signal professional success. During the vacation he had been travelling in Switzerland, and had reached Paris on his way home to resume his labours, where, after a brief illness, he died. Apparently still in the prime of life, he seemed to bear the promise of many years, and larger honours yet in store. In Westminster Hall, and on his circuit, men speculated on his promotion, and his rivals fretted because there seemed no immediate opening for him; none thought that death would clear him from their path. But so it was to be; in the full maturity of his powers, at the height of his success, his place was to know him no more. The gap soon fills up. The business of life, and of the courts, rolls on; able men waiting their turn in the rear-rank, step to the front; the public perceive no vacant space, but we, of the robe, know well how few, if any, equal to himself, Edward James has left behind him.

Not only was he the ablest advocate on his circuit, he was not inferior to any of his competitors in the Metropolitan courts. He was possessed of personal advantages denied to many others, perhaps, as learned or as eloquent as himself. He had a striking presence, with handsome and most expressive features, a clear and pleasing voice, a composure that nothing could disconcert, a dignity of bearing which never deserted him.

Without being deeply read in the ancient lore and black-letter learning of the law, James was a sound practical lawyer. In one important branch—commercial law—he was thoroughly versed; in all cases relating to the things which do come or go by the sea in ships he was entirely at home; as an advocate in mercantile causes he had no superior or even equal at the Bar. His written opinions were clear and concise, intended as practical guides to his clients rather than as legal essays; his arguments before the courts were always directed to the main question at issue; he never wasted time or power on a subsidiary point. Here, again, clearness was his characteristic

quality; he always himself knew, always made his hearers understand, what he was driving at. He possessed a keen sense of order; his facts and his arguments always observed their due and logical sequence. Though a fluent and pleasing speaker, to eloquence of the higher kind he had no pretensions; he never could have excited or quelled the passions and feelings of a large or mixed audience; his style was without ornament, his ideas were not decked in the glittering vestments of oratory. Plain and sober was the dress which his speech habitually wore—a garb well suited for an advocate's daily use. He was, however, eloquent with the eloquence that arises from lucid arrangement of ideas, of facts, and of arguments, and from language neat, elegant, and always adapted to his subject and his audience. Ease and simplicity were the characteristics of his style; truly as an orator he was "*simplex munditiis*," yet his speech bore witness to the well-stored mind within. No one of his contemporaries equalled James in the management of a cause; he was unrivalled in his quick perception of when he had got enough for his purpose; he never called a superfluous witness; he rarely asked an unnecessary question. In opening his case it was easy to follow the orderly and deliberate march of his narrative, and when the time came to sum up or reply, concisely and compactly he would put the strength of his own, the weakness of his opponent's case, his retentive memory omitting no important fact, his well-guided tongue dwelling only on material, gliding lightly over dangerous, topics. He was excellent in the cross-examination of a hostile witness, extracting admissions and contradictions with a bland persistence that made obstinacy and prevarication alike unavailing. He could be very terrible, too, when roused by what he believed to be wilful falsehood, and those who paltered with the truth would be sorely wounded when they escaped from his hands. It should, however, be said that he never abused this power merely to win his cause; he used it only when he conceived the interests of truth and justice demanded its exercise.

Take him all in all, James was consummately adapted to his position, that of an advocate of large practice in the highest class of causes. He was zealous for his client, discreet, sagacious, learned, and persuasive. But one grave fault marred these excellent qualities, and this memoir would be more imperfect than it is, did it make no mention of his defects: he was prone to take offence too often; he imagined offence where none was intended. We wish to speak with all gentleness of the dead, but those who knew him best and esteemed him most could not fail to see how often James's temper made his own life harder than it need have been; made things very hard for those who came into contact with him. In justice to him be it said that it was not to those below him that this acerbity showed itself; to them he was gentle and forbearing, but to his opponents of equal position he was not an agreeable adversary. He resented sharply any supposed imputation on his fairness; on this point he was oversensitive, and the offence was more often imaginary than real.

We have said that James was unequalled in his management of a cause; in this he would brook no interference, hence his too frequent unseemly differences with the Bench; at judicial interposition, which he deemed uncalled for, the whole man seemed to bristle in angry opposition, and he was then apt to forget the respect which every advocate, no matter how distinguished, owes the court.

We have alluded with sorrow to his faults, let the same page record his kindly heart, his untarnished honour, his independent character. Long pining for business before it came, no mean or truckling action was ever laid to his charge. He never sought to gain the favour of a client by any other arts than by the zealous discharge of his duties as an advocate—even in that he was careful of his self-respect: all that he could do for his client "*per fas*" he did—never did he stoop to gain a victory "*per nefas.*" He never took the wages of evil: in him high powers of intellect were united with the highest principles of duty; this union may have retarded, but it con-

firmed, his eventual success. Such was the man whose career we now briefly trace.

Edward James received his early education at the Grammar School of Manchester, his native town, and completed it at Brasenose College, Oxford, where he enjoyed, we believe, a scholarship connected with the Manchester School, and latterly one of the Hulme exhibitions. On leaving College, he became a student of Lincoln's Inn, and was called to the Bar in 1835, being then twenty-eight years of age. He married, we believe, in the same year, and settled as a provincial barrister in Liverpool, practising as a member of the Bar of the Northern Circuit, but principally in the local courts, civil and criminal, of that town. For some years he made little progress; with his powers in such a field this is unaccountable; but so it was; at one time despairing of ultimate success he sought a scholastic appointment—the mastership of the Wigan Grammar School—but happily he did not attain this object. At length, as to every one who waits and watches, his opportunity came. James had far more than ordinary ability: with such a man business led to business, and his superiority was manifested as the opportunities for display increased. After some years' residence in Liverpool, and having obtained the lead of the local courts, he removed to London, there, so far as metropolitan practice went, to begin the game again, and, for some time, his voice was seldom heard in the Courts of Westminster Hall. Good fortune shone upon him at length: in 1852 he succeeded the late Sir Charles Crompton, on his promotion to the Bench, as Judge of the Court of Passage of Liverpool, which office he held until his death. His conduct as a Judge increased his reputation. To sound law he joined a warm love of justice; he always strove that a case should be decided according to the right; he was rapid in the disposal of his causes, but with him rapidity never led to wrong.

In 1853 he obtained a silk gown, and became in due course a Bencher of his Inn; at this time the front row of the

Northern Circuit was crowded, and there seemed no room for another candidate for the great prize which James at length won—the lead of his circuit. In the front rank were Knowles, the then leader—Watson, Wilkins, Bliss, Warren, Hugh Hill, Atherton, Hoggins, and Stephen Temple. Death, promotion, or retirement has removed all these, save the last-named, James's successor as Attorney-General of the County Palatine, and the present leader of the northern circuit. Amongst these were some men of mark. Knowles was one of those men who are greater than they seem to be; he rather shunned than courted notice, yet he was learned and humorous, and, though without eloquence, an advocate equal to every occasion; he seemed to rise with the exigencies of the cause, and he justly held a foremost place amongst the men of his day. Wilkins, too, was a rough antagonist; to him nature had been very prodigal of her gifts, and genius supplied in him most of the defects of imperfect training. In Hugh Hill the circuit boasted a great lawyer, who afterwards, for too short a period, was a great Judge. It was a loss to the nation as well as to the profession, when failing health compelled his premature retirement from the Bench. One other, junior to all these, we must name, who soon after came to the front rank, and in whom James found a formidable rival. We mean Sir James Wilde, the present accomplished Judge of the Court of Probate and Divorce.

Five years made great changes, and, in the year 1858, we find James in good work in the northern towns of the circuit, and doing a fair share of the business at Liverpool, with Atherton and Wilde for his principal opponents. From this date his rise was rapid; two years later Atherton became Solicitor-General, and Wilde a Baron of the Court of Exchequer; thenceforth to his death James held the undisputed lead of his circuit. Its official leader, as Attorney-General for the county palatine of Lancaster, he became, on the retirement of Mr. Bliss, Queen's Counsel, we believe in the year 1863, and the attainment of this coveted post crowned his professional honours.

In 1865 he was elected Member of Parliament for the city of Manchester, and a proud thing to him must have been his selection to represent his native city. Of his parliamentary career a friendly pen cannot write with satisfaction; his friends were, in fact, disappointed with the figure he made in the House. He made no speech there at all worthy of his forensic reputation. Probably he entered Parliament too late in life to attain any great success in that arena. His was no uncommon case; the great advocates of our Forum often fail in our Senate.

Meantime, as years flowed on, his reputation at the Bar was steadily spreading, until at last, though late, the great city houses of Attorneyship eagerly sought his services and confided their weightiest causes to his hands. As his London connection increased, he gradually withdrew from the northern towns of his circuit, and confined his attendance to the county of Lancaster. Short of official position, he had now all that his profession could bestow—an honourable name, an overflowing business, a growing fortune. The well-earned honours of the Bench seemed in the early future, but earlier came the grave.

His own court, the Court of Passage, was sitting (held by a deputy) at the time of his death, and was at once adjourned out of respect for the memory of its late Judge. The attendant Bar sorrowfully dispersed; each man seemed to have lost a personal friend. In truth he deserved their regard, for he took the warmest interest in their welfare, and was ever ready to promote their interests. We have spoken of James only as a professional man; we do not intend to intrude upon his private life. This, however, let us add, that he was never seen to so much advantage as in his home, there the kindliness of his nature seemed to have full play; he opened his house freely to the younger members of his circuit, and he was ever the genial courteous host with a warm welcome for every guest; a welcome alas! which they shall hear no more.

This is we feel a very imperfect sketch of the career of

Edward James; a very meritorious career we affirm it to have been. By his industry and talents he raised himself to great eminence in his profession; his name was never associated with anything mean or dishonourable; he has left a high example of perseverance, of probity, and of independence.

We lament him, as a good man, cut off in the early autumn of his days, ere his harvest was fully gathered—one deserving a high place amongst the Worthies of the English Bar.

A. P.

Art. X.—RECENT WRITERS UPON MARITIME LAW.

Papers on Maritime Legislation; with a Translation of the German Mercantile Law relating to Maritime Commerce. By Ernst Emil Wendt. London: Longmans. 1868.

The Elements of Maritime International Law; with a Preface on some Unsettled Questions of Public Law. By William De Burgh, B.A., Barrister-at-Law. London: Longmans. 1868.

THE two books at the head of this paper are intended to supply a growing want of the age. It is an age of change; in many respects an age of progress; but in all respects an age of change. They who go down to the sea in ships have not escaped its influences. A general demand, as our readers are aware, for a revision of those laws which constitute what is called the maritime law of nations, in the sense of simplicity and uniformity, has occupied for many years past all the jurists and statists and chambers of commerce throughout the civilised world, and has excited the attention even of some communities lying far beyond it. "Lex omnibus una" was the device which Lord Denman, upon his passage through the dignity of the coif to the chief seat upon the bench of justice, chose for the rings, which, in compliance with an ancient

and laudable custom, the new-made serjeant distributed that day amongst his well-wishers. "Lex omnibus una" appears to be the device of all thinking people of the day, who lay their heads together to consider of the particular exigencies of their several states in relation to the law maritime.

Mr. Wendt, we think, has made out against our legislation, of the last fourteen years at least, a strong case of deviation from the comity and even from the obligations of that universal law of nations. He does not seem to be aware of the cause, although a little acquaintance with our text-books, especially those of Mr. Maclachlan amongst British, and Mr. Parsons amongst North American lawyers, might have enlightened him upon that point. In plain language, it consists in the vulgar error, from which, however, learned men ought to have kept themselves free, of confounding the law maritime with the law merchant; the former essentially and purely one of international origin, the latter partly of international and partly of municipal origin, but deriving all its municipal authority at least from the municipal law.

It is not wonderful that the legislature, always more or less amenable to the old reproach of being "Parliamentum indoctum," should have shared in the common error, so far as to undertake the making of new laws which were to bind all the mercantile navies in the world, in their relations with this country and its people, with the same indifference to received traditions and principles long established amongst all nations, as if the subject-matter had been the law of bills of exchange, or the law of promissory notes.

It is impossible that the powerful and authoritative representations of so many important associations of underwriters, shipowners, and merchants, in whose name Mr. Wendt has come forward to expostulate with the Board of Trade, the legislature, and the constituencies of the realm, should not receive their full measure of respectful consideration, before the pending Bills for the re-adjustment of the Admiralty and Salvage jurisdictions, for the devolution of a portion of

those jurisdictions upon the County Courts of Liverpool, and one or two other select ports, and for the amendment and consolidation of the Acts relating to the Mercantile Marine are laid by Parliament at the foot of the throne. We earnestly commend his instructive and valuable compilation to the notice of those charged with the draughting, the revision, and the parliamentary conduct of these measures before it is too late. We urge this duty upon them, in the spirit of the wise words of the late Lord Justice Knight Bruce,—words upon which, not without reason, Mr. Wendt again and again lays much stress, for they contain the root of the matter:—"We ought not to forget that there are other people in the world besides ourselves." It would, indeed, be a matter of self-reproach and open shame to us, if the result of our desultory attempts to remove the municipal legislation of this kingdom, concerning the merchant shipping and seamen of foreign states, from their only true and solid basis, the maritime law of nations, to the uncertain and unsafe grounds of local predilections and dislikes,—were to confirm in the minds of foreigners that feeling, which, it is very clear from Mr. Wendt's citations, they do largely entertain, and as to which we should be only too happy if we could believe them to be altogether ill-founded that, from the passing of the Merchant Shipping Act of 1854, down to the introduction of the Bills still pending in Parliament, and to which we have already alluded, the tendency of our legislation and of our attempts at legislation, on the important subjects which that Act embraced, has been to deprive foreigners of the advantage to themselves and to us,—for our national reputation depends upon our own fidelity to the traditions of the days of Lord Stowell,—of having justice administered to them by our courts, in conformity with the principles of the general maritime law, and by virtue of a jurisdiction which the law of nations, itself parcel of the English common law, alone conferred; because the matters to which it is applied are such as no Act of Parliament can lawfully bring within its own jurisdiction, or withdraw from

that of the universal and higher law. We refer particularly to the comments of the erudite author, and the justificatory appendices accompanying his comments, upon our hasty and ill-considered legislation touching the flag,—pilotage,—collision,—the limitation of liability for damages,—salvage,—wrecks,—and the law of maritime lien, (pp. 1; 86, 109; 126.) But the whole work is worthy of attention in this point of view, as well as with regard to the collateral question of an international mode of maritime law, and other such questions, which are already familiar to the readers of this Magazine.

We, therefore, do not hesitate to declare the "Maritime Legislation" of Mr. Wendt—albeit not himself an English lawyer—to be a most valuable contribution to the practical development of the science of maritime jurisprudence.

The second book at the head of our paper will probably be considered by Mr. Wendt, to some extent, as illustrative of a danger which he, not without reason, more than once has pointed out (pp. 10, 81, and *passim*), that is to say, the decline of Admiralty lore, in proportion as the existing race of learned civilians dies out and those men replace them, who are alien to the learning of Scævola, however well versed they may be in that of Archbold, of Chitty, or of Fonblanque. It certainly does look very like it when we are told, by one of the youngest aspirants to the old and venerable succession,* that it is only within the last few years that public law has found even a subordinate place in the studies of the English lawyer:" that "questions and principles which, from the time of Grotius, have been familiar to continental jurists . . . have been, until lately, except for purposes of a special practice, and occasionally to serve a political purpose, left unnoticed by, and almost unknown, to the student of our laws;"—that it is only "recently" that "some approach has been made to a systematic teaching as an integral part of legal education of that body of law which governs the relations of independent com-

* Preface on some unsettled questions, &c., to Mr. De Burgh's "Elements of Maritime International Law," p. ix.

munities both in peace and war; nay, that there is reason as yet to fear that international law at large is hardly out of chaos, for that it is but recently that even any "efforts have been made by the reduction of the maxims of this branch of jurisprudence, to extend the knowledge and increase the influence of those principles of the law of nations—the *jus inter gentes*—by whose rules the international transactions of civilised states must at all times be governed."

It really takes one's breath away to read this astounding statement. Our recollections go back to the days of our young studies within the walls of University College, and elsewhere, when, albeit always destined for the courts of Westminster, and not at all "for the purposes of a special practice" (as, indeed, that practice—with the High Court of Admiralty where it flourished—was closed to us), we certainly were put to acquire, and, as we hope, did acquire, not only "the elements of international law," but an ample stock of that learning of the civilians, without which, in those days, few well-advised "students of our laws" would have ventured to consider themselves qualified to accost them. Lord Lyndhurst has not long left the scene of his fame. Lord Brougham still lives. Lords Cranworth, Wensleydale, and Westbury are still in the enjoyment of all their wonted vigour; the present Lord Chief Baron has infused new life into the court over which he presides; and it was but the other day that Sir William Erle retired from the chief place upon the Common Bench. We are old enough to remember Sir James Macintosh; we have frequented the lectures of Austin, of Amos, of Park; we have had the benefit of counsel and direction from Burge, and Manning, and Groves, and Davenport Hill; we see daily Sir George Bowyer. Sir William Follett was lost too early; but, in Sir Roundell Palmer, the Queen possesses amongst "Her Majesty's counsel learned in the law," one, in every sense, worthy of treading in his footsteps. But the time would fail us were we to continue the enumeration of great lawyers of Westminster Hall, who have

been "distinguished" and eminent withal, for their thorough knowledge of the principles and practice of international law, and yet were no "civilians." And, as to the wants which Mr. De Burgh appears to have found embarrassing, of some "system of maxims of this branch of jurisprudence," some "systematic teaching" thereof, some need, not only "in this country," but generally "in this age," of "a revival in the interest with which questions of public law are regarded, and an increase in the learning brought to bear on their investigation," * he has been very unfortunate in his readings; that is all. A five minutes consultation of any law catalogue would have put him into possession of the names of a stock of books of the highest authority in the English, as well as in the principal continental tongues, containing all of those *desiderata*, which it appears, so far as he is concerned, are still *desiderata*, and fully supplying every one of those yet unsatisfied wants. We cannot help adding, that they certainly have left no place at their table for any mere elementary treatise like this. Were it otherwise, we fear that neither the "Elements" of Mr. De Burgh, nor yet his "Preface on some unsettled Questions of Public Law," would be considered of sufficient authority to fill it.

It were well if every young writer, before he rushes into print, would reflect upon that wise institution called "silent year," in Doctors' Commons, and "stage," at the Bar of Paris. Imperfect and ill conceived in many respects, the work on which we are forced thus to comment, bears traces of an ability and industry which give much promise of excellence for the season of maturity. Was it wise to anticipate the certain coming of that future time? If the learned author had bided that coming, the intervening years spent in the unceasing acquirement and digesting of the knowledge and experience most especially requisite for so great a work, would have enabled him to complete what is unfinished, to supply

* *Ibid.* p. xlvi.

what is wanting, to correct what needs amendment in his manuscript, before committing it irrevocably to the press. He would have learned, for instance, that "Maritime International Law" has its peaceful and commercial side, as well as its warlike side, and he would have made of the former by far the more important and predominant portion of his book, instead of altogether excluding it, which is what he has actually done. He would have found time for the endeavour, at least, to enumerate the numerous unsettled "questions of public law" relating to his subject-matter; whereas he has enumerated only three, of which but one, the almost obsolete question as to the retro-active effect of war upon a previous embargo or capture,* is really any question of public law at all. The other two, viz., that of the Alabama piracies,† and that of the jurisdiction of the courts of a neutral state to enforce within its borders the laws and proclamations of foreign belligerents,‡ are, as to the former, a mere controversy as to the application of an admitted principle of public law to disputed facts, and, as to the latter, neither the one nor the other, but a question of municipal jurisprudence, in which, as our author himself shows (p. xlii), no foreign state, belligerent or not, has ever pretended to concern itself.

Of making many books there is no end. Of late years this has been especially true of text books upon law. The worth of a law book, at least, must greatly depend upon the labour spent in preparation and in performance. Every lawyer, no doubt, as Lord Coke tells us, owes to his profession a debt which he ought to discharge;—the debt of his own learning. But surely this is not the way to discharge it!

* *Ibid.* p. xxiii. † *Ibid.* p. xii. ‡ *Ibid.* p. xlii.

Art. XI.—GUERNSEY PRISON.

NEARLY one hundred years have passed since Howard began his prison visiting, and by his philanthropic labour revealed the cruel sufferings, to which men and women, convicted or only even suspected of offences against the laws, were subjected by reason of the wretched and filthy condition of our gaols.

The reforms he inaugurated have, of late years, made rapid progress. Our prisons are now substantial buildings, well adapted to the purpose for which they were erected, clean and wholesome, and fully supplied with all requirements for the health of those confined within their walls. Nor have our efforts been limited to amending the physical condition alone of our prisoners.

Our attention has also been turned, especially within the last few years, towards the best means, when their punishment shall be at an end, of preventing their ever re-entering the gaol doors; and though we cannot say we have done all that is needed towards accomplishing this desirable object, yet we may fairly congratulate ourselves on having made considerable progress on our road thither. But how must our satisfaction at this general improvement, alike in the construction and the object of our gaols, be dashed when we find that there still exists, within a few hours journey of the metropolis, a prison so bad, both in its external and internal arrangements, that it would be well-nigh impossible to adopt therein any expedients for the reformation of its occupants.

This prison is in Guernsey, and is the only gaol in that island, yet in it there is no division of classes, nor is any labour imposed, except grinding in the air at a crank—work which is almost enough to make those compelled to execute it positively loathe labour, although labour must be their only means of earning an honest livelihood, and a love of it would almost

certainly prevent them ever re-entering the prison gate. We may almost say there is no separation of the sexes, for the cells for men and women are so near together, and the whole arrangement so bad, that their inmates can easily converse. There is no bath, or any other washing apparatus than a pump in the prison yard, where the male prisoners take exercise, and which is in full view from the gallery where men not sentenced to separate confinement loiter away their time. There is no infirmary, nor any accommodation for nursing prisoners in sickness; these are, when seriously ill, received, as a favour, into the town hospital; but, of course, in that institution there are no means for their safe custody, and a patient from the prison did, in fact, make his escape from the hospital. There is no schoolroom or schoolmaster, nor, indeed, is any secular instruction proffered to the prisoners. There is no chapel; one of the cells, 16 feet 2 inches by 10 feet 3 inches and 9 feet high, too dark to read in, being used for the performance of divine worship, if not employed as a place of confinement for debtors, for which it is needed when the rest of the gaol is full. We heard that at one time, when the prisoners were suffering from the itch, the chaplain, being afraid to go in among them, stood outside the cell and read the service, looking in through the window. In the chapel cell there is no screen to divide the men from the women, who often talk and laugh during the service. The chaplain stated to Mr. Perry, the prison inspector, that his exhortations were of no avail—the prisoners openly laughed at him. There is no kitchen, the cooking being done in the gaoler's residence. There is no prison-dress, nor any fund from which to purchase one; the prisoners are obliged (except in cases of urgent need when clothing is occasionally supplied at the expense of the Crown) to wear their own, however ragged and filthy it may be. Lastly there is no female warder; the gaoler and his male assistant are the guardians of the women, and can visit them at pleasure. Old and young, those awaiting their trial and those convicted, the mere lad with a first offence, and the hoary criminal sunk deep in vice, all herd

together, with not even a task (except the crank-labour which occupies but a small portion of the prisoner's time) to prevent the practised delinquent from teaching their less guilty companions how to follow their own vicious courses. Idleness, the acknowledged root of all evil, must, truly, send forth vigorous shoots in the prison of Guernsey! Far were we from feeling surprise when the gaoler told us, on our visiting it in May last, that he believed offenders quitted its walls more depraved than they had entered.

One would naturally conclude from what we have described that the island must be in a state of semi-barbarism—that its inhabitants, absorbed in their own pursuits, neither know nor care how their erring fellow-citizens are treated. Nothing could be more unjust than such a conclusion. Any person visiting Guernsey must perceive that he has entered a well-ordered community, where the laws are respected, the poor cared for, the children educated, and the sick tended. Each parish has its school, provident and temperance societies are in action. In short, neither the material nor moral welfare of the humbler classes of Guernsey is neglected by their fellow-citizens of higher station. Nor is money grudged for charitable purposes, for charities, indeed, far beyond the limits of the Channel Islands. The people of Guernsey subscribed liberally to the Irish Famine Relief Fund, the Lancashire Cotton Fund, and towards the Nightingale Testimonial, and also for the assistance of the sufferers by the terrible floods in France in 1856. Neither are they niggardly in spending money for loyal objects. They raised a handsome tower to commemorate the visit of Her Majesty to Guernsey in 1842; and a beautiful statue of the lamented Prince Consort, erected by the inhabitants, adorns the pier of St. Peter's Port. That their prison is a disgrace to the civilization of the present century is perfectly true; nor will this statement be called in question by the people of Guernsey. But they consider that the blame rests chiefly on the Home Government.

The Channel Islands formed part of the Duchy of Nor-

mandy at the time of the Conquest, and, as a portion of William's inheritance, came into the possession of the sovereigns of England; the inhabitants, however, retained their own laws and language, for though French is seldom heard in conversation now in Guernsey, except among the older peasants, it still remains the language of the courts of justice, and of the "States," the representative body of the island. Guernsey sends no member to the British Parliament, and is, in fact, politically very much in the position of our American and Australian colonies. But the prison has always belonged to the Crown, and has been maintained at the Crown's expense from the royal revenue of the island. The inhabitants contend that their constitution exempts them from defraying this cost, though, as is stated in the petition of the Royal Court in 1854, they did build the present prison from funds of their own. It is, however, only the cost of re-building or enlarging, not of maintaining, that appears to be matter of dispute. So long ago as 1848 the deficiencies of the prison were brought before the Home Government by the Lieutenant-Governor, Sir John Bell; and from the year 1854, when the Royal Court of Guernsey first petitioned the Queen to adopt such measures as might be found advisable, in order to put the prison upon an efficient footing, until 1863, a correspondence was carried on between the Bailiff of Guernsey and the Lieutenant-Governor of the island on one side, and the Home Government on the other. The officers of the island fully exposed the defects of the prison, and, at the request of the Central Government, forwarded plans for its improvement, besides offering, on the part of the islanders, to bear a portion of the expense. Indeed, a piece of land contiguous to the gaol, bought by the States in 1852, would have been ceded by them to the Crown, and its size is amply sufficient for all the necessary alterations. The land, we believe, remains at this moment unoccupied, and would still be ceded, could any equitable arrangement be made for enlarging the prison.

In 1861, the Secretary of State sent Mr. Perry, an experienced inspector, to report on its condition, with a view to obtaining his opinion on the best mode of accomplishing the proposed improvements. His report, dated in March of that year, confirms all the representations previously made, and recommends certain alterations. He states, however, that the enlargement of the prison would occupy a considerable period of time, and offers, therefore, suggestions for temporary arrangements, which, *ad interim*, would greatly improve both the material and moral condition of the prisoners.

None of these suggestions, five in number, had been carried into effect when we visited the prison, though the first, as we were told, was on the point of being adopted,—namely, that the basement floor, the windows of which look into the prison yard, should no longer be used as a lock-up for police cases. The islanders consider that with regard to the other four suggestions the Home Government must take the initiative towards carrying them into effect. Except that, an offer of assistance, held by the islanders to be utterly inadequate, has since, we believe, been made on the part of the Crown; the correspondence concerning Guernsey prison was brought to a close in 1862, the last communication from the Lords of the Treasury being to the effect that if the existing prison no longer sufficed for the requirements of the island the States should rebuild or enlarge it.

Such is the explanation of the deplorable state of the Guernsey prison. The Crown declares that it is the duty of the islanders to bear the expense of the necessary alterations, while they contend that their constitution exempts them from this duty. Meanwhile the gaol remains in a condition disgraceful to humanity. Surely the question at issue should be speedily decided.

R. H.

Notices of New Books.

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

A Chart of Hindu Family Inheritance, with an Explanatory Treatise. By Almaric Rumsey, of Lincoln's Inn, Barrister-at-law, etc., etc. London. Amer; Carey Street, 1868.

It is no reflection upon the author of this little volume to say that he has undertaken an impossible task. There can be no "chart" where there is no survey of the seas, the shores, and the shoals, which ought to be laid down upon it. There exists no such survey for the difficult and indeed impracticable navigation of the Hindu laws of inheritance. We say, advisedly, the "laws" of inheritance; for their name is Legion. Only a few of them, when compared with the whole mass, have been as yet translated into any European tongue; not all of these into English; and of those which have, but few are to be found in England, out of the private libraries of some retired lawyers from the Superior Courts of India. It is also evident—nay Mr. Rumsey seems to say as much (p. 2)—that even to these the learned author "has not had access" to the fullest extent; and has found himself "obliged to follow English writers" in the very imperfect attempt to which his space confined him, of presenting a general view of what he calls "the divergencies of the other schools," from "the Bengal School" of Hindu law:—a school, by the way, which ought not to have been presented as the Corpus Juris proper, but rather as the most heretical of the separated bodies of the local jurisprudence. We also think that, if Mr. Rumsey had been more fortunate in his materials, or even if, instead of the vain attempt at a "chart," he had contented himself with reproducing, after the manner of preceding writers, the points to be gathered from such materials as he had, the student would have had the benefit of at least a methodical compilation of "sailing instruction," useful so far as they went, however incomplete, as a repository of science. At all events, a careful examination of the already voluminous collections of cases, in the Privy Council here, and the late "Supreme" Courts and present "High" Courts of India,—(for

the Sudder and Mofussil are not, as he seems to suppose, looked up to, even in India, as possessing any reputation for law, or any authority to fix, expound, or interpret the doubtful and difficult passages or traditions of the Hindu jurists, so as to bind succeeding judges) he would have omitted, we think, the very rash and erroneous statement, that "the divergencies are not really very numerous or important;" because he would have seen that the direct contrary is nearer the truth. This labour, however, Mr. Rumsey has not, and, indeed, consistently with his plan, could not, have undertaken. His citations of reported cases are but three, and very brief withal, one of a case in Privy Council, which is of authority (p. 21) and two of cases in the old Calcutta Sudder, which are of no authority at all. His only English text books are the well known "Principles and Precedents" by Macnaghten, (the Bengal civilian) and a "Manual of Hindu and Mahommedan Law," by Mr. Houston, an Irish lawyer, of which it is enough to say that it is but a manual. Very obviously the explanation of all this penury of material is that Mr. Rumsey's plan did not permit him to prepare more than a few pages of elementary exposition, by way of guide to the student. We doubt the value of guides at all, where the very threshold of science is beset with difficulties inextricable, but after an expenditure of research, sufficient to the whole work of exploration. There is no learning of which it can be more truthfully said, than of the learning of India, that "there is no royal road to it."

One result of all this has been to let in a good deal that is ambiguous, and not a little that is unsound, into the expositions of general principles, and the definitions of terms which make up the twenty-two pages of Mr. Rumsey's "explanatory treatise." To point them out would require us to re-write those pages, but at much greater length. We must therefore forbear.

There is but a single reference to English parallel passages of jurisprudence, in illustration of the text. Those parallels nevertheless are unusually abundant, as any one may see who will consult Sir Thomas Strange or Dr. Sumner Maine. This penury of illustration was unavoidable, no doubt, in the present instance. But then why attempt it at all, if it could not be done well? Above all, Mr. Rumsey ought to have taken the trouble to verify the exactness of his solitary parallel, instead of relying upon a fancied resemblance of verbal sense, as he appears here to have done. Speaking of the female right of "*Stridhan*," (or separate property), and its kinds, he says, (p. 15. note):—"Singularly enough, one of these kinds is described by some Hindu writers, as 'that which was gained by loveliness,' reminding the English student of the mediæval institutions of 'Dower *de la plus belle*.'" The italics, which are Mr. Rumsey's, point the meaning of his words, and the source of his mistake. Let him consult his Littleton (s. 48) and he will see that "Dower *de la pluis beale*" was never before predicated of the tenant in dower but of the tenement:—"*id est*," says Littleton, "of the most faire of the tenements, which she hath as gardien in socage."

Allegiance and Citizenship: An Inquiry into the Claim of European Governments to exact Military Service of Naturalized Citizens of the United States. By George H. Yeaman, U. S. Minister at Copenhagen. Copenhagen: Printed by Fritz Moller, 1867.

THE argument of this pamphlet may be shortly stated thus: The United States of America are nothing if not protectors of all their citizens, by birth or naturalization, at home and abroad. They have, therefore, the duty of protecting all such citizens from military conscription in foreign countries, where they happen to dwell, even if themselves citizens or subjects of the same, by birth or otherwise. That this is denied by other Codes, and by some of the best jurists and statesmen does not affect the question. Such foreign codes must be disregarded; and so must such jurists and statesmen, whether American citizens or not, for, if they be the former, they cannot be said to maintain the liberal view on this subject" (p. 2), and if the latter, "they discover a supposed interest in maintaining what we (the United States) hold for error" (*ibid*). It is clearly, therefore, a question, the decision of which "must proceed from our Government, and be accepted by the European Governments" (*ibid*), unless the latter prefer "giving cause of war to a nation, which, of all others, should be most jealous of the rights of its citizens" (p. 3). This can hardly be said to be a jural argument.

A Treatise on Common and Waste Land. By C. J. Elton. London, Wildy & Sons, Lincoln's Inn Archway, 1868.

THIS is a work by an author already known as a writer on the tenures of Kent. This work, like the preceding, shows much study and acquaintance with an abstruse and difficult subject. It is divided into fourteen chapters; also an appendix containing the Metropolitan Commons Act passed in the session 1866, with a view to protect existing rights of the public in open spaces so necessary for health, and also to give powers for improving such grounds in order to make them more available as recreation grounds, and for this purpose powers are conferred on local authorities to contribute such sums as they may think fit, for executing a scheme to be settled under this Act by the Inclosure Commissioners for England and Wales for improving generally Metropolitan commons and open spaces. The author treats the subject under the following heads; 1. Rights of Commons generally. 2. Commons of Pasture; this he divides into common of pasture appendant, appurtenant, and in gross common of Estovers, turbary and piscary, of digging and miscellaneous profits. He then treats of the extinguishment of rights of commons by various modes and refers to the evidence given before the Committee of the House of Commons on the subject in 1865. He then gives a chapter on approvements, the old mode by which Lords of Manors were accustomed to extinguish rights of common, and devotes a chapter to the con-

sideration of the Statute of Merton, especially with reference to copyholders. The author is of opinion that this important statute was not not only founded on the Common Law, but was simply declaratory of it; he quotes in support of it Lord Coke:—"I affirm that the Statutes of Magna Charta, and of Merton, * * * are the very body and as it were the very text of the common law of England." (8 Co. p. 25.) Two chapters are devoted to other minor matters of inclosure, and a very important chapter on the rights of the public over waste land closes the book, the author coming to the conclusion that the public has acquired by usage no such right of recreation and exercise over the open wastes near London and in other populous neighbourhoods, as of itself would prevent either inclosures by agreement, between the Lord of a Manor and a body of Commoners, or by the Lord alone where there is more than sufficient waste land to satisfy existing rights of common; and that the only mode in which the public can acquire such rights is by means of an express dedication. While not always adopting the conclusions arrived at by the author, we can most confidently recommend this treatise as containing in a small compass a very valuable stock of information on a subject of importance.

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

THE great interest of the subject treated of in the present volume, and the extensive research which this work displays, render it deserving of a fuller notice than we can at present bestow on it. Mr. Cox has availed himself of all the sources of information respecting our early constitutional history which are now open, and has put together the materials which he has laboriously collected, in a clear and satisfactory manner. After some preliminary chapters on the social and legal status of the various agricultural classes in the middle ages, and the constitution of the antient County Courts, he proceeds to discuss the origin of Parliaments, the county suffrage after the fourteenth century, the procedure at elections, the representation of boroughs, and the borough electors.

The author says in his preface,—"The subject has been regarded in its historical aspects, apart from all reference to existing controversies. The social and political condition of the country at the period now under examination differed materially from that which at present prevails, and, therefore extreme caution is necessary in deducing from the antient history of Parliament lessons of modern application. At the first institution of the House of Commons land was cultivated principally by peasant proprietors; Members of Parliament were paid wages; their functions were principally fiscal; the parliamentary franchise was a burden rather than a privilege; the

polling of voters and a property qualification for the suffrage were unknown, and the relations of the administrative Government to Parliament were utterly different from those established under the Hanoverian dynasty. These considerations are sufficient to show that a constitution which worked well in the fourteenth century would not necessarily be beneficial in the nineteenth." (Preface, p. ix.)

A Treatise on the Hindoo Law of Inheritance; comprising the Doctrines of the various Schools, with the Decisions of the High Courts of the several Presidencies of India, and the Judgments of the Privy Council on Appeal. By Standish Grove Grady, Barrister-at-Law, Recorder of Gravesend, &c. London, Wildy and Sons, 1868.

A TREATISE on a law which is binding upon millions of his fellow-subjects, must necessarily be interesting to the English lawyers. With all the guarantees that competitive examination, and fair selection according to merit may give us, it is impossible that the gentlemen who are sent to India to administer the law of the country, should know, as the result of their previous education, much of the duties which they undertake. A young barrister who has completed his education, and who may select India as the sphere of his professional operations, will find it necessary to commence a fresh course of study before he can feel any confidence in himself. Since the publication of the treatises of Sir Francis Macnaghten, Mr. W. H. Macnaghten, and Sir Thomas Strange, the law of India has undergone such great changes, that a new book upon it has become necessary. Mr. Grady has devoted years to the laborious work of making a complete compilation of the Hindoo law, and has now issued, as the first instalment of his great undertaking, a most able and learned book on the Hindoo law of inheritance. It is impossible for us, in a short notice, to do justice to all the labour and skill that have been devoted to the bringing out of this valuable addition to the Indian law library. We intend, therefore, in our next number, to devote more space to a careful examination of this treatise. In the meantime we direct attention to it as a work of great merit and industry.

The Law of Fire Insurance. By Charles John Bunyon, M.A., of the Inner Temple, Barrister-at-Law, Author of "The Law of Life Assurance," &c. London. 1867.

THIS work is marked by the same thorough knowledge of the subject to which it is devoted, and the same accuracy and completeness in the treatment of it as the author's former publication on life assurance. Mr. Bunyon's "Law of Life Assurance" is now a standard work in the profession, and we confidently anticipate a similar position for his "Law of Fire Insurance."

The object of the author is to present to the reader "a view of the law of life insurance as it now exists, and as applied to the practice of insurance offices." Of the utility of such a work there can be no doubt in the mind of any one who has had practical experience in cases connected with this subject. The difficulty of ascertaining the law is often considerable, and much care is requisite in arriving at a sound view. Mr. Bunyon has stated very truly the manner in which the law of fire insurance is to be discovered. "In the consideration of our present subject," he says, "it will be always important to remember that fire insurance is the offspring of marine insurance, and that the same general principles govern both branches of the law. The reported decisions are far less numerous in the former than in the latter and elder branch, and except so far as any particular case may be determined by the express contract of the parties, or any circumstance necessarily foreign to the latter system, the solution of any question that may arise upon an insurance against fire will generally be found by a careful application to it of the doctrines of marine insurance. To master these should be the first object of the student, and noting the points of difference in the two contracts, and the express decisions of the courts upon our subject, he will deduce from them the law of fire insurance also." (p. 4.)

This is the manner in which Mr. Bunyon has proceeded in preparing his present work. He has thrown all the light on the different parts of his subject which can be derived from the sources thus indicated. Every branch of the inquiry has been explicitly treated, and no pains have been spared in dealing with all the questions which are likely to arise on this matter. The author complains justly of the unsatisfactory nature of the labours of a text writer, whose work, in the course of a few years, is rendered almost valueless by new decisions and new enactments. But whilst our law continues what it is, the profession owes a debt of gratitude to men like Mr. Bunyon, who bring correct legal knowledge, sound judgment, and laborious research to the elucidation of such important subjects as life assurance and fire insurance.

The Law Journal. London, 5, Quality Court. 1868.

A NEW series of this useful periodical appeared with the new year. It contains, as before, a great deal of current legal information interesting to the profession, together with notes of cases tried in all the courts. In form and character the journal is greatly improved by the change.

Mr. Dana's Edition of Wheaton's International Law.

To the Editor of the Law Review.

Sir.—My attention has been drawn by its author to my review of this work, to the effect that I have stated that "either by accident or design he does not refer to the stone blockade of Charleston harbour, whereas he has treated on the whole subject." In justice to Mr. Dana I must admit that he has done so, and I here offer him all the reparation in my power. To review a volume of more than 700 pages elaborately was more than I was able to do under the circumstances in which I was placed. The supposed omission of the stone blocked, was caused by my not finding it included under the head of Blockade, Mr. Dana having thought it came rather under the head of Rights of War. Mr. Dana also complains of my having attributed to him the inconsistency of describing the recognition of the belligerency of the seceding states as "unprecedented and precipitate," in the earlier part of his work, whereas in a subsequent page he describes it as "unwarranted," as if he had abandoned the former epithets. He says, that in so doing "he did not describe or assert his own opinion, either in his own words or by adopting those of another." They were, in fact, the words of Mr. Adams. I think I may be justified in concluding that, when the language of the American Minister was quoted by Mr. Dana, without comment, that if he did not adopt it he, at least, concurred in it. In justice to Mr. Dana I must admit that at page 35 of his work he gives, on the part of Great Britain, a very fair summary of the points involved in the pending controversy.

The Reviewer of Mr. Dana's "Elements of International Law."

Events of the Quarter, &c.

DIGEST OF LAW.

THE following has been distributed among the Inns of Court by order of the Commissioners on the Digest:—

"Digest of Law Commission,
"2, Stone Buildings, Lincoln's Inn,
"22nd November, 1867.

"Sir,—I am directed by Her Majesty's Commissioners for inquiring respecting a Digest of Law to state to you, for the information of the Benchers of [Lincoln's Inn, Inner Temple, Middle Temple, Gray's Inn], that the Commissioners in their first report to the Queen gave it as their opinion that a digest of law is expedient, and recommended that a portion of the digest, sufficient in extent to be a fair specimen of the whole, should be in the first instance prepared, which specimen, they submitted, might be conveniently executed under their superintendence.

"The Commissioners now propose, with the authority of Her Majesty's Government, to proceed with the preparation of specimen digests, such as they have recommended, of certain portions of the law.

"The subjects they have selected for this purpose are the following:—

"(1.) Bills of exchange, including promissory notes, bank notes, and cheques;

"(2.) Mortgage, including lien;

"(3.) Rights of way, water, and light, and other easements and servitudes.

"The Commissioners are desirous to obtain for this undertaking the co-operation of the Bar, and they accordingly propose to entrust the preparation of a specimen digest of the law under each of these heads to a gentleman of the Bar, to be selected by them, with liberty to him to associate with himself another member of the Bar, to be nominated by him and approved of by the Commissioners.

"The gentlemen selected will be required to execute the several specimens in conformity with the views expressed in the Commissioners' first report, and their work will be subject to the general superintendence of the Commissioners.

"The specimens, when completed and approved of by the Commissioners, will be reported to Her Majesty, with the names of the gentlemen by whom they have been executed.

"With regard to remuneration, the Commissioners do not consider themselves to be as yet in a position to determine on the amount, and they think that, on the whole, the most acceptable course to the profession will be, that the sum to be paid for the preparation of each specimen should be fixed, after its execution, by a committee of three of the Commissioners, for which purpose the Commissioners propose to nominate their chairman (Lord Cranworth), Sir James Wilde, and Mr. Reilly.

"The Commissioners, then, with a view to their guidance in the selection of gentlemen for this purpose, suggest that any member of the Bar willing to undertake the preparation of one of the specimen digests, should, on or before the last day of Hilary Term next, send in to the Commissioners (under cover to me) a statement of such his willingness, accompanied with

"(1.) A general summary, in an analytical form, of the whole matter of the law comprised under the head chosen by him;

"(2.) A small subdivision of the same worked out in detail, as an example of the mode in which he would propose to fill up the outline furnished by his analytical summary;

"(3.) Any general observations he may think relevant, respecting the execution either of the portion of the digest that will embrace the particular subject chosen by him, or of the digest generally.

"The Commissioners would not object to more than one gentleman combining in executing one of the specimens, and accordingly joining in preparing and sending in the papers indicated.

"I am directed to send herewith the accompanying twenty copies of a volume containing the first report of the Commissioners, and other papers; and I am to beg that the Benchers of [Lincoln's Inn, Inner Temple, Middle Temple, Gray's Inn] will be pleased to bring the same, with this letter, under the notice of the members of the Bar who belong to that Society.

"I have the honour to be,
"Sir,
"Your very obedient Servant,
"GODFREY LUSHINGTON, Secretary.

"The Treasurer of the Honourable Society of
"[Lincoln's Inn, Inner Temple, Middle Temple, Gray's Inn."]

THE LAW OF ARREST FOR TREASON FELONY.

The following correspondence took place between Mr. Digby Seymour, one of the Counsel for the defence of the prisoners concerned in the late Fenian outrage at Manchester, and Mr. Justice Blackburn, on the legal points involved in the capture of the prisoners. Mr. Seymour, in forwarding the statements to the editor of the *Times*, writes as follows:—

Sir,—I beg to enclose a copy of the statement submitted by myself and my learned friends for the consideration of Mr. Justice Blackburn and Mr. Justice Mellor, with the reply of Mr. Justice Blackburn, which I have his permission to publish.

I will not pause at present to examine the grounds of their Lordships' decision, but, with the sincerest respect for their high authority, I must say that the consideration thereof, and a calm perusal of the reasons alleged in its support, have not changed my matured and deliberate conviction that the opinion of myself and my learned friends is law.

Were this not so, it must occur to every lawyer, and, indeed, to every citizen uninfluenced by prior opinions, or, it may be, prejudices, that in a question of such solemn gravity—one of life and death, involving the fate of four human beings—an argument on the points suggested would have been more in accordance with the precedent and more consistent with the protective vigilance and impartiality which have always characterized the administration of criminal law in England.

I am, Sir, your obedient Servant,

Temple, Nov. 20, 1867. WILLIAM DIGBY SEYMOUR.

Statement submitted to Mr. Justice Blackburn and Mr. Justice Mellor.

"REGINA V. ALLEN AND OTHERS.

"Upon the trial of Allen and others for the murder of Serjeant Brett two points of law arose, under the following circumstances :—

"On the morning of the 11th of September last two men, who turned out afterwards to be Kelly and Deasy, were arrested by a Manchester policeman, as he alleged, under section 216 of the Manchester Police Act (7th and 8th of Victoria, cap. 40), which enacts that it shall be lawful for any constable belonging to the police force of the borough to take into custody, without a warrant, all loose, idle, or disorderly persons whom he may find disturbing the public peace, or in his own view committing an offence against this Act, or whom he shall have good cause to suspect of having committed, or being about to commit, any felony, misdemeanour, or breach of the peace, or to instigate or abet any such breach.

"The two men, who gave the names of White and Williams, were taken before a magistrate on the 11th, and remanded until the 18th by a warrant, which stated the charges against them to be, not for suspicion of felony, on which charge they were arrested, but for 'felony,' and omitted to specify what felony or other offence they were charged with. They were brought up again on the 18th, when no evidence whatever was given upon the charge on which they were alleged to have been arrested, but an inspector of detectives from London, who stated he had a warrant against Kelly for treasonable practices, alleged to have been committed in Ireland, and a constable from Ireland, who was stated to have a similar warrant against Deasy, appeared, and on their application, without the production of either of the warrants, which, in fact, were not then backed as the statute required, the prisoners were again remanded for a week.

"No warrant for such second remand was produced upon the trial, but it was stated that a warrant had been signed, a copy of that signed on the 11th inst., and had been destroyed by the police after the escape of the prisoners.

"Kelly and Deasy were then placed in the prison van, for the purpose of being taken to prison, and on the way the van was attacked, the prisoners rescued, and Brett killed.

"The two questions were—1st, whether or not Kelly and Deasy were in legal custody; and, 2nd, if they were not in legal custody, whether the crime of killing Brett, in the act of rescuing them, amounted to murder or manslaughter.

"As to the first point, it would seem (1st.) that the magistrate had no jurisdiction to commit for felony, no charge of felony having been made; and (2d.) that the magistrate had no jurisdiction to entertain the charge of treasonable practices committed in Ireland, or to remand the prisoners upon such a charge. By the 11th and 12th of Victoria, cap. 42, sec. 22, justices are empowered to take the examination of witnesses against persons who are brought before them charged with an offence alleged to have been committed in any county or place within England and Wales wherein they have not jurisdiction. By sec. 2 of the same Act they are empowered to issue their warrant to apprehend any one within their jurisdiction charged with having committed any crime or offence on the high seas, or in any creek, harbour, &c., or any 'crimes or offences committed on lands beyond the seas for which an indictment may legally be preferred in any place within England or Wales.' By sec. 11, where an English warrant is backed in England, the offender, when apprehended, may be taken before the justice who issues the warrant, or, if so directed by the justice backing the warrant, before such last-mentioned justice or any other justice of the same county or place; but by sec. 12, when an Irish warrant is backed in England, the offender must be taken before the justice who granted the warrant, and there is no power to take him before the magistrate who has backed it. It would seem, therefore, that in this case the proper course would have been, in the case of Deasy at least, for the magistrate to have backed the Irish warrant, and for the prisoner to have been taken, under the authority of the warrant so backed, to Ireland, and that the magistrate had no jurisdiction to examine any witnesses against Deasy, or to remand him upon the charge of felony.

"Thirdly.—It is laid down in Coke's Second Institute, p. 591, when speaking of prison-breaking, that a *mittimus* must 'contain the cause, but not so certainly as an indictment ought, and yet with such convenient certainty as it may appear, judicially that the offence (prison-breaking) *tale judicium requirit* as *pro altâ proditione, viz., in personam domini regis*, &c., or *pro feloniâ, viz., pro morte talis*, &c.,' and he lays it down that a *mittimus pro feloniâ* generally is bad. So again, Hale (P.C., vol. 2, p. 122) says that a *mittimus* 'must contain the certainty of the cause, and therefore if it be for felony, it ought not to be generally *pro feloniâ*, but it must contain

the special nature of the felony briefly, as for felony for the death of J. S., or for burglary in breaking the house of J. S., &c., and the reason is because it may appear to the judges of the King's Bench upon an *habeas corpus* whether it be felony or not. Hale, however, adds that he does not think the absence of such particularity would make the warrant void. It is worthy of notice that in the forms of remand given by Chitty in his *Criminal Law*, vol. 4, pp. 33, 116, and in the form given in the 11th and 12th of Victoria, cap. 42 (Q. 1) the felony is specifically described.

"The second point which appears to be of the greater importance, looking at the actual direction to the jury, and to the fact that they were not asked to find the existence, contents, or form of the warrant, whether, assuming the detention of one or both of the prisoners to have been illegal, the killing of Brett amounted to murder.

"The first case on the subject is that of Sir H. Ferrers (*Cro. Car.*, 371), who was arrested for debt, and thereupon Nightingale, his servant, in seeking to rescue him, as was pretended, killed the bailiff, 'but because the warrant to arrest him was by the name of Henry Ferrers, Knight, and he never was a knight, it was held by all the court that it was at variance in an essential part of the name, and they had no authority by that warrant to arrest Sir Henry Ferrers, Baronet, so it is an ill warrant, and the killing of an officer in executing that warrant cannot be murder.' This case is also reported by Sir W. Jones (p. 346), where it is said to have been held not to be murder either in the servant or in the prisoner, because the warrant was not good.

"The next case is that of Hopkin Hugget,' which was tried in 1666, and is best reported in J. Kelyng (p. 59). In that case Hugget and three others pursued three constables who had impressed a man, and demanded to see their warrant. The constables showed a paper, which the prisoners said was no warrant, and thereupon they drew their swords and Hugget killed one of the constables. Of the twelve judges eight delivered their opinion that this was no murder but only manslaughter, and they said that if a man be unduly arrested or restrained of his liberty by three men, although he be quiet himself, and do not endeavour any rescue, yet this is a provocation to all other men of England, not only his friends, but strangers also, for common humanity's sake, as my Lord Bridgman said, to endeavour his rescue ; and if in such endeavour of rescue they kill any one, that is no murder, but only manslaughter. The four other Judges held it murder, and thought the case in question to be much the stronger because the party himself who was impressed was quiet and made no resistance, and they who meddled were no friends of his, or acquaintances, but mere strangers, and did not so much as desire them which had him in custody to let him go. Although all the judges of the King's Bench thought it murder, they conformed to the opinion of the other eight, and gave judgment of imprisonment for 11 months.

"In 'Reg. v. Mawgridge,' which was tried in 1707 (*J. Kelyng*,

136) the Chief Justice alludes to Hugget's case as having settled the law upon the point.

"In Tooley's case (2 *Lord Raymond*, 1296), which was tried in 1710, Ann Dakin was in custody of one Bray, when the prisoners, who were strangers to Dakin, assaulted Bray, but withdrew. They afterwards assaulted Bray again, after the woman had been locked up, and killed one Dent, whom Bray had called to his assistance. One of the prisoners gave the stroke, the two others were aiding and abetting. Seven of the twelve judges held this to be manslaughter, and five held it to be murder, one of the five thinking that the constable had authority. Those judges who held the offence to be manslaughter only, so held on the opinion that the prisoners had sufficient provocation, for if, say they, one be imprisoned upon an unlawful authority, it is a sufficient provocation to all people out of compassion, much more where it is done under a colour of justice, and where the liberty of the subject is invaded it is a provocation to all the subjects of England."

"In 'R. v. Adey' (1 *Leach*, 206), which was tried in 1779, a somewhat similar point arose, and the presiding judge, on the authority of Tooley's case, reserved the point for the consideration of the twelve judges. The prisoner escaped in the riots of 1780, and no judgment was given, but Leach says that it was understood the judges held it to be manslaughter only.

"Again, in 'R. v. Osmer' (5 *East*, 304), argued in 1804, Lord Ellenborough, Chief Justice, says that 'if a man without authority attempt to arrest another illegally, it is a breach of the peace, and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose.'

"In 'Reg. v. Phelps' (*Car. and M.*, 180), tried in 1841, a policeman attempted to apprehend a man on suspicion of having stolen growing potatoes. He resisted, and some persons came to his aid and killed one Southwood, whom the policeman had called to his assistance. Upon proof of these facts Coltman J. directed the jury that, as the policeman had no right to apprehend the man, the offence of those who killed Southwood was manslaughter only, and not murder.

"These appear to be the cases bearing most closely on the subject, but turning to the authority of text writers and the *dicta* of Judges, we find Hawkins, in his *Pleas of the Crown* (book 1., chap. 31, sec. 60), stating the law as it was laid down in Hugget's and Tooley's cases, and adding that 'since in the event it appears that the persons slain were trespassers, covering their violence with a show of justice, he who kills them is indulged by the law, which in these cases judges by the event, which those who engage in such unlawful actions must abide at their peril.'

"Hale (P. C., vol. i., p. 465) also cites Hugget's case, and apparently with approval.

"On the other hand, Foster J., in his *Discourse upon Crown Law* (p. 312), while he appears to approve of the law as laid down in Hugget's case, combats the doctrine of the majority of the

judges in Tooley's case, and appears to doubt the propriety of that decision, partly upon general principles, and partly because the second assault on the constable seemed to him rather to have been grounded upon resentment or a principle of revenge for what had before passed than upon any hope or endeavour to assist the woman.

"It is these observations of Foster J. which Alderson B. appears to have had in his mind when he is reported to have said in 'R. v. Warner' (1 *Moo., cc.* 385), that Tooley's case had been overruled. Tooley's case in fact had no bearing upon Warner's case, in which no attempt was made to arrest the prisoners at all, and Alderson B. does not refer to any authority for his statement. A similar remark was made by Pollock C. B. in 'Reg. v. Davis' (*Leigh and Cave*, cc. 71), but there again no authority was given.

"East, in his *Pleas of the Crown*, vol. 1, p. 325, states the question with the arguments on either side, without showing much leaning either way, and so does Russell, (*Criminal Law*, vol. 1, p. 632), although his editor, Mr. Greaves, from his note (p. 848 of the 4th edition) appears to have been convinced by the arguments adduced by Foster.

"It would thus seem that the doctrine laid down by the majority of the judges in the cases of Ferrers, Hugget, and Tooley has been acted upon, not only in those cases, but also in 'R. v. Adey' and 'Reg. v. Phelps,' and recognized in 'R. v. Mawgridge' and 'R. v. Osmer,' and by Hawkins and Hale.

"The opposite doctrine is supported by the authority of a minority of the judges in Hugget and Tooley's cases, and by Foster J., and receives some sort of sanction from the observations of Alderson B., and Pollock C.B., if they can be considered to display a sufficiently accurate knowledge of the subject to entitle them to any weight. This view of the law, however, has never once been acted upon, and it follows that if the prisoners convicted at Manchester be executed without any discussion of the law, they will be put to death in opposition to the decided cases on the subject, upon the authority solely of extra-judicial arguments and dicta.

"In some of these arguments a distinction has been taken between the interference of a friend or a relative, and that of a mere stranger; but this distinction does not appear to rest on any authority. Hawkins, in his *Pleas of the Crown* (book 1., c. 31., ss. 56 and 57) says, that 'if a man's servant, or friend, or even a stranger, coming suddenly and seeing him fighting with another, side with him and kill the other, or seeing his sword broken send him another, wherewith he kills the other, he is guilty of manslaughter only. Yet in this very case, if the person killed were a bailiff or other officer or justice, resisted by the master, &c., in the due execution of his duty, such friend or servant, &c., are guilty of murder whether they knew that the persons slain were an officer or not.'

"For these and other reasons we are of opinion that the points raised in this case are of such a grave and serious character as to demand further discussion and consideration, and that they ought

to be decided after full and deliberate argument, before the Court of Criminal Appeal.

"W. Digby Seymour, Q.C.,
"Michael O'Brien, S.L.,
"Ernest Jones,
"James Cottingham,
"Lewis W. Cave."

Reply of Mr. Justice Blackburn.

November 20, 1867.

"Dear Mr. Seymour.—Mr. Justice Mellor and I have received and carefully perused the paper signed by you, my brother O'Brien, and Mr. Cave.

"It contains nothing that is new to us, but it puts all the authorities in the light most favourable for your clients, and I need not say that it is a great satisfaction to us to think that nothing has been overlooked which could bear on so grave a question.

"The Legislature have, by the 11th and 12th of Victoria, cap. 78, cast upon the presiding judges the very disagreeable and invidious duty of determining whether their own view of the law at the trial is or is not so questionable as to justify an appeal. If they refuse to reserve any point made it is still open to the prisoners to appeal to the equitable consideration of the Sovereign, but no appeal lies to any court of law.

"In the present case my brother Mellor and I considered the points raised before us on the trial, and entertained no doubt that the direction which we then gave to the jury was strictly according to law. We therefore reserved no question for the Court of Appeal at the time, but simply postponed our final determination on the subject until we had the means of referring to the authorities and considering the case more at leisure. We have now considered the authorities, and have consulted the other Judges, not with the view of dividing our responsibility, nor in order to obtain a judicial opinion from them which they could not give on a point not regularly before them, but because, in a case so serious, we were very anxious to have the best advice and assistance that we could obtain for our guidance. I need not say that if the result of such consultation and research had been to lead to the conclusion that there was doubt enough to justify a further appeal, it would have relieved us from a most painful responsibility. I regret to say that the result has been to satisfy us that the law is too clear to justify us in reserving any point for the consideration of the Court of Criminal Appeal.

"Entertaining that opinion, we have officially informed the Secretary of State for the Home Department that there will be no further appeal to a court of law, and that it is now for Her Majesty's Government alone to determine what shall be done with the convicts.

"This decision of ours is final; but, as a satisfaction to you and the other counsel for the prisoners, I will briefly state the reasons which have induced us to think the law too clear for argument.

"When a constable, or other person properly authorized, acts in the execution of his duty, the law casts a peculiar protection round him, and consequently, if he is killed in the execution of his duty, it is, in general, murder, even though there be such circumstances of hot blood and want of premeditation as would in an ordinary case reduce the crime to manslaughter. But when the warrant under which the officer is acting is not sufficient to justify him in arresting or detaining prisoners, or there is no warrant at all, he is not entitled to this peculiar protection, and consequently the crime may be reduced to manslaughter when the offence is committed on the sudden, and is attended by circumstances affording reasonable provocation.

"The cases which you have cited are authorities that where the affray is sudden and not premeditated, when, as Lord Holt says in '*R.* v. *Tooley*' (2 *Ld. Raymond* 1,300), 'it is acting without any precedent malice or apparent design of doing hurt,' the mere fact that the arrest was not warranted may be sufficient provocation.

"But in every one of those cases the affray was sudden and unpremeditated.

"In the present case the form of warrant adopted may be open to objection, and probably might on application to the Court for a writ of *habeas* have entitled the prisoners to be discharged from custody, but we entirely agree with the opinion of Lord Hale (2, *Pleas of the Crown*) that though defective in form the gaoler or officer is bound to obey a warrant in this general form, and consequently is protected by it. This is a point which, had the affray been sudden and unpremeditated, we probably should have thought it right to reserve.

"In the present case, however, it was clearly proved that there was on the part of the convicts a deliberate, pre-arranged conspiracy to attack the police with firearms, and shoot them if necessary, for the purpose of rescuing the two prisoners in their custody, and that they were well aware that the police were acting in obedience to the commands of a justice of the peace, who had full power to remand the prisoners to gaol if he made a proper warrant for the purpose. It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could possibly justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.

"To cast any doubt on this subject would, we think, be productive of the most serious mischief, by discouraging the police in the performance of their duties, and by encouraging the lawless in a disregard of the authority of the law.

"We feel bound under these circumstances to decline to take a course which might lead to a belief that we considered the matter as open to doubt.

"COLIN BLACKBURN."

The *Times* has been favoured "by a very eminent legal authority" with the following remarks upon the Law of Arrest. The "eminent authority" is Sir Vaughan Williams :—

1. Recent acts of violence to constables engaged in the arrest of persons charged with treason-felony seem so likely to be repeated for want of a clear understanding of the law, that a plain statement of the conditions under which an accused or suspected person can lawfully be taken into custody and detained for trial may be useful both as a warning and as a guide.

2. It was argued or assumed upon a late occasion that the want or invalidity of a warrant might justify the prisoner in resistance, or at least reduce the offence of killing the constable, if committed by the prisoner himself in order to effect his escape, to manslaughter ; nay, might even entitle him to be discharged upon *habeas corpus*. Each of these positions is, however, untenable, and the former one is calculated to betray hot-headed men, ignorant of the law, into crime, for which they must answer with their lives.

3. In a case of mere misdemeanor, indeed, except when a statute enacts otherwise, a private individual is not justified in arresting without a warrant, and even an officer is not justified in so arresting unless the misdemeanor is committed in his presence.

4. For felony, however, the law gives extensive, and for treason still more extensive, power of arrest, without warrant, both to private individuals and to constables. A private individual may justify an arrest for felony without warrant if he can show either that a felony was in fact committed by the party arrested, or that a felony was committed by some one, and that he had probable cause from his own observation, or the credible information of another, to suspect the person arrested of being the felon. If these facts can be established, the arrest, in order to bring the accused or suspected person before a magistrate, and his detention until the question of his guilt or innocence is decided, are lawful, even though in the event he should be found not guilty (*West* v. *Baxendale*, 9 C. B. Rep. 141; *Ex parte Knaus*, 1 B. & C. 258).

5. And as a constable must constantly act upon the charge and information of others in arresting criminals who might escape altogether unless promptly captured, so he has a larger authority and protection than a private individual, and is justified in arresting, and, indeed, bound, under pain of indictment, to arrest any person whom he has probable cause to suspect, even from the information of another, of having committed a felony. The constable is protected in the discharge of his duty, even though in the end the person arrested is found not guilty, and even if it turn out that no felony was, in fact, committed by anybody (*Beckwith* v. *Philby*, 6 B. & C. 635).

6. It has been assumed that there was no common law power of arrest in one part of the kingdom for an offence committed and to be tried in another, and that the Acts of Parliament for backing warrants (allowing Irish officers to act in England, and *vice versa*,) which

are but cumulative—44 Geo. III. c. 92; 45 Geo. III. cc. 92, 55; 54 Geo. III. c. 186; 11 & 12 Vict. c. 42; and 14 & 15 Vict. c. 93, ss. 27, 29—alone can be resorted to for such authority. One consequence of this assumption would be, that if a murder were committed in Liverpool by a person who escaped into Ireland, followed by the hue and cry of the press, or preceded by a telegram, no Irish officer could lawfully arrest him until a formal warrant, properly indorsed according to the statute, arrived in Ireland, and happened to be at hand in the place when the accused happened to be detected and might be on the point of embarking. That he would be arrested is certain. Would he, then, be justified in killing the officer? Might his friends lawfully storm the gaol? The law is not so absurd. The constable would assuredly be justified in arresting the accused, and detaining him (or having him remanded by a magistrate—1 Chitty's Criminal Law, 35-46) until a warrant, either under the statutes or of the Lord Lieutenant, or Secretary of State, as conservator of the peace, was obtained. The assumption to the contrary is without authority as applied to felonies, and inapplicable to arrest for treason or treason-felony, common to different parts of the kingdom. First, it is erroneous as applied to felonies, for even before the Union, and before any Act for backing English warrants in Ireland, or Irish warrants in England, and after the Habeas Corpus Act (31 Car. II. c. 2) (which, indeed, in the branch as to extradition includes only "inhabitants or resiants" in England, and as to them allows extradition for capital offences), fugitives from justice, charged with crimes committed in Ireland, might be and were arrested here and sent for trial there (Viner's Abridgment, Ireland, D. 8; Chitty's Criminal Law, 2nd edit., 46). Thus Lundy, Governor of Derry, who was charged with attempting to betray that city to James II., an offence capital by martial law, having escaped into Scotland, was taken there and sent to the Tower; and the judges, one of whom was Holt, advised the Crown that there was power by law to send the prisoner to Ireland to be tried by court-martial (2 Ventris, 314). In like manner, Kimberley, who was charged with abduction in Ireland, escaping to England, was there taken, and upon suing out a *habeas corpus*, was remanded and sent to Ireland for trial (*Reg.* v. *Kimberley*, 2 Str. 848). And in *Sedley and Aborvin* (3 Esp. 173), Lord Eldon held that the Secretary for Ireland had acted lawfully in sending over to England for trial a person who was suspected of having made away with part of the estate of an English bankrupt, in collusion with him. As to Scotland, Lord Sanchar, or Sanquire, in James I.'s time, having procured one Carlish to murder, in London, Turner, a fencing-master, who had accidentally put out the said Lord's eye, Carlish was, upon proclamation and reward offered by the King, taken in Scotland and sent to England for trial, and he and his noble employer were convicted and executed. (*Lord Sanchar's case*, 9 Rep. 120; 2 State Trials, 743.) In '*Mure* v. *Kaye*,' 4 Taunt. 34, a forgery was committed in England, and Mure, who turned out not to be the forger, was arrested in Scotland by a private individual upon suspicion, and

brought an action for false imprisonment, to which it was pleaded that a person unknown committed the forgery in England, and that Mure was arrested upon suspicion, the grounds of which were not stated. Upon this latter omission—for not stating the grounds of suspicion—the defence failed. It was, however, incidentally discussed whether the plea ought not to have stated that the law of Scotland, which does not use the word "felony," like that of England, allowed of an arrest upon suspicion without warrant. Those judges who expressed an opinion upon the point, thought the law of Scotland must be taken to authorize such an arrest. That sort of question, however, could not arise between England and Ireland, the common law of which is identical. One more case may be referred to, of a detention in the kingdom without warrant for an offence committed thereout. It is that of *ex parte Knaus*, 1 B. & C. 258, when it appeared, upon the return to a *habeas corpus*, that the prisoner was in the Downs on board of a man-of-war, the captain of which detained him upon the request of the lieutenant in command of a revenue cutter, who had reported that he took the prisoner on board a smuggler, after an engagement upon the high seas, in which one of the crew of the revenue cutter was killed, and that the detention was with a view to take the prisoner before a magistrate. The Court of King's Bench held the custody to be lawful, and committed the prisoner to the Marshalsea, in order that he might be taken at the first convenient opportunity before some competent authority and dealt with according to law, with a view to his trial. The assumption that arrest for felony committed out of that part of the kingdom where the arrest takes place depends upon statute, and that there can be no lawful arrest, unless by some one who holds a backed warrant, is, therefore, erroneous.

8. In cases of treason, moreover, the power of arrest without warrant is free from any question of locality, because treason, wheresoever committed, may be tried either when committed or (by statute 35 Hen. VIII. c. 2) in England. And every subject of the Crown is justified in arresting and detaining for trial, without warrant, a person against whom there is a probable charge of treason, wheresoever committed. That was the ground of the remand in the case of the Canadian prisoners, who, having been indicted in Canada, compounded with the Government for transportation without being brought to trial, and were sent to Liverpool gaol in the course of being transported. They sued out a *habeas corpus*, and it was insisted upon their behalf that the proceedings were illegal; that the warrant for their transportation was void, and that they were therefore entitled to be discharged. The Court of Exchequer, however, held that, assuming the proceedings to be informal and even void, yet, as the prisoners, though not tried and convicted, were persons charged with treason upon probable suspicion, any subject who held them in custody would be guilty of a crime in aiding and assisting their escape if they were permitted to go at large without lawful authority, and that if the transportation could not lawfully take place it was to be presumed that the Government, upon being so certified,

would take proper measures for prosecuting them in England. No distinction can be drawn in this respect between treason and treason-felony in any form which the latter offence has yet assumed. The Treason-Felony Act (11 & 12 Vict. c. 12), which includes treasonable plots, whether "within the United Kingdom or without," and though it had in view the removal of doubts as to the scope of the law of high treason, was passed mainly in order to relieve the Crown from the necessity of proceeding against the meaner sort of conspirators in the cumbersome style of State trials: in short, to waive the technicalities of a trial for high treason upon waiving the capital character of the offence. Still, until trial, the charge—at least where armed force is to be resorted to—is treason, if the Crown chooses to treat it as such. If any case can be suggested of felony within the statute—by merely verbal sedition, for instance—not amounting to treason, the Fenian conspiracy to dethrone the Queen and make Ireland a republic by armed force is not such a case.

9. Therefore, in the case which has lately attracted so much attention, the Police-serjeant Brett, knowing that there was a warrant out, though not backed, against Kelly and Deasy for treason-felony, or even knowing simply that they were credibly charged with treason-felony as Fenian conspirators, was justified in detaining, and bound at his peril to detain them without warrant; and if they had applied for their discharge by *habeas corpus* they would, upon that ground, without regard to the question whether the justice's warrant was good or bad, have been, not set free, but remanded, and at the instance of the Government either sent for trial in England for treason under the stat. 35 Hen. VIII. c. 2, as was Colepepper for treason in Carolina in the time of Charles II. (1 Ventris, 349), and Platt for treason in Georgia, in 1777 (1 Leach, 1577) or tried in England under the Treason-Felony Act, or sent to Ireland to be tried for an offence against the same Act, the jurisdiction in the case of such a conspiracy instigated in both parts of the kingdom being common.

10. In such a case and, indeed, in any case of detention upon probable cause of suspicion though there be no warrant, and even though the prisoner be, in fact, innocent, he is not justified in resisting. A known officer of the law, acting *bonâ fide* in arresting a person reasonably suspected of treason or felony, is only bound to satisfy himself of the probability of the charge, and dare not decide either way the question of guilt or innocence which are for the judge and jury. No more must the prisoner take the law into his hands and decide upon his own innocence by killing the officer. He must submit to the trial and judgment of the law, and if, in order to escape, he injures the officer, knowing him to be such, he is guilty of aggravated assault; and, if he kills him, he is guilty of murder (*Woolmer's case*, Moo. Cr. Cas. 334).

11. It may be useful here to refer to a case in which the legality of an arrest of a foreigner abroad for a felony committed in England came in question upon an indictment for murder, though it serves only for illustration. In *Sattler's case*, Dear & B. 525, Christian

Sattler, a foreigner, committed felony in England, and escaped to Hamburg, with which place there was no extradition treaty. He was pursued by a London officer, who, with the concurrence of the Hamburg police, arrested him there, and took him in custody on board a British steamer bound for England. While she was upon her voyage upon the high seas Sattler shot the officer, not merely to effect his escape, but out of malice and revenge. He was tried and convicted of murder, and, upon a case reserved, the judges affirmed the conviction, holding that there was jurisdiction to try the prisoner, though he was on board by compulsion, and that, assuming the arrest to have been illegal, as to which no opinion was given, the killing of the officer was murder. That case, of the arrest of a foreigner in a foreign country, though for a crime committed in England, has no direct bearing upon the present inquiry, except so far as it shows that, even in a case of false imprisonment, killing the officer of *malice prepense* is murder. The better opinion, however, seems to be that in that case the question of locality was one between the two Governments only, and that the custody of Sattler was lawful.

12. By thus presenting the law as to arrest without warrant in its broadest aspect it is not intended to suggest that the warrant actually in the hands of the officer Brett was in point of law insufficient to justify him, supposing that a warrant were necessary. It was not a warrant of commitment after hearing the evidence; it was a warrant of remand, which may be issued for reasonable cause in the discretion of the magistrate, such as is issued every day before the depositions are completed, and before the precise legal form of the charge is ascertained. The offence charged was one which might, and no doubt would, have turned out to be triable in either England or Ireland. If the proceeding were for trial in Ireland, it would be governed by the law already stated. If it were to terminate by a commitment for trial in England, the remand would be governed by Jervis's Act (11 & 12 Vict. c. 42 s. 21), which allows of remand for evidence or further evidence, and, therefore, under circumstances in which a precise description of the offence before commitment for trial could not help the prisoner, and, indeed, might mislead him, for he might be remanded for one form of felony and afterwards committed for another appearing upon the evidence when taken. This shows that the objection to the warrant that the remand was for "felony" only, without saying what felony, is at best but a formal one; and it is well settled that the ministerial officer of a court, as he has not the control of its proceedings, must not criticize its process, and is protected in the *bonâ fide* execution of that process, even though the proceedings be irregular, and may justify an arrest thereunder (Hale's Pleas of the Crown, 460). The irregularity is no fault of his, and where there is substantial cause of arrest, notwithstanding the irregularity, it is murder to kill the officer (Hale *ubi supra*).

13. Upon a similar ground, where the question is whether the officer has acted in accordance with his duty, he is not bound to

prove the proceedings which led to the warrant, but only the warrant. This is a familiar law in civil cases, and it was applied to a criminal case, *re* Davis, 1 L. & C. 64. That was an indictment for an assault upon the officer in the execution of his duty. The principle involved, however, was the same as if the charge were murder.

14. One test suggested of the validity of the arrest, supposing a warrant to be necessary, is to consider whether any court or judge would, upon *habeas corpus*, have discharged the prisoners. Upon this point the rule of law is, that a person in custody in this country upon a criminal charge, with a view to trial, is not, by reason of any irregularity in his arrest, entitled to discharge upon *habeas corpus* without trial. Such has always been the law as to felony, and it was so held as to a misdemeanor, *Scott's case*, 9 B. & C. 446, where the Court of Queen's Bench refused to discharge out of custody before trial a person indicted for a misdemeanor only, who had been arrested abroad, and brought over to this country to answer the indictment. That decision in the case of a mere misdemeanor, for which, in the absence of an extradition treaty, the arrest in a foreign country was all but unprecedented, illustrates in this respect the distinction between arrests in civil and criminal cases; and it confirms previous decisions that in a case of felony there could be no discharge from custody before trial upon the ground of mere informality in the warrant.

15. These considerations plainly establish that in the case referred to, assuming the officer to have had no warrant, or an informal warrant, the prisoners themselves, who suffered the immediate pinch and pressure of the imprisonment, if they had killed him would have been guilty of murder; much more their unhappy comrades who effected their liberation by an armed riot, in itself a distinct offence against the law.

16. The object of these remarks, however, was not to recall bygones, but, with a view to the future administration of criminal justice, and the safety of both officers and accused persons, to point out that a person charged with treason-felony, wheresoever found within the kingdom, may be taken and detained for trial upon probable cause of suspicion, without warrant; and that, if he resists to the death a known officer of the law, he will be guilty of murder.

THE BAR IN INDIA.

THE following communications from Dr. Maine and from Mr. Justice Markby, of Calcutta, on the abbreviation of the period of term for admission to the Bar, have been made to Lord Westbury and Sir Edward Ryan:—

"1, Theatre Road, Calcutta, 25th Sept., 1867.

"My Lord,—Relying upon the interest which I know your Lordship takes in the administration of justice, as well as in the welfare of the Bar, and in legal education, I venture to address you on a subject which nearly concerns each of these matters.

"It has hitherto been the practice (as you are probably aware) to admit as Advocates in the High Court at Calcutta only those gentlemen who have been already called to the Bar in England or Ireland, and an English or Irish call to the Bar, accompanied by satisfactory testimonials as to character, has always been considered a sufficient qualification.

"Several gentlemen have, however, of late presented themselves upon an English call to the Bar, granted, not upon the usual terms required for barristers practising in England, but upon special terms, accompanied with a stipulation that the barrister obtaining the dispensation shall not practise in England.

"In some cases two, in others four, and in one case, it is said, six terms of residence had been dispensed with under these circumstances.

"The judges of the High Court are naturally very unwilling to refuse to admit as advocates any gentleman who has been at the trouble and expense of obtaining an English call to the Bar, and who has come out to this country relying upon its sufficiency; but at the same time they feel strongly the necessity of keeping up the character of their own Bar. Those Members of the Calcutta Bar also who have gone through the regular course, feel some, and I think not unreasonable, irritation that others should be admitted on easier conditions than themselves.

"The gentlemen who principally avail themselves of this relaxation, are members of the Indian Civil Service at home on furlough, and Indian natives of the country. The object of the former is generally to qualify themselves for appointments, and of the latter to practice. In some cases, also, Europeans who have been resident out here as attorneys, or in some other private capacity, go home and get called to the Bar under the same favourable terms; some with a view to appointments, and others to practice.

"Of course, with those whose sole object is to obtain appointments, and who do not attempt to practise, we have nothing to do, but as they frequently—indeed, I believe, generally—apply to be admitted as Advocates, we have to consider their qualifications as well.

"Now, in accepting the twelve terms nominal residence at an Inn of Court as a qualification, most of the judges here felt they were adopting a low standard, and many consider that it is too low. Indeed, I believe the only consideration which has induced the Court here, hitherto, to accept members of the English Bar, without further inquiry as to their qualification, is this: That, until lately, the class of men who have presented themselves for admission has consisted almost entirely of those who have adopted the profession as a means of livelihood, and are dependent entirely on their own exertions; self-reliant men, having neither fortune nor powerful interest. Such men are likely to be (as I believe those who come from the English Bar to practise in this country almost invariably are) industrious. With respect to these, therefore, a principle of natural selection operates, which enables us to dispense with any artificial one.

"But with respect to the classes I have mentioned above, and which, owing to the increased facilities of communication with Europe, are rapidly growing in number, it is different.

"These, whether natives, or European residents of this country, are not sifted by any such process. They frequently rely on their connections or influence to obtain appointments or business, and yet it is with respect to these very persons, that the standard of requirement has been lowered by the Inns of Court.

"It is undoubtedly true that, in one sense, we have the remedy in our own hands. We have the power to reject the English call to the Bar as a qualification, and to establish tests of our own for ascertaining the fitness of candidates for admission as Advocates; but, for my own part, I feel one very strong objection to this course, which is this:—It appears to me, the only test we could establish would be an examination. Now, looking to the fact that almost every English barrister who comes out here to practise is poor, that he has to expend a large sum, frequently to incur a heavy debt, in coming to India, that failure is little short of absolute ruin,—I fear no one would risk so much on passing an examination, the exact standard of which could not possibly be made known. Moreover, men come out here generally two or three years after they have been called, when they have done with examinations, and the habits necessary for preparation for them—they would at least have to spend some months, after their arrival in this country, before they ventured to offer themselves to be examined. And altogether, though I do not think it likely that any test would be proposed here, which would be a serious barrier to an industrious man, I think it would deter the class of men who come out now, from the English Bar, from trying their fortunes in this country.

"This would, I think, be a very great misfortune. Up to the present time the Calcutta Bar has been supplied almost entirely from the English Bar: by men bred in the same social school as English lawyers, and who bring out with them the same high standard of honourable dealing that prevails at home. I do not hesitate to say, that were these to be turned away by the introduction of any such rule as I have mentioned, our Bar would sadly deteriorate. At present it would bear comparison for independent, honourable, and gentlemanlike conduct with any similar body of men in the world; and this, I believe, is mainly owing to the traditional notions of honour and self-respect brought out from the English Bar, which here, as at home, so vastly contributes to enable the honest to hold the dishonest in check. Considering the very great temptations to dishonesty to which an Advocate is exposed in any country, and the extent to which those temptations are aggravated in India, I cannot doubt that, were the change which I speak of introduced, and its consequences should be such as I anticipate, though we still most certainly have many respectable men at the Bar, yet the power of these to check dishonest practices would be infinitely less than that of a body like the majority of the present Bar, who have at once a standard to appeal to, and also a strong bond of union, giving rise to a feeling of full

reliance on the support of each other in carrying out their principles.

"For these reasons I should feel great regret if the Inns of Court, by lowering their already low standard, should drive us to institute an examination for Advocates here, and it is my unwillingness to adopt this inevitable alternative which has induced me to lay this subject before your Lordship; and to ask you, if you concur in my views, to use your influence with the Inns of Court to induce them to discontinue the practice of calling barristers who intend to practise in India on terms different from those who intend to practise in England.

"It would be a far easier task and far more satisfactory to myself, to advocate these views if the qualification for an English call to the Bar were not, as regards legal attainments, merely nominal; I do so, however, because I feel sure that legal attainment, important as it is, is of greatly less importance than honest dealing. Honesty in the Advocate, next to honesty in the Judge, is, all over the world, but here most especially, the main security in the administration of justice. At the time I cannot help expressing how great a boon it would be to this country if, while the moral and social standard were not lowered, the intellectual standard of English legal education were raised to that of other European countries. This would not only solve the difficulty which I have been discussing, but it would be one step towards solving one of vastly greater importance, namely—how to find Judges to administer the law in India. Sooner or later it must be forced upon the attention of those who manage the affairs of this country that the proper persons to fill the highest judicial offices are not men who have been trained to other duties, who have never studied law, and who have had no judicial experience. Many a Zillah Judge enters his civil court for the first time in his life to preside over it; and though he tries men for their lives in his criminal court, it is frequently years since he has heard a criminal case, and then only of a petty character. This rough administration of justice might have done in former times, and may still do in some districts of India; but it will not do in those districts, the area of which is rapidly increasing, where suits are conducted by expert advocates—where suitors know and are encouraged fearlessly to assert their rights, and where the relations of men to each other are daily becoming vastly more complicated and more difficult of investigation.

"I again apologise for trespassing on your Lordship's time, and can only plead the importance of the interests at stake.—I remain, your Lordship's obedient servant,

The Rt. Hon Lord Westbury. "(Signed) WILLIAM MARKBY."

And this is the letter from Dr. MAINE to Sir EDWARD RYAN:—

"Oxford and Cambridge Club, Nov. 20, 1867.

"My dear Sir Edward,—With reference to our conversation the other day, I should like to assure you again that I have been made most sincerely anxious by the attitude assumed by the Indian High Courts, in consequence of certain recent calls to the English Bar. It

is understood that certain gentlemen have recently been called, after a shorter period of probation than usual, on the understanding that they will practise exclusively in India, there being, however, nothing to show that they are better qualified for Indian practice than other members of their profession. The High Courts—for themselves and for the Bar practising before them—conceive that they have a right to deprecate, and even to resent, these calls; and, without pretending to be absolutely certain, I believe the grounds of their dissatisfaction to be the following: —

"1. They think that the Indian branch of the profession is thus stamped with a mark of inferiority. You are yourself aware how high is the status of barristers in India, and that their pretensions go even beyond their conceded claims. But their claims turn entirely on their being members of the Bar, in precisely the same sense in which—and to precisely the same extent to which—this membership belongs to every gentleman practising in Lincoln's-Inn or Westminster-Hall.

"2. They say that the very ground on which they admit barristers —as, of course, to the privileges of Advocates before the High Courts —is rendered, to a considerable extent, untenable. The ground of this unconditional admission is not the peculiar fitness of the English barrister as such for Indian practice (for, indeed, owing to the wide departure of Indian law and procedure from English models, he has almost to go to school again), but the moral elevation he derives from his connexion with a great profession regulating its system of advocacy by definite rules and honourable traditions. This elevation—which is of incalculable value in such a country as India—they allege to be lost in proportion to the diminution of the time during which the student remains in England under the special influences of the Inns of Court.

"3. They assert that considerable practical injustice is occasionally caused by these premature calls. It has happened that a member of the Bar thus prematurely called, has come out to India at the same time with, or a little before, barristers who had completed the full period of probation, but who had not thought fit to apply for any allowance of time, or perhaps had only made up their minds to go to India at the moment of being called. The man called in the shorter period thus became senior at the Indian Bar; and I need scarcely remind you that at those Bars seniority is a serious matter, seeing that nobody has pre-audience, otherwise than by seniority, except the Advocate-General of the Queen.

"I am not, as you know, in any way connected with the High Courts, and I do not feel myself called upon to maintain the absolute impregnability of their reasoning, but I wish to urge on you the fact that they are discontented, and that they have the power of acting on their opinion. The admission, without conditions, of members of the English, Irish, and Scotch Bars to the status of Advocate, is only a matter of grace; the High Courts are entitled under their charters to impose what conditions they please. I am seriously afraid that, unless satisfied, they will exercise their powers, and will place on the

roll of Advocates only such persons as can pass some examination test, producing, perhaps, a certificate of good character.

"Now, the effect of this measure would not be to facilitate to any appreciable extent the admission of natives of India to the position of practitioners before the courts; if it had that effect there would be strong, though not, in my judgment, preponderant reasons, for adopting it. With rare exceptions, however, a native of India will always prefer being admitted, not as an Advocate, but as a vakeel or pleader, in which case he is permitted to practise in the District Courts and on the appellate side of the High Court. The very freedom from restraining rules which he thus enjoys makes it easier for him to enrich himself. The true result of the new system of the High Courts would be to bring in, wholesale, practitioners of English extraction from the various colonial, and especially from the Australian, Bars. I have myself received not a few letters from persons in this position, bitterly complaining of the alleged monopoly of the courts by practitioners coming direct from the mother country, and claiming to be admitted, at all events, after showing their fitness by examination.

"Now, I do not think I use too strong language, and I certainly do not use language stronger than my opinion, when I say that such admission of colonial practitioners would be an unmixed calamity for India. We have already had some illustration of the fruits of allowing Englishmen to practise who do not hold themselves subject to the strict rules of our profession; and I can only say that the combination of the chicane which a native permits himself with the energy and high-handedness of the European, produced results which appeared to me to be frightful. Happily, the admission of the class to which I refer, who got in by qualifying as vakeels, has been stopped by the High Courts.

"The natives of India have a genius for advocacy largely developed in them; but nothing is a greater snare to them than the apparent liberty enjoyed by the Advocate. Nothing is so effectual a check on the abuse of these immunities as the example of English barristers voluntarily submitting themselves to very strict rules of professional conduct. Not only have native practitioners a strong tendency to imitate and adopt the habits of a class conventionally higher than themselves, but they soon see that the self-restraint of the barrister is remunerative. The true reason why a native litigant prefers a barrister to conduct his case is, not that he thinks him a better advocate than a native vakeel, but that he is sure that no foul play will be practised.

"Perhaps the very last thing which a native learns to imitate is the candour displayed by the English barrister in arguing his cases; but even that he finds in time to pay better than attempts to keep back facts from the court.

"If the High Courts substitute an examination test for the present unconditional mode of admission, it may be safely asserted that no barristers, or next to none, will attach themselves to the Indian Bars. It is not easy to get young Englishmen, of twenty-three or

twenty-four, to submit to examination in London; it will be all but impossible in the tropics. The result will be the loss of important advantages by the English Bar. The number of barristers now practising in India is not extraordinarily large, but it is sure to increase materially. A High Court and a Chief Court have now been established in the interior of India, where the climate is better than in the Presidency towns, and before long barristers will find their way even into the district courts. More than this, I can see that, in the more settled provinces of India, we are drifting fast on the separation of the judicial from the administrative branches of the public service, and on the relaxation, so far as regards the former, of the monopoly now enjoyed, in most courts, by the covenanted civilians. The courts which will supersede the not very satisfactory tribunals which now administer justice, will pretty certainly be mixed courts of barristers and civilians, provided (but provided only that the barrister-advocate preserves his present prestige in India).

"While, however, I should deeply lament the adoption by the High Courts of the measure which they threaten, I am by no means blind to some considerations which make in favour of the system of calling persons intending to practise in India to the Bar on shorter probation. There are no students worthier or more interesting than the comparatively few natives of India who come to England for the purpose of becoming members of an Inn of Court. The fact of their doing so is a remarkable proof of personal energy and superiority to prejudice; and, as I before stated, they are likely rather to lose than to gain through the step in point of the emoluments of practice. Now, no doubt, the full time required for admission to the Bar is somewhat longer for gentlemen removed so far from their native country.

"I myself believed that the High Courts would be satisfied, while the interests of the persons just referred to would be consulted, if the Inns of Court, giving up the system of calling to the Bar on more lenient terms, when nothing is alleged except that the student means to practise in India, would make a certain allowance of time to students who show, by satisfying some definite test, that they are qualified for Indian practice. The position assumed by the High Courts is that, as the moral results of connexion with the English Bar are being more and more denied to them, they will at all events secure the advantage of definite proof that the gentlemen practising before them have mastered the elements of the Indian system of law. But the Indian judges would be more unreasonable than I take them to be if they were not satisfied when they obtained this proof from the Inns of Court, together, to some extent, with the moral influences on which they set so much store.

"My further connexion with the educational system of the Inns of Court is my only excuse for saying more than this, but I myself should certainly rejoice if the Inns of Court thought fit to go further than the mere establishment of an examination. Indeed, I cannot say that I have any very great belief in examinations which do not test the progress or completion of a pre-arranged course of study.

Just before I left England, five years ago, it was understood that the Inns thought of establishing a department of Hindoo and Mahomedan law. But nothing seems to have come of it, and, indeed, I can see that there would be great difficulty in making such a department fit in exactly with the present system of legal education. Moreover, the present law of Hindoos and Mahomedans no longer constitutes the part of Indian law which is most interesting to Englishmen at large. You, yourself, as an Indian Law Commissioner, can easily divine what are the portions and peculiarities of the Indian legal system which one would wish to see brought to the notice of the student, and, indeed, made part of his knowledge. The Government of India has made considerable progress in giving legislative sanction to codes which contain nothing more than English law very greatly simplified. As regards civil law alone, law and equity are already fused in our courts, and already the law of realty is almost entirely assimilated to the law of personalty. The experiment would hereby possess importance from a mere speculative point of view, but in fact it is one of the most practical character, since the simplified law at the present moment guides the decision of courts in which the interests which are the subject of litigation are at least as large as those litigated in English tribunals, even including the Court of Chancery.

"Simplified English law, actually applied in a country which is the most litigious in the world, and which, of all countries, is most rapidly advancing in wealth, is surely worthy of the observation of English lawyers.

"I shall be again in Calcutta about the beginning of February. If you can give me any assurance that the subject of these calls to the Bar is likely to be seriously considered by the Inns of Court, I dare say I can get the Calcutta judges to postpone any step they may meditate.

"I am, my dear Sir Edward, very sincerely yours,

"(Signed) H. S. MAINE.

"The Right Hon. Sir E. Ryan."

PREVENTION OF CRIME.

AT the Meeting of Magistrates for the county of Middlesex, in November last, Mr. Serjeant Payne laid before them the following resolutions on Penal Servitude and the Prevention of Crime:—

"1. That the great object of all classes of society should be the prevention of crime, and the consequent avoidance, as far as possible, of the necessity of punishment.

"2. That in the earlier periods of this kingdom, those who had committed offences were allowed to abjure and leave the realm, and were not to return without permission.

"3. That the difficulty which now exists in providing a penal settlement to which to transport criminals, renders it desirable that in cases not requiring capital or severe punishment, certain offenders, after repeated convictions, should be expelled the kingdom for such period as might be considered proper, without their being transported

to a penal settlement—by which means great expense would be saved to the country in their maintenance either in the colonies or county prisons; and such a proceeding would be justifiable, inasmuch as foreign nations transport their criminals to England and other countries.

"4. That in order to check and prevent the commission of crime, which from recent investigations appears to exist to an extent hitherto unheard of, the magistrates of the several petty sessional divisions should meet once a week, or oftener if occasion requires it, and that such meetings should be open to any person desirous of communicating information of any offence committed or about to be committed; such information to be received confidentially by the magistrates, and by them communicated at their discretion to the police authorities, and to be authenticated by the oath of the informant, not for publicity, but as a guarantee of good faith.

"5. That by this means it is to be hoped many cruel offences against the person which are now frequently and continuously committed by men against their wives and families, and by workmen against their masters and fellow workmen, might be prevented or detected; it being probable that many persons would be willing to communicate to the magistrates information which might even be the means of saving life when they would not be willing to go to a police station to be regarded as public accusers.

"6. That the laws against drunkenness should be more stringently enforced as a further mode of preventing crime, and every person in such a state of intoxication as might fairly lead to an apprehension that mischief would be the result, should be detained in custody by the police until such person became sober and was fit to be discharged with safety.

THE INCORPORATED LAW SOCIETY OF IRELAND.

This Society has resolved on presenting the following Address to the Queen:—

"*To the Queen's Most Excellent Majesty:—*

"The dutiful and loyal address of the attorneys and solicitors of Ireland.

"Most Gracious Sovereign!

"We, the attorneys and solicitors of Ireland, humbly approach Your Majesty, to tender to Your Majesty the warmest expression of our loyalty and attachment to Your Majesty's Throne and Person.

"In the exercise and performance of our professional duties and avocations we have had every opportunity of observing the moral and material condition of our country, and for some years past we had the satisfaction of knowing that, as compared with former years, there was an almost entire absence of agrarian and other kindred crimes, which had injuriously affected a growing prosperity, the natural result of industry and peace.

"We deeply regret to say that the growth of this prosperity has been of late years interrupted by the existence of an organized conspiracy called Fenianism.

"We are, however, happy to be able to state that this wild and insane conspiracy is not universal in this country; that there are many districts in which we believe it does not exist, and that it has no support or sympathy from the educated or the industrious of our fellow-countrymen. At the same time we believe there is no part of the country that is not at least indirectly suffering from its blighting influence.

"We therefore humbly beg to convey to Your Majesty the expression of our entire and earnest condemnation of the Fenian conspiracy, and to assure Your Majesty of our determination to support Your Majesty's Government by every means in our power as may be deemed most expedient for utterly exterminating the senseless, cruel, and baneful conspiracy.

"We humbly but fervently pray that Your Majesty may enjoy a long and prosperous reign, and have the happiness of seeing all Your Majesty's subjects in this country loyal, peaceable, and prosperous."

SIR MATTHEW R. SAUSSE.

Sir Matthew Richard Sausse, late Chief Justice of Bombay, died of gastric fever, on the 5th of November, at Killarney House, the seat of Lord Castlerosse. The deceased judge, who was born at Carrick-on-Suir in 1809, was a brother of Sir Richard de la Saussaye, a general in the Spanish service, and now governor of Carthagena. He was educated at Trinity College, Dublin, and was called to the bar in Ireland, in Trinity Term, 1829; he was nominated a Queen's Counsel there in 1849, and was formerly Crown Prosecutor on the Leinster circuit. From 1837 to 1840 he reported, in conjunction with Mr. V. Scully, in the Rolls Court, Ireland. For some years he acted as chairman of Quarter Sessions for the county of Wexford, and was appointed a Puisne Judge of the Supreme Court of Bombay in 1856, on which occasion he was knighted. In 1852 he was promoted to be Chief Justice, on the retirement of Sir William Yardley, and resigned that office last year, after having earned his retiring pension by serving the prescribed period of ten years in India.

BAR EXAMINATIONS.

Michaelmas Term, 1867.

At the General Examination of Students of the Inns of Court, held at Lincoln's-inn Hall, the Council of Legal Education awarded to:—Robert Bannatyne Finlay, Esq., Student of the Middle Temple, a studentship of fifty guineas per annum, to continue for a period of three years. Louis Adonijah Mendes, Esq., Student of the Middle Temple, an exhibition of twenty-five guineas per annum, to continue for a period of three years, William A. Hunter, Esq., Student of the Middle Temple, certifi-

cate of honour of the first class. Edward James Castle, Esq., Student of the Inner Temple; John William Cooper, Esq., Student of Lincoln's Inn; Gasper Gregory, Esq., Student of the Inner Temple; Alfred Fraser Lingham, Esq., Student of Lincoln's Inn; Jonathan Holmes Paulter, Esq., Student of the Middle Temple; Henry Edgar Prest, Esq., Student of the Inner Temple, Arthur Thomas Pyne, Esq., Student of the Inner Temple; John Rose, Esq., Student of Gray's Inn; James Samuelson, Esq., Student of the Middle Temple; Edward Wilkinson, Esq., Student of Lincoln's Inn; and Edward Daniel Joseph Wilson, Esq., Student of the Middle Temple, certificates that they have satisfactorily passed a Public Examination.

CALLS TO THE BAR.

Michaelmas Term, 1867.

INNER TEMPLE.—Cecil Allen Coward, Esq. (holder of an exhibition awarded to him in Trinity Term, 1867); Edward Holland Bennett, Esq. (certificate of honour, first class, awarded in Trinity Term, 1867); Horatio Hale Shephard, Esq., B.A. Oxford; Charles Edward Harris, Esq., Oxford; John Henry Seale, Esq.; Christopher Wilson Braithwaite, Esq.; Walter Devereux Whitty, Esq.; Henry Peto, Esq., B.A. Cambridge, and B.A. London; Jonathan Cremer Gilbanks, Esq., B.A. Cambridge; Marcus Bourne Huish, Esq., LL.B. Cambridge; Charles Hamilton Bromby, Oxford; Harry Chevallier Purkis, Esq.; Henry Charles Litchfield, Esq., LL.B. Cambridge; Henry Hicks Hocking, Esq., B.C.L. Oxford; Frank Richman Ayers, Esq.; Edward Hugo Rice Wiggin, Esq., B.A. Oxford; Charles Stuart Parker Darroch, Esq., B.A. Cambridge; and Charles Gilbert Heathcote, Esq., M.A. Cambridge.

MIDDLE TEMPLE.—Robert Bannatyne Finlay, Esq., M.D., University of Edinburgh, holder of the studentship, Michaelmas Term, 1867, exhibitioner in advanced equity, 1867, and in elementary equity and common law, 1866, awarded by the Council of Legal Education; Lewis Adonijah Mendes, Esq., B.A., LL.B. London, holder of the exhibition awarded by the Council of Legal Education, Michaelmas Term, 1867; William Alexander Hunter, Esq., M.A., University of Aberdeen, holder of Certificate of Honour, Michaelmas Term, 1867, exhibitioner in advanced Constitutional Law and Legal History, 1867, and in advanced Jurisprudence, Civil and International Law, 1866, awarded by the Council of Legal Education; Bernard James Cuddon, Esq., Richard Henn Collins, Esq., B.A. Cambridge; Douglas Kingsford, Esq., Cambridge, exhibitioner in Constitutional Law and History, 1867; Charles Clement Webster, Esq., Oxford; Alexander Gerard, Esq.; Risdon Darracott Bennett, Esq., B.A. Cambridge; Arthur William Grant, Esq., B.A. Oxford; Thomas Henry Leach, Esq.; Reginald Black Roach, Esq., Oxford;

Philip Newman, Esq., M.A. Oxford; Frederick Gladstone Bagshawe, Esq.; Jonathan Holmes Poulter, Esq., B.A. Dublin; Edward Daniel Joseph Wilson, Esq., M.A., LL.B.; Joseph Robinson, Esq.; Henry Gustave Pilot, Esq.; William Cockburn Sharland, Esq., Oxford; and George Frederic Blake, Esq.

LINCOLN'S-INN.—John Wesley Hales, Esq., M.A. Cambridge; Albert Harford Pearson, Esq., B.C.L. and M.A. Oxford; James Cholmeley Russell, Esq., B.A. Oxford; Robert Pitcairn, Esq., late of Oxford; Henry Gaselee, Esq., B.A. Cambridge; Samuel Benjamin Large Druce, Esq., M.A. Oxford; Reginald Hughes, Esq., B.A. Oxford; Francis Alfred Hanbury, Esq., M.A. Cambridge; John Ansell Gay, Esq., B.A. Oxford; Henry Stubbins, Esq.; Thomas Whitcombe Greene, Esq., B.C.L. Oxford; Robert Campbell, Esq., M.A. Cambridge; and Edward Grey, Esq.

GRAY'S-INN.—James Ward, Esq.; Henry Griffiths Seymour Cooper, Esq.; William Morris, Esq.; and Alfred Greatbach Govre, Esq.

Hilary Term, 1868.

MIDDLE TEMPLE.—Lindsey Middleton Aspland, Esq., M.A., LL.D. of the University of London, Fellow of University College, holder of a Certificate of Honour awarded by the Council of Legal Education, Michaelmas Term, 1865; Henry David Greene, Esq., B.A., LL.B. Cambridge; the Hon. Walter John Bethell, B.A. Oxford; Hubert Thomas Knox, Esq.; Robert Casswell, Esq., B.A. Cambridge; William Millwood, Esq., B.A. Oxford; Robert Frank Stone, Esq.; Nicholas Flood Davin, Esq.; and John Timbrell Pierce, Esq.

LINCOLN'S-INN.—The Hon. Charles Arthur Ellis, Oxford; Marcus Trevelyan Martin, Esq., LL.B. Cambridge; William Cole Pendarves, Esq., B.A. Oxford; Edward Denison, Esq., M.A. Oxford; Edward Wilkinson, Esq., B.A. Oxford; William Hilary Baliol De Molines, B.A. Oxford; Archibald John Mackey, Esq., B.A. Cambridge; James Marshall, Esq., M.A. Oxford; John Dixon, Esq., Sheffield; and Job Bradford, jun., Esq., LL.B. London.

GRAY'S-INN.—Croft Worgan Dew, Esq., M.A. Cambridge.

INNER TEMPLE.—Henry Kirk, Esq., M.A., B.C.L. Oxford; Arthur Thomas Pyne, Esq., M.A. Oxford; Richard Entwisle, Esq., B.A. Oxford; John Page Sowerby, Esq., LL.B. Cambridge; J. Fletcher Yearsley, Esq., B.A. Oxford; Paul F. Forster, Esq., B.A. Cambridge; E. C. Felix Poulin, Esq., B.A., Licentiate in Law, Paris; Archer A. Clive, Esq., M.A. Oxford; W. Berkeley Monk, Esq., B.A. Oxford: J. William Walker, Esq., LL.B. Cambridge; R. Henry Meyricke, Esq., B.A. Cambridge; Edward Vickers, Esq., B.A. Cambridge; Oswald J. Steele, Esq., B.A. Oxford; Beauchamp P. Selby, Esq., B.A. Cambridge; Henry E. Prest, Esq.; Gasper Gregory, Esq.; Herbert H. Swift, Esq., M.A. Cambridge; William Mills, Esq., B.A. Cambridge; Edwin H. Johnson, Esq.: and Walter Vere Vaughan Williams, Esq., Oxford.

EXAMINATION AT THE INCORPORATED LAW SOCIETY.

Michaelmas Term, 1867.

At the final examination of candidates for admission on the roll of attorneys and solicitors of the Superior Courts, the examiners recommended the following gentlemen, under the age of twenty-six, as being entitled to honorary distinction: Maurice Sinclair Mosely, Ralph Straughan, Francis Henry Kendall, John James Jones, John Stuart Corbett, James Ellison Tucker, George Lewis, Charles Henry Glascodine.

The Council of the Society have accordingly awarded the following prizes of books:—To Mr. Mosely, the prize of the Honourable Society of Clifford's Inn; to Mr. Straughan, the prize of the Honourable Society of Clement'-Inn; to Mr. Kendall, Mr. Jones, Mr. Corbett, Mr. Tucker, Mr. Lewis, and Mr. Glascodine, prizes of the Incorporated Law Society.

The examiners also certified that the following candidates, under the age of twenty-six, passed examinations which entitle them to commendation: Benjamin Dulley, Charles Edward Freeman, James Heygate, Thomas Crump Lindon, B.A., Henry Edwin May. The Council have accordingly awarded them certificates of merit.

The examiners also reported to the Council that there was no candidate from Liverpool in the year 1867 who was, in their opinion, entitled to honorary distinction. The Council have therefore withheld the gold medals founded by Mr. Timpron Martin and Mr. John Atkinson. The examiners also reported that there was no candidate from Birmingham in the same year who was, in their opinion, entitled to honorary distinction. The Council have accordingly communicated this report to the Liverpool and Birmingham Law Societies.

The number of candidates examined in this term was 93; of these 76 passed and 17 were postponed.

APPOINTMENTS.

Mr. Stephen Temple, Q.C., has been appointed Attorney-General for the County Palatine of Lancaster, in succession to the late Mr. Edward James, Q.C., M.P.

Mr. Thomas E. P. Lefroy, Barrister-at-Law, has been appointed Judge of County Courts, Circuit No. 55, in the place of Mr. Edward Everett, who has resigned.

Mr. Pickering, Q.C., has been appointed Assessor of the Liverpool Court of Passage in the room of the late Mr. Edward James, Q.C.

Mr. J. W. Patteson has been appointed Police Magistrate at Greenwich in the place of Mr. Trail, resigned.

Mr. Hugh Dunn, Solicitor, has been appointed Town Clerk of the newly-incorporated borough of Darlington.

Necrology.

October.

13th. TENNANT, William, Esq., Solicitor, aged 44.
22nd. EVANS, J. Cook, Esq., Barrister-at-Law, aged 60.
24th. CHARD, William, Esq., Solicitor, aged 75.
26th. DEVEREUX, William, Esq., Solicitor, aged 66.
26th. BANISTER, E. C., Esq., Solicitor.
29th. SAUNDERS, W. A. F., Esq., Barrister-at-Law.

November.

3rd. BREWIS, George, Esq., Solicitor, aged 53.
9th. THRESHER, F. R., Esq., Barrister-at-Law, aged 68.
10th. HEELIS, Thomas, Esq., Solicitor, aged 33.
11th. RUDGE, Edward, Esq., Barrister-at-Law, aged 32.
11th. CHARLES, Ebenezer, Esq., Barrister-at-Law, aged 32.
13th. LLOYD, Herbert, Esq., Solicitor, aged 61.
22nd. EVANS, J. Cook, Esq., Barrister-at-Law, aged 60.
23rd. PHELPS, W. R., Esq., Chief Justice of St. Helena.
27th. HALL, Joseph, Esq., Solicitor, aged 61,
28th. SLACK, E. Francis, Esq., Solicitor, aged 48.

December.

1st. ROUND, C. Gray, Esq., Barrister-at-Law, aged 72.
3rd. BODENHAM, Charles, Esq., Solicitor, aged 63.
6th. CLARKE, John, Esq., Solicitor, aged 54.
7th. ADCOCK, Stephen, Esq., Solicitor, aged 64.
10th. BRIDGES, Charles, Esq., Solicitor.
13th. MUDGE, Zachary, Esq., Barrister-at-Law, aged 54.
13th. MOURILYAN, J. N., Esq., Solicitor, aged 56.
14th. WHITE, G. Towry, Esq., Barrister-at-Law, aged 53.

14th. Rose, William H., Esq., late one of the Judges of the Madras Small Causes Court.

14th. Robinson, Samuel, Esq., Solicitor, aged 67.

16th. Barrett, Charles W., Esq., D.C.L., Barrister-at-Law, aged 58.

17th. Kennedy, C. Rann, Esq., Barrister-at-Law, aged 60.

18th. Morgan, J. F., Esq., Barrister-at-Law, aged 47.

18th. Pedley, Joseph, Esq., Barrister-at-Law, aged 36.

18th. Sharpe, H. E., Esq., late Chief Justice of the Island of St. Vincent, aged 73.

25th. Hughes, R. Lewis, Esq., Solicitor, aged 29.

26th. Farrant, Robert, Esq., Solicitor, aged 34.

29th. Bloxome, Edward, Esq., Solicitor, aged 67.

31st. Glaisher, Henry, Esq., Solicitor, aged 39.

31st. Simpson, Samuel, Esq., Barrister-at-Law.

31st. Goodrich, R. E., Esq., Chief Clerk in the Queen's Bench Judgment Office, aged 54.

1868, *January.*

3rd. Rudd, Eric, Esq., Barrister-at-Law.

4th. Kirkman, J. Charles, Esq., Barrister-at-Law, aged 83.

6th. Bird, James, Esq., Solicitor, Coroner for Western District of Middlesex, aged 61.

6th. Birch, James, Esq., Solicitor, aged 96.

7th. Edgworth, Thomas, Esq., Solicitor, aged 63.

10th. Stainton, W. Nathaniel, Esq., Barrister-at-Law, aged 53.

11th. Chabot, P. J., Esq., Barrister-at-Law, aged 65.

17th. Finch, Hon. Daniel, Barrister-at-Law, aged 79.

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