LETTER

TO THE RIGHT HONORABLE

LORD LYNDHURST,

ON THE

APPOINTMENT OF SHERIFFS IN IRELAND,

UNDER THE EARL OF MULGRAVE,

BY

A BARRISTER.

LONDON:

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MDCCCXXXVIII.

"LET ME EXHORT AND CONJURE YOU, NEVER TO SUFFER AN INVASION OF YOUR POLITICAL CONSTITUTION, HOWEVER MINUTE THE INSTANCE MAY APPEAR, TO PASS BY, WITHOUT A DETERMINED, PERSEVERING RESISTANCE. ONE PRECEDENT CREATES ANOTHER. THEY SOON ACCUMULATE AND CONSTITUTE LAW. WHAT YESTERDAY WAS FACT, TO-DAY IS DOCTRINE. EXAMPLES ARE SUPPOSED TO JUSTIFY THE MOST DANGEROUS MEASURES: AND WHERE THEY DO NOT SUIT EXACTLY, THE DEFECT IS SUPPLIED BY ANALOGY. BE ASSURED, THAT THE LAWS WHICH PROTECT US IN OUR CIVIL RIGHTS GROW OUT OF THE CONSTITUTION, AND THEY MUST FALL OR FLOURISH WITH IT. THIS IS NOT THE CAUSE OF FACTION OR OF PARTY, OR OF ANY INDIVIDUAL, BUT THE COMMON INTEREST OF EVERY MAN IN BRITAIN."

JUNIUS.

A LETTER,

&c.

My Lord,

The subject of the appointment of Sheriffs in Ireland, is just now exciting great interest. As a question of law it is interesting; as a constitutional question it is vitally important. It was the object of a letter, lately addressed to the honorable and learned member for Bandon, to suggest, that this matter should be brought before the Legislature, that, if any doubt exists as to what the law is, that doubt might be removed by a declaratory act. It was, at the same time, the object of that letter to shew, by some brief references, that no reasonable doubt could be entertained on the question of law. The public attention has been since directed very generally to the subject. The press, indeed, has teemed with the expressions of the various views and opinions taken, or professed to be taken by the organs of different parties; and that letter, although written "sine irâ et studio, quorum causas procul habeo"—did not escape the vituperation of party. It has been urged upon the writer to bring the matter more fully before the public than it has yet been, and in endeavouring to comply with this request, he would deprecate all consideration of party and of party politics, and address himself, through your Lordship, to honest men of all parties. To one who has never taken any share in political life, and whose pursuits, in the intervals of professional duty, raise him above the excitement and prejudices to which party ever exposes and betrays her votaries, there is an interest in a question of so deep importance, in a constitutional point of view, far greater than any with which party or party politics can invest it—an interest which a mere political opponent or partisan can

neither appreciate nor understand. Were it a question of party merely, it would have remained unnoticed, as far as he is concerned. "In questions merely political, an honest man may stand neuter; BUT THE LAWS AND CONSTITUTION ARE THE GENERAL PROPERTY OF THE SUBJECT: not to defend is to relinquish—and who is there so senseless as to renounce his share in a common benefit, unless he hopes to profit by a new division of the spoil?"

It is the object of the present letter to establish this proposition, that THE APPOINTMENT OF A HIGH SHERIFF, WITHOUT REGARD TO THE LISTS RETURNED BY THE CHANCELLOR AND THE TWELVE JUDGES, IS UNCONSTITUTIONAL AND CONTRARY TO LAW. In addressing myself to this question, I fearlessly ask the candid consideration of reasoning men of all parties. It is true, as is somewhere remarked by Locke, that "there are scarcely any two men who have, perfectly, the same views of the same thing, till they come with attention, and perhaps mutual assistance, to examine it"—but, as is added by the same candid and great man, "it will be otherwise where men are inquisitive after TRUTH, apply their thoughts with attention to the gaining of it, and are indifferent where it is found so they can but find it."

Before entering upon this question, I wish to state, that nothing is further from my intention than to arraign the motives, which have actuated the Executive, in the recent appointments of Sheriffs, which have naturally excited such public alarm. With these motives I, as a private individual, have no concern; my object is this, and this only—to shew that the course adopted is unconstitutional, and contrary to law.

The office of Sheriff is older than the Conquest, and may be considered as coeval with the earliest traces of the British Constitution. Its importance in the executive department of the law rendered it an object of early attention to the English Parliament. It has been the subject of legislative regulation, by a series of enactments, from Magna Charta inclusive, to the period of the Union.* The Earl had, anciently, the government

* Fifteenth Report of Commissioners of Inquiry on Courts of Justice in Ireland.

of the county, and now the Sheriff is the principal officer in the county, under the Crown.* As the keeper of the King's peace, both by common law and by special commission, he is the first man in the county, and superior in rank to any nobleman therein, during his office.† His authority is both judicial and ministerial. His ministerial authority consists in the execution and return of all writs and process directed to him, and in the election and return of Knights and Burgesses for Parliament; accordingly, the office being of such high rank, importance and responsibility, it is provided by several Acts of Parliament,‡ that no man shall be Sheriff in any county, except he have sufficient lands within the same county where he shall be Sheriff, whereof to answer the King and his people.

It is justly remarked by Mr. Christian, the learned Editor of Sir William Blackstone's Commentaries, that the intention of our ancestors, that the lands of a Sheriff should be considerable, abundantly appears from their having this provision so frequently repeated, and at the same time that they obtained a confirmation of *Magna Charta* and their most valuable liberties. In ancient times, this office was often executed by the nobility, and persons of the highest rank in the kingdom. Richard, Duke of Gloucester, was Sheriff of Cumberland; and the learned Sir Henry Spelman states in his Glossary, "exigebantur olim ad hoc officium potentissimi sæpenumero totius regni proceres, barones, comites, duces, interdum et regum filii."

Sheriffs were originally elected by the freeholders of the county.§ So in the Gothic Constitution, the Judge of the county court, which office is executed by our Sheriff, was elected by the people, but confirmed by the King. The people chose twelve electors, who nominated three persons, "*ex quibus Rex unum confirmabat.*"‖ This right of election was confirmed by the

* Com. Dig. Court, B. 1.

† 1 Roll. Rep. 237.

‡ 9 Ed. II. St. 2. 2 Ed. III. c. 4. 4 Ed. III. c. 9. 5 Ed. III. c. 4, &c.

§ 2 Inst. 174, 558. The election was never in the crown.

‖ 1 Bl. Comm. 340. Stiern de jure Goth. l. i. c. 3.

28th of Edward the First, (ch. 8, and 13,) A.D. 1300. "But these popular elections," as Sir William Blackstone remarks, "growing tumultuous, were put an end to by the statute 9th of Edward the Second, in the year 1315, which enacted, 'that the Sheriffs should, from thenceforth, be assigned by the Chancellor, Treasurer and the Judges; as being persons in whom the same trust might with confidence be reposed.'" It is called by Lord Coke, the Statute of Lincoln de *vicecomitibus*, and is commonly known by the name of "THE STATUTE OF SHERIFFS." It recites the grievous complaints of the people, and that the King intended to eschew the evil oppressions and disheritances occasioned theretofore by the Sheriffs, and it ordains and establishes that "THE SHERIFFS, FROM HENCEFORTH, SHALL BE ASSIGNED *(soient mis)* BY THE CHANCELLOR, TREASURER, BARONS OF THE EXCHEQUER, AND BY THE JUSTICES; AND IN THE ABSENCE OF THE CHANCELLOR, BY THE TREASURER, BARONS AND JUSTICES; AND THAT NONE SHALL BE SHERIFF EXCEPT HE HAVE SUFFICIENT LAND WITHIN THE SAME SHIRE WHERE HE SHALL BE SHERIFF TO ANSWER THE KING AND HIS PEOPLE." At the end of the statute is a letter in Latin from the King to all the Sheriffs in England, commanding them to make the statute known in the full county court, and to cause it to be firmly and inviolably observed; "in omnibus articulis suis quantum ad te pertinet firmiter et inviolabiliter facias observari." There is also a memorandum in law French subjoined—that the statute was sealed with the great seal, and commandment given to the Treasurer, Barons of the Exchequer, and the Justices of both benches, to observe it steadfastly in all its particulars.*

The next statute upon the subject is the second of Edward the Third, c. 4. (A.D. 1328.) It confirms the preceding statute of Edward the Second, and is entitled, "A confirmation of the Statute of Lincoln, containing the sufficiency of Sheriffs, &c."

* Pickering's Edn. of the Statutes, vol. 1st.—"*et fait a remembrer que meisme 'lestatut fu seal souz le grant seal et maunde as tresorer et Barons del Eschekier et auxint as Justices de l'un bank et de l'autre de fermement garder en tuz ses pointz.*"

The next statute is the fourth of Edward the Third, c. 9. (A. D. 1330,) and enacts, that "none shall be Sheriffs, unless they have lands sufficient in the place where they be ministers," and refers to the preceding statute (of Sheriffs) 9th Edward II.

The next statute is the 5th Edward III. c. 4, passed in the next year, (A.D. 1331,) and containing similar provisions.

The next statute in order is the 14th Edward III. c. 7. (A.D. 1340.) It is entitled, "How long a Sheriff shall tarry in his office." It enacts that none "shall tarry over one year, (*outre un an,*) and then another convenient shall be ordained in his place, that hath land sufficient in his bailiwick, by the Chancellor, Treasurer, and Chief Baron of the Exchequer, taking to them the Chief Justices of the one bench and of the other, if they be present; and that shall be done yearly in the morrow of All Souls, at the Exchequer." It is remarkable, that this statute does not mention the puisne Judges, as the statute 9 Edward II. does. The statutes, however, being *in pari materia*, are construed together—and by giving the nomination to the twelve Judges, both statutes are complied with. It is also remarkable, that none of the statutes on the appointment of Sheriffs, confer expressly any power, even of selection, upon the Crown. Sir William Blackstone conjectures, that the present practice originated from a statute which cannot now be found. That is an improbable conjecture. If any such Act was passed, it must have been between the 23d Henry VI. which recites and ratifies the 14th Edward III. and the date of the privy council record, hereafter referred to, of the 34th Henry VI. Mr. Christian conjectures, that "the practice originated from the consideration, that as the King was to confirm the nomination by his patent, it was more convenient and respectful to present three to him, than only one, and that this is neither contrary to the spirit, nor, in strictness, to the letter of the statute." (See Appendix, No. XV.) It seems, that while the election of Sheriffs was in the freeholders, the King's writ issued to the freeholders to elect the Sheriffs. See Harleian Miscell. vol. viii. p. 82, where precedents of the writ are given.

Other statutes relating to the office of Sheriff, the sufficiency of his means, and the duration of his office, were passed in the subsequent years of the reign of Edward III. in that of Richard II. and of Henry VI.—they are abstracted in another part of this letter. The next statute that refers to the mode of appointing Sheriffs is the 34th Henry VIII. c. 26, entitled "An Act for certain Ordinances in the King's Majesty's dominions, and principality of Wales." It distinctly recognises the nomination, by the Chancellor and the Judges, and the selection by the Crown out of those so nominated, as *the law of the land.* It is declaratory of the constitutional law of the realm; it enacts, (s. 61) "that there shall be Sheriffs in Wales, as there are in England; and for the yearly nomination of the said Sheriffs, the Lord President, Council, and Justices of Wales, or three of them at the least, whereof the said President to be one, shall yearly nominate three substantial persons to be Sheriffs of the same, and shall certify their names to the Lords of the Council, to the intent the King's Majesty being thereof advertised may *appoint one of them* in every shire to be Sheriff for that year, at his most gracious will and pleasure, *like as his Highness doth for his realm of England.*" Such then is the statute law upon this subject; all the preceding Acts, except the 34th Henry VIII. c. 26, which concerns only the principality of Wales, are (by Poyning's Act, 10 Henry VII.) in force in Ireland; but the section above cited is a distinct legislative recognition of what the constitutional law of the realm of England and Ireland is—and so Sir William Blackstone states it, as "expressly recognizing" the appointment by the Chancellor and the Judges, "to be the law of the land." (See Appendix, No. XVI.)

One would think that it was impossible for an unprejudiced mind to read the foregoing, and the several other statutes, relative to Sheriffs, with the most ordinary attention, without being convinced that it is the duty of the Executive to be guided in the appointment to this office, by the Chancellor and the Judges, the tribunal expressly recognised by the law for now more than five hundred years—the Statute of Sheriffs being passed in the

year 1315; and whatever may be the possible objections to that tribunal, let any honest man—be he of what party he may—say what other tribunal would be less exceptionable?

At a general meeting, held in Michaelmas term, the Judges of each circuit produce the lists which they propose for the respective counties—the claims and merits of the different persons in these lists are deliberately discussed—the names are transposed, or struck out, and others substituted, according as the majority of the Judges, assisted by the Chancellor, approve; —when the lists are finally agreed upon, they are handed to the Chancellor, and presented by him to the Lord Lieutenant.* It would perhaps be difficult to suggest any mode of appointment from which a fair and impartial nomination might more reasonably be anticipated; and accordingly it is stated by the Commissioners of Inquiry on Courts of Justice in Ireland, (Fifteenth Report) that "as to the Grand Juries of the counties at large, which are invariably formed by the High Sheriff, no complaint has reached us of any undue or improper motive influencing their selection: *and from the care taken by the Judges* in nominating Sheriffs at present, *and the respectability of the persons appointed*, we consider that any suspicion of that nature must be unfounded."† But whatever are the objections, which party spirit or party prejudices may urge against this tribunal, it is impossible to read the preceding statutes and entertain a doubt as to what the law is; and accordingly Sir Robert Atkyns, who was a Judge in the Common Pleas, and afterwards Lord Chief Baron in the reign of William the Third, says that it "is most evidently made out, that the King neither hath, nor ever had any just right or power to elect Sheriffs. Only by his patent or commission to the Sheriff, hath he used to signify to the

* See the letter of the Lord Chief Justice of the Court of Queen's Bench in Ireland, *post*, page 20.

† This report is signed by Messrs. Webber, Mitford, Plunkett (son of the present Irish Lord Chancellor), and Wynne. Printed by order of the House of Commons, in 1826.

Sheriff himself, that is so chosen—this is all the use of the patent; but it is the proper election of those great officers (Lord Chancellor, Treasurer, Judges, &c.), that truly vests them in their office."* There is, however, upon record THE UNANIMOUS DECISION OF THE TWELVE JUDGES OF ENGLAND on the construction of these statutes. It is mentioned by Lord Coke, in his second institute. King Henry the VI. (A.D. 1454) had passed over the persons assigned by the Judges, and appointed, of his own authority, a Sheriff of Lincolnshire; he refused to act, whereupon the opinions of the Judges were taken, what should be done in this behalf. The circumstances and the decision are thus detailed by Lord Coke:—

"I could not let pass a resolution of *all the Judges* of England, in 34 Henry VI. which grew upon this occasion. Upon a reference, by the King's Privy Council, to Sir John Fortescue, and Sir John Prisot, Chief Justices, and to the rest of the Justices, concerning a Sheriff, constituted by the King himself, it is thus in the Council Book recorded—(3. Mart. ann. 34, Henry VI.)† Upon a demand that my Lord Chancellor made to the chief Judges, and to the remnant of the Judges, how that the King's laws, neither justice might not be executed in Lincolnshire, because there was no Sherrif there, and that the King by his letters patent, under the great sele, had deputed certain men for to have be Sherrifs there—what them seemed should be done in this behalf, so that the King's laws and justice might be executed in that shire, as it is executed in other shires of England. The two Chief Justices the same day came unto my Lords of the King's Council, in the Sterred Chamber, and upon

* See Sir R. Atkyns' "Inquiry into the power of dispensing with Penal Statutes." Law Tracts, 8vo. Lond. 1734.

† A fac simile of this record, as it appears in the Council Book, is recently published by that very learned lawyer and antiquarian, Sir Harris Nicolas. It is headed—"Minutes of Council, which are assigned in a modern hand to the 3d March, 34 Hen. VI. 1455-1456." This date was, however, assigned before Lord Coke's time, as he mentions it as above. 2 Inst. 559.

the abovesaid demand, sayde, that them seemed, and so it seemed unto the remnant of the Judges, *that the King did an error*, when that he made another person Sherrif of Lincolnshire, than was chosen and presented unto his Highness after the effect of the statute in such behalf made—and though that he that so was made Sherrif, would not take it upon him, ought not to be so punished, and to make also a great fine for his disobeissance, as that if he had be one of the three persons *that were chosen to be Sherrifs, after the tenor of the Statute;* and furthermore them seemed, that *the King should have recourse to the three persons that were chosen after the tenor of the Statute*, and make one of them Sherrif by letters patent, bearing date either at the day of election of them, or else at Michaelmas—and though that sithence the said election, any of them have got him an exemption that he should not be made Sherrif, yet them seemeth that he should be charged to take the said office upon him—and furthermore them seemeth, that if none of the said three persons chosen be made, that then some other thrifty man, dwelling in a foreign shire, be entreted to occupie the said office, for this year—and the next year that in eschewing of such inconveniences, that the order of the statute, in that behalf made, be observed and kept." "*Which aforesaid unanimous opinion, being the advised resolution of two such famous Chief Justices, and of all the Judges of England*, and finding it in the Council Book, I thought fit to be published in such words, as it is there set down, as a sure and just exposition of the statutes concerning the making of Sheriffs."*

It might be well if the advisers of the Executive in Ireland, would take example from the Lords of the Council in the reign of Henry VI. and propose, as they did, to the Lord High Chancellor, and the twelve Judges, whether his Excellency has not "done an error" in constituting eight Sheriffs in 1836, eight Sheriffs in 1837, and six Sheriffs this year, affecting the whole four provinces of Ireland, without regard to the lists presented,

* 2 Instit. 559, 560.

after mature deliberation and discussion, by the Chancellor and the Judges.*

It is to be regretted that the study of constitutional law is so much neglected at the present day, as compared with former times. This is very generally the case, yet the time may shortly come when the knowledge of it will practically be of more importance than it has been since "the Revolution." The advisers of the Irish Executive, however, are probably to be exempted from this censure—they are doubtless in possession of precedents which they may urge in justification of these appointments.

No doubt, my Lord, there are precedents. I know no measure, however illegal, however unconstitutional, for which a precedent may not be found. The very appointments which occasion this letter, will probably be cited as precedents by a fu-

* In the *Gazette* the Judges' lists are usually thus described—"Names of persons returned by the Judges of Assize, to serve the office of High Sheriff for the ensuing year." The Counties in which the lists of the Judges were set aside, in the years above-mentioned respectively, were the following:—See Dublin Gazette.

1836.	1837.	1838.
Clare,	Cavan,	Fermanagh,
Kerry,	Clare,	King's County,
King's County,	King's County,	Limerick,
Leitrim,	Longford,	Louth,
Louth,	Louth, (twice)	Monaghan,
Monaghan,	Queen's County,	Queen's County.
Queen's County,	Westmeath.	
Wexford.		

See Appendix, No. XXII.

It is remarkable, that it was not until long after the expiration of the year of office of the preceding Sheriffs, and after the Judges had gone out on the different Circuits—nay after the Spring Assizes were actually held and over in different Counties—it was not until the 6th of March, in this year, (see the *Gazette* of that date,) that the public were apprized who the Sheriffs for the year were; although the list of names, signed and returned by the Chancellor and the Judges, and from which the public naturally supposed the Sheriffs would be selected, was published in the *Gazette* in November or December, 1837.

ture Executive, if they now pass unnoticed. "ONE PRECEDENT CREATES ANOTHER: THEY SOON ACCUMULATE AND CONSTITUTE LAW: WHAT YESTERDAY WAS FACT, TO-DAY IS DOCTRINE. EXAMPLES ARE SUPPOSED TO JUSTIFY THE MOST DANGEROUS MEASURES." Charles the First, for instance, on one occasion set aside the Judges' lists in seven instances, the precise number adopted by the Irish Executive last year, and declared "he would have Sheriffs of his own." (See Appendix, No. XVIII.)

It appears manifest, however, from cotemporary writers, that the usual mode of appointment, even in his reign was, as theretofore and since, by the Chancellor and the Judges,* and as the circumstances of the case alluded to are remarkable, it may be worth while to consider it more fully. The unhappy Charles does not seem to have felt what a noble author of the present day pronounces to be "the greatest curse that can befal the native of a free state—responsibility for the exercise of arbitrary powers."† As part of his device he had determined to get rid of certain members of Parliament, who were become obnoxious by their unflinching exposure of the abuses of the prerogative. The King had again resort to the issuing of writs, without the authority of Parliament, for the levying of money, and it was a great object to keep out of the ensuing Parliament all who might dare to raise their voices against this unconstitutional measure. We learn this even from the court writers of that day. The "Strafford Letters" afford abundant evidence of this. I subjoin two curious extracts from the letters of Sir Arthur Ingram, who was privy to, and had influence in court matters, which are addressed to Sir Thomas Wentworth, Bart. afterwards the unfortunate Earl of Strafford.

"Noble Sir—A great many privy seals are sent out already, and for very great sums, and especial to merchants strangers; but they have in a very fair and discreet manner made in writing a denial. What will be the end of it I know not. I have it from good

* Croke's Reports, temp. Car. pp. 14, 595.

† "Yes and No," by the Author of Matilda.

authority that the writs (for Parliament) will go forth at the end of this term, and the King hath had some conferences with some of his Council, to make some that were of the last Parliament, Sheriffs, of which you are one, that is in name. I know your mind, that you would not willingly be in, which I will use all the care I can to keep you from it. If I cannot do it, then must you take it for a suffering for your carriage in Parliament.

"Your most faithful,

"And loving friend,

"November 7, 1625. "AR. INGRAM."

Sir Arthur Ingram, to Sir Thomas Wentworth, Bart.

"Noble Sir—God give you joy, you are now the great officer of Yorkshire, but you had the endeavours of your poor friend to have prevented it—it was set and resolved what should be done—*the Judges proceeded in their old course*, and so went it to the King; but when the names came to the King, the King declared that he himself had the names of *seven that he would have Sheriffs, and so named them himself.*—For your being chosen my poor opinion is, that there did not any thing befal you that is, and will be more honour to you in the publick, *who speak most strangely of it.*

"Your faithful friend,

"November, 1625. "ARTHUR INGRAM."*

So much for the first precedent. A second, though prior in point of time, occurred in the reign of Elizabeth.

It is mentioned by Sir William Blackstone, and in a remarkable manner: "Notwithstanding," he says, "this unanimous resolution of all the Judges of England," (referring to the decision reported in Lord Coke's second institute, mentioned above) "thus entered in the Council book, and the Statute 34 and 35 Henry VIII. c. 26, s. 61, which expressly recognizes this to be the law of the land, some of our writers have affirmed, that the King, by his prerogative, may name whom he pleases to be Sheriff, whether chosen by the Judges or no. This is grounded on a very

* Strafford Letters and Despatches, i. 29.

particular case in the 5th year of Queen Elizabeth, when, by reason of the plague, there was no Michaelmas Term kept at Westminster, so that the Judges could not meet *in crastino animarum* to nominate the Sheriffs: whereupon the Queen named them herself, without such previous assembly, appointing for the most part one of the two remaining in the last year's list: and *this case, thus circumstanced, is the only authority in our books* for the making these extraordinary Sheriffs." In such terms does Sir William Blackstone speak of the case; but in fact it was not "a case"—it is a mere memorandum of the reporter. It does not appear to have been argued, or deliberated *by the Judges* at all, as the case in the reign of Henry VI. was. It is thus mentioned by Dyer, in whose Reports it originally appeared: "Memorandum—5th and 6th Queen Elizabeth. Michaelmas Term was wholly adjourned until the 8th of St. Hilary, on account of a great plague and infection of the air; also the Sheriffs were nominated and appointed, without any meeting of the Judges (on the morrow of All Souls at the Exchequer) *according to the common usage*, (solonque le common usage,) but for the most part" (and there may have been good reasons, as death, absence, or the occupation of some other office, for the exceptions) "none were named except one of the two who remained on the list the last year past."

It is indeed added, "although it was holden (by whom it does not appear,) that the Queen, by her prerogative, may make a Sheriff without such election, *non obstante aliquo statuto in contrarium*." But there had been *no* nomination by the Judges. Is it said, that it was holden that where there *was* a nomination by the Judges, pursuant to the statute "and the common usage," the Crown could, by its prerogative, set aside the persons so nominated, and nominate others of its own authority? This "MEMORANDUM," so far as it goes, is against the proposition it is put forward to support.*

But, even under the circumstances stated by Dyer, it is expressly put upon the doctrine of *non obstante*, a doctrine first

* See Appendix, No. III.

introduced into England by the Pope in his bulls of provisorship in the reign of Henry the Third, and adopted by that weak King,—a doctrine, upon the strength of which, James the First used these famous words, that, "as it was blasphemy for man to dispute what God might do, so was it sedition for his subjects to dispute what a King might do in the fulness of his power,"—"a doctrine which," as Sir William Blackstone observes, when speaking of this very memorandum of Dyer's, "sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated Westminster Hall, when King James the Second abdicated the kingdom." (See post, Appendix, No. IV.)

So much then for "the precedents" by which the recent appointment of the Executive in Ireland may be supported; nay, if it be precedents of which the advisers of the Crown are in search, I will furnish them with some, although I cannot think that they have escaped their attention. They are, moreover, Irish precedents, and, therefore, immediately in point. In a recent work, published in connexion with the Ordnance Survey of Ireland, it is stated, that a former Lord Lieutenant of this country, THE EARL OF TYRCONNEL, superseded a Protestant mayor, John Campsie, mayor of Derry, and substituted a Roman Catholic, Cormick O'Neill, in his stead, acting, I presume, on the principle of Lord Suffolk, in "Henry the Sixth"—

> "Faith, I have been a truant in the law,
> And never yet could frame my will to it,
> And therefore frame the law unto my will."

Even he, however, was not advised to interfere with the Sheriffs, (Kennedy and Brooks,) however obnoxious their politics, or those of their sub-sheriffs may have been. In Armagh, likewise, that noble Earl, whose adviser was Nagle, who is described as "the most artful of the Irish lawyers," superseded a Protestant, and appointed one Con. O'Neill in his stead.*

* Historical Memoirs of Armagh, by James Stuart, Esq. L.L.D. p. 412.

So James the Second, acting under the counsel of father Petre, and other such constitutional advisers, would not even trust Lord Clarendon, the Lord Lieutenant, to make the selection of Sheriffs, but insisted upon the lists being transmitted to England for revision.* Upon another occasion the same King wrote with his own hand to Lord Clarendon, commanding him to defer the appointment of Sheriffs over all Ireland. As the answer of the noble Lord shews what the practice was, and what the law was considered to be in that day, it may not be uninteresting to transcribe both.†

"The King to the Earl of Clarendon.

"Whitehall, Oct. 8th, 1686.

"The usual time approaching now for appointing Sheriffs of the several counties there, I have thought fit that that matter should be deferred for some short time, and accordingly I would have you not name nor appoint any of the Sheriffs till you shall receive my further directions therein.

"J. R.

"To the Lord Lieutenant."

"The Earl of Clarendon to the King.

"Dublin Castle, Oct. 16th, 1686.

"I have received the honour of your Majesty's letter of the 8th instant, and shall most punctually obey your commands, not to proceed to the nomination of the Sheriffs till your further orders; and I hope your Majesty does not doubt my perfect obedience to all the commands you shall think fit to lay upon me, as I am sure I have hitherto fully executed all I have received. I humbly beg your Majesty's permission, upon this occasion, to inform you, that the day before my Lord Tyrconnell went hence, he and Mr. Justice Nugent gave me a paper of the

* A curious specimen of the animadversions made upon the proposed Sheriffs, will be found in the Appendix, post, No. VIII.

† See the Correspondence of the Earl of Clarendon, ii, 22, 36. Nos. 235, 240, 4to. London, 1828.

names of the persons who were thought fit to be Sheriffs for the next year. I confess, sir, I thought it very strange (to say no worse of it,) for any two men to take upon them to give a list of men for Sheriffs over the whole kingdom; *to anticipate the representation of the Judges, who are the proper persons to offer men fit for those employments*, and without so much as leaving room for the Chief Governor to have an opinion in the matter. This list is pretended to be made indifferently of Roman Catholics and Protestants; but I am sure several of them, even of those who are styled Protestants, are men no way qualified for such offices of trust. In this I am not partial; as with humble submission, I must beg leave to assure your Majesty, I have not been, in any thing I have done here, in which I will be content to be judged by any who have been witnesses of my actions. I humbly beg your Majesty's pardon for my presumption in saying thus much, which I think it my duty to do for your service, with all possible submission to whatever commands your Majesty shall send me. When your Majesty knows what is said on all sides, you are still master of your own resolutions, and cannot doubt of an obedience from those who serve you: at least, I am sure, not from me, who am proud of nothing but of what I have been, and ever will be,

"Sir, your Majesty's, &c.

"CLARENDON."

The reader will find further precedents, Appendix V. and VI.

But, precedents apart, it may perhaps be contended, that though the statutes are express upon the subject, yet that the practice has not been uniform in Ireland. It is a new proposition, and one which no English or Irish lawyer has ever advanced, that a statute can be obsolete, or any way lose its force but by actual repeal. In Scotland, indeed, a statute is said to lose its force by desuetude, if it hath not been put in execution for sixty years; but the distinction made in that country between statutes that are obsolete, and those *in viridi obser-*

vantiâ, is unknown to the law of England, or of Ireland.* In point of fact, the usage has not been uniform, that is, uninterrupted either in one country or in the other. The precedents above referred to prove this. Henry the Sixth, as already mentioned, only a few years after having given his solemn assent to the statute of the 23rd year of his reign, trampled upon the law, and appointed a Sheriff of Lincolnshire, in defiance of the Judges, being of Wat Tyler's opinion, that there is

"Nothing like
A fair and open trial, where the King
Can choose his Jury and defy his Judges."

Charles the First followed that example, and adopted it as an engine for keeping out of Parliament seven persons whose political opinions were obnoxious to him. But if it is said that the general usage, either in England or in Ireland, has not been to appoint the Sheriffs according to the nomination of the Judges, the assertion is unfounded. Is it pretended that the present usage in England is not for the Judges to present their lists, from which the Crown appoints the Sheriffs? It is not. Is it pretended that this was not the usage in the reign of George the Third, George the Fourth, and William the Fourth? No. Then as to the ancient usage. That the appointment by the Judges, &c., was the usage in the time of Henry the Sixth appears both by Fortescue, *(de laudibus legum Angliæ,)* who was Chief Justice, and afterwards Chancellor to that King, and also by the unanimous decision of the twelve Judges of England before mentioned.

That it was the usage in the reign of Henry the Eighth, appears by the statute 34th H. VIII. c. 26, s. 61.

That it was the usage in the reign of Elizabeth, appears by the memorandum of Chief Justice Dyer, in his Reports.

That it was the usage in the reign of Charles the First, appears by Sir George Croke's Reports, temp. Car. I. p. 14, 595, and by the Strafford Letters, *ante*, p. 12. (See *post*, Appendix, XXVII.)

* Barrington on the Statutes, 34.

That it was the usage in the reign of George the Second, appears from the statute of the twenty-fourth year of that reign (ch. 48); and that it was the usage in the reign of George the Third, Mr. Christian tells us distinctly, and sets forth the practice at length. Nay, that it was the USAGE so long since as the reign of Henry the Fifth, (A.D. 1414,) the issue roll of that reign, a fac simile of which I have recently seen, affords a curious testimony. An item of £7 11*s.* 10*d.* (of the then currency,) is charged as having been paid to William Hokhirst, for the expense of a dinner given at the King's cost, "to the Chancellor, Justices, &c. dining at Westminster, there attending for the election of Sheriffs, and Escheators for each county in England: also to certify and deliver to our Lord the King, the names of those persons so elected, *according to custom*, for his advice to be taken thereon:"—that is, to advise which of those so nominated the King would adopt.

Now as to the ANCIENT USAGE in Ireland, it is stated, in a book called "The office of Sheriff in Ireland," printed in 1721, that the nomination of Sheriffs is regulated by the statute of Edward the Third.

The Fifteenth Report of the Commissioners of Inquiry on Courts of Justice in Ireland, states, that the appointment of Sheriffs originally took place in Ireland, according to the regulations of the statutes 9th Edward the Second, and 14th Edward the Third, already referred to.

The Eighteenth and Nineteenth Reports of the Commissioners of Public Records in Ireland, printed by the House of Commons, in March, 1830, contains "a list of public general acts not found in the printed edition of the statutes formerly submitted to the Board." Amongst other entries is this:—

"Ed. I. 21, c. 1, from Red Book of Exchequer. } Sheriffs, who are recited to have been often made by the great seal of England, and at other times by the Justices, shall be made by the Treasurer and Barons of the Exchequer, and not otherwise. Bailiffs, who are personally accountable at Exchequer, shall be

made by the Barons: but such of them as are accountable to the Sheriffs, by the Sheriffs." Under this, is a memorandum thus: "N.B.—This purports to be an ordinance by the King, merely, and was sent hither by writ."

The above ordinance, it will be observed, is prior to the statute of Sheriffs, the 9th Ed. II. (See Appendix, No. II.)

The 2nd of Edward the Third, (c. 4,) confirmed the 9th Edward the Second, the statute of Sheriffs; which is again referred to in the 4th Edward the Third, c. 9. Now at the end of the 5th of Edward the Third, c. 14, is a letter from the King to his Justiciary in Ireland, directing that all the previous statutes of that reign should be proclaimed in that country, and firmly observed. It is in these words:—

"Rex dilecto et fideli suo Antonio de Lucy Justiciaro suo Hibernie salutem. Quædam statuta ..... edita in diversis parliamentis nostris postquam gubernacula regni nostri suscepimus vobis mittimus in formâ patenti, mandantes quod statuta prædicta et omnes articulos in eis contentos in predictâ terrâ nostrâ Hibernie tam infra libertates quam extra publice proclamari et quantum ad vos et populum nostrum partium illarum attinet firmiter teneri et observari facias."

That the usage in the reign of Charles II. and until James II. infringed upon it, may be inferred from Lord Clarendon's Letter, *ante*, p. 16.

Then as to the modern USAGE in Ireland, it is stated thus, in a work written by a public officer, and published in 1776. "The method, which has been for *many years* of appointing Sheriffs, is thus:—The Judges of assize, on their summer circuit, require the Sheriffs in office in the several counties in the kingdom, each of them, to return them the names of three persons in each county proper to succeed them, which they accordingly do; and at the meeting of the Judges in the Chancellor's chamber, on the morrow of All Souls, in the following Michaelmas term, the Lord Chancellor calls on them for their returns, which, when received, he delivers to the Lord Lieutenant, who appoints *one* for each county *out of each return*.

But note, the Judges have a power before they make their returns to alter the persons, or any of them, in their discretion."*

So the practice in later times is stated by the present Lord Chief Justice of the the Queen's Bench in Ireland, in a letter addressed to the Secretary of the Commissioners of Inquiry into the Courts of Justice in Ireland, in the year 1826. It is given in the Appendix to the Fifteenth Report of the Commissioners. The following is an extract from it :—"Upon the summer circuit, the senior Judge in each county procures the best information he can collect, as to the gentlemen in that county qualified for the office of High Sheriff, who have not already filled it, from amongst whom he selects the three persons whom he considers most fit for the situation. In the following Michaelmas term, upon a day fixed for the purpose, generally the second Thursday in the term, the Chancellor meets the twelve Judges in the Chief Justice's chamber, and each Judge who had been senior on the circuit, according to seniority, hands a list of three names for each county to the Chancellor, who reads out each list as he receives it; and after he has read each list, the qualifications of the several persons therein named are considered by the Chancellor and the twelve Judges; and if any one present knows any thing of the character or qualifications of those persons, or any of them, he communicates it, and according to the result of the discussion, the list stands as given in, or the names are transposed, or some of them struck out; in which latter event the Judge who had returned the list substitutes others, which are subjected to a similar discussion; and the lists, when finally agreed upon, are taken away by the Chancellor to be laid before the Lord Lieutenant, and are immediately afterwards published in the Dublin Gazette, after which the several High Sheriffs are appointed by the Lord Lieutenant." (See Appendix, post, No. XVII.)

So the very last Act on Sheriffs, 5th and 6th William IV. c. 55, passed so lately as the year 1835, recognizes the legal practice, and makes no alteration in it. It was founded on the Re-

* Howard's Revenue Exchequer in Ireland, pref. 22, Edn. 1776.

ports of the Commissioners of Inquiry on Courts of Justice in Ireland, who state at length, and with approbation, the statute law and the established practice requiring the assignment of the Sheriffs by the Chancellor and the Judges. It recites the Twelfth Report of those Commissioners. It does not give the Executive any power which he had not before, but only substitutes a warrant, to save expense, for letters patent, under the great seal, by which Sheriffs were formerly appointed; it neither repeals nor restricts any of the former statutes already referred to, but enacts that "whenever any person shall be DULY nominated by the Lord Lieutenant to be Sheriff, such appointment shall be forthwith notified in the Dublin Gazette; and the appointment of every such Sheriff shall be made by a warrant under the signature of the Lord Lieutenant." In England the phrase is to "prick the Sheriffs," and accordingly the 3rd and 4th William the Fourth, c. 99, (English) passed in 1833, enacts, that "when any person shall be *duly* pricked or nominated by his Majesty to be Sheriff, the same shall be forthwith notified in the London Gazette." The English Act expressly recites "the expense, delay and trouble," attendant on the mode of appointment by letters patent. The form is accordingly changed from letters patent to a simple warrant or letter; and the Irish Act refers to this English Act, which was passed two years previously, and declares the expediency of extending certain of its measures to Ireland. Both Acts leave the law and the practice, as to the assignment by the Judges, and the selection or "nomination" by the Crown or the Lord Lieutenant, just as they were before the passing of the Act.

To conclude then, this part of my argument, I have, I trust, on the authority of the Statute law, on the authority of the twelve Judges of England, and on the authority of ancient usage, established conclusively the proposition with which I set out—that THE APPOINTMENT OF A HIGH SHERIFF WITHOUT REGARD TO THE LISTS RETURNED BY THE CHANCELLOR AND THE TWELVE JUDGES, IS UNCONSTITUTIONAL AND CONTRARY TO LAW.

The appointment of a Sheriff in consideration of his political opinions, or the refusing to appoint him because those opinions are opposed to the government for the time being, is a direct violation of this Act of Parliament. The Constitution never contemplated that the office of Sheriff should be a political office, and it was to avoid the possibility of this that the Legislature so jealously and so repeatedly declared, that the Chancellor, Treasurer, and the Judges should be the tribunal to nominate proper persons for the office, leaving no discretion to the Executive, save that of selection from the names so returned; carefully guarding against the exercise of that arbitrary discretion, which is, to use the words of Lord Camden, "the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is every vice, folly and passion to which human nature is liable."

Where even one person, not recommended by this, the constitutional tribunal, is appointed, and those recommended are set aside by the exercise of the prerogative, "the whole administration of justice," says a learned and constitutional writer of the reign of George the Third, "throughout the county for a twelvemonth, if not corrupted, is certainly suspected."*

Notwithstanding these numerous statutable enactments, the undue influence and corruption of Sheriffs were not subdued. Accordingly, the 23d Henry VI. c. 8, was passed. It recites "the many and divers oppressions" done by "the unduly, evil and falsely serving" of the office, and the continuing in office beyond one year, contrary to the statutes. It then recites the preceding statutes of Edward the Third and Richard the Second, which directed the assignment of the Sheriffs by the Chancellor, Treasurer, &c., and limited the duration of the office to one year, and "the great damage from their acting contrary to the said statutes and all other good rule, and very like in

* Christian's edition of Blackstone's Commentaries, vol. I. ch. ix. note.

time to come to be to their importable damage, and open disherison, upholding of manslaughter, perjury and great oppression to many of the king's liege people, considering the great consanguinity, alliance and familiars of the Sheriff." It then confirms and re-enacts the preceding statutes, and imposes a penalty of two hundred pounds upon any Sheriff who shall occupy the shrievalty above one year. It declares every such patent void, any clause of *non obstante* in such patent notwithstanding, and disables the party offending from ever being again Sheriff of any county.

Nothing can testify more strongly the importance which our wise ancestors attached to the independence of the Sheriffs, and their jealous anxiety to remove them from the undue influence of the Crown, than the repeated enactments on this subject.

That anxiety was fully justified by their experience of the temptations from the Crown to which the nature and influence of their office peculiarly exposed the Sheriffs, and to which they too often yielded. History is full of such instances.

That very curious collection of cotemporary original letters, known by the name of "THE PASTON LETTERS," abounds in proofs of the tampering of the Crown with the Sheriffs, and of the practice of procuring a King's letter *at the eve of an assizes* or an election, to obtain the favor of the Sheriff. The Sub-Sheriffs also were no less tampered with by the High Sheriffs.*

Even so long since as the fourteenth century, one of the articles of the celebrated parliamentary impeachment in the reign of Richard the Second, against Robert Tresilian, "the false justice," and Robert De Vere, the Duke of Ireland, "whom the King had been advised, as much as was in him, to make King of Ireland," and others, was the illegal appointment of Sheriffs.†

Again in a subsequent reign, in the year 1552, just before the summoning of a new Parliament, we are told the King sent

* See "the Paston Letters," vol. iii., letters 76, 22, 25, 36, &c. &c. also vol. iv.

† See 1st Howell's State Trials.

letters to several High Sheriffs, recommending persons to be elected members. They were almost all persons who belonged to the court, or who were in places of trust about the King.*

So in the reign of Charles the Second, Bishop Burnet states that "all juries were returned by the Sheriffs: but they commonly left that wholly in the hands of their under-Sheriffs. So it was now pretended that it was necessary to look a little more carefully after this matter. The under-Sheriffs were generally attornies, and might easily be brought under the management of the court. So it was proposed that the Sheriffs should be chosen with more care, not so much that they might keep good tables, as that they should return good juries."†

So in the same reign, the motive which actuated the Executive in procuring the forfeiture of the charter of the city of London, was the desire of securing the obedience of the Sheriffs: and when the Common Council petitioned the King on the subject, North, the Lord Keeper, by the King's order, told them, that one of the conditions on which their suit might probably be obtained was this—that the Executive, if the persons chosen to be Sheriffs, or either of them, should be disapproved of, might appoint by commission such as he pleased.‡

A noble author of the present day, Lord John Russell, speaking of this transaction says, "As it was found that the proceedings in the case of *quo warranto* being embarrassed by legal forms, would occasion considerable delay, a shorter way to the same object was perceived by electing Sheriffs against the will of the citizens." ..... "On the 29th September, Mr. North and Mr. Rich, the one chosen by an unlawful mode, and the other by open violence, were sworn, and took possession of their office." ..... "The

* Rushworth's Memorials, vol. ii., 395.

† Burnet's History of his own times, i., 480. Carew, in his Account of Cornwall, states, that it was a common article in an Attorney's bill, to charge *pro amicitiâ vicecomitis.*

‡ See the Life of Lord Keeper North, Noorthouck's History of London, and Macpherson's Reign of Charles II.

election of the Sheriffs seemed to complete the victory of the throne over the people."*

In the earlier part of the same reign, the jealousy of the Legislature was again awakened by the illegal and unconstitutional interference of the Crown. The 14 C. II., c. 21, s. 7, repeats the enactment so frequently introduced into former statutes, requiring that no man should be appointed Sheriff who had not sufficient land within the same county: and again in the reign of Queen Anne, an Act was passed for the express purpose of enabling those who were then Sheriffs of England and Wales to be continued in office until the first day of the ensuing Hilary term; thus impliedly declaring, that the Executive had no power to continue a Sheriff in office one hour beyond the year for which he was originally nominated.

Accordingly Lord Chief Baron Atkyns, in his Inquiry into the power of dispensing with Penal Statutes, remarks, that "when former Kings dispensed with a Sheriff's continuing in office beyond one year, contrary to the several statutes forbidding it, the King hath so done it by virtue, not of his prerogative, but of a special Act of Parliament enabling him to do it for some extraordinary occasions, and for some limited time only." He refers, for proof of this, to the statute 9 Hen. V. c. 5. It recites the statute 14 E. III., and enacts, that the King, by authority of this Parliament, may make Sheriffs through the realm at his will, for four years; and it states, as a reason which induced Parliament to confer this extraordinary power *pro tempore* on the Crown—"that as well by divers pestilences within the realm of England, as by the wars without the realm, there is not now a sufficiency of persons to occupy the office."†

So the 28 Hen. VI., passed to indemnify Sheriffs of the preceding year, who had continued more than one year in their

* Life of Lord Wm. Russell, 4th ed. pp. 172, 174.

† This statute, being a temporary one, is not found in the common editions of the statutes, but is given at length in the copy of the statutes printed by command of Geo. the Third, and published by the Record Commissioners in 1816. (Vol. ii., p. 206.)

office, is a legislative declaration that the Crown has no prerogative in this matter. The interference of the Crown, however, was not so easily put an end to. The evasion of the law, for political purposes, continued. The policy, of which Tacitus complains, was resorted to. Those who were legally appointed were not found sufficiently subservient. "Ceteri, quanto quis servitio promptior, opibus et honoribus extollerentur: invalido legum auxilio, quæ vi, ambitu turbabantur." Thus in the reign of Queen Anne, one of the charges made against Sir Constantine Phipps, who was Chancellor of Ireland, and one of the Lords Justices, was his unconstitutional interference in the election of Sheriffs.

On the 22d Dec. 1713, the House of Commons passed a resolution, "that Sir Constantine Phipps, Knight, Lord High Chancellor of Ireland, hath been the chief cause and promoter of the frequent disapprobations of persons elected Lord Mayors *and Sheriffs* of the city of Dublin."*

On the 19th of the same month, the House addressed the Queen to remove him on this ground, amongst others, that "he had fomented the distinction of parties, and that her Majesty's Protestant subjects had been most injuriously traduced and misrepresented;" accordingly, after the demise of Queen Anne, and before George the First arrived in England, the Lords of the Regency took this matter into their consideration: and "finding that the administration in Ireland was in general disliked by the Protestants, and that the city of Dublin was very much injured by having the right of choosing their own magistrates denied them, and that the Lords Justices and Privy Council there had not only refused to observe what the British Regency had ordered them to do, about allowing those of Dublin to choose their own magistrates, but remonstrated against it," the Regency thought fit, about the beginning of September, to remove Sir Constantine Phipps, Lord Chancellor, who was also one of the Lords Justices; and we read that "Sir Constantine's behaviour had made him so odious that his Majesty's friends in

* Journals of the Irish House of Commons, Dec. 1713.

Ireland did not think themselves safe while he continued in power. It soon appeared they had very good reason: for, by his influence, the Irish Lords Justices and Privy Council had, before the Regency's orders, drawn up a representation, with their pretended reasons why they could not comply with their said orders. One of these reasons was, because 'the allowing the city of Dublin to choose their Magistrates was derogatory from the prerogative of the Crown.' Their reasons were considered by the British Regency, and their Excellencies came to a resolution (Sept. 14th) that they were frivolous and scandalous. His Majesty (Geo. I.) approved their Excellencies' conduct, and returned them his thanks for it."*

These lessons of history will not be thrown away upon a reflecting and unprejudiced mind. What *has* been, may be again, and I see no reason to suppose that the prerogative may not be abused in future, as it was in former times, unless a sound public opinion be called into operation constitutionally to resist it; but to minds blinded by passion and party, the page of history, where its lessons are at variance with their prejudices, too often presents but a blank, and "the light which experience gives, is but a lantern on the stern, which shines only on the waves behind them."†

It was the maxim of one of the illustrious predecessors of her present gracious Majesty, that "to bind the hearts of the people to the throne, the obedience to the law, which is imposed

* Annals of George the First, London, 1716. See Appendix, post, Nos. XXV. and XI.

† The words of the sagacious Guicciardini are as true now as they were in his day—"Vedi che mutati sono i visi degli uomini ed i colori estrinseci; le cose medesime tutte ritornano, ne vediamo accidente alcuno, che a altri tempi non sia stato veduto."

"Wie sich der Sonne Scheinbild in dem Dunstkreis
Mahlt, eh' sie kommt, so schreiten auch den grossen
Geschicken ihre Geister schon voraus,
Und in dem Heute wandelt schon das Morgen."

Wallenstein.

upon the meanest, must be observed by the highest subject of the realm." "I am Queen," said Elizabeth, "of the small as well as of the great, and I will hear their complaint against the first magistrate in my kingdom." Sir Walter Raleigh mentions, as an instance of this, that "when the Lord Treasurer Burleigh, the Earl of Leicester, and Mr. Secretary Walsingham, set themselves against a poor waiter of the Custom-house, Queen Elizabeth sent for him, and gave him countenance against them all."*

But I feel, my lord, that it is time to bring this letter to a close. I have demonstrated that the measures which occasioned it are unconstitutional and contrary to law. Are they advocated on the ground of expediency—the idol of the day, which is put forward to justify every breach of law and infringement of the constitution? The prerogative of levying ship-money was put upon this plea. The prerogative of issuing general warrants—nay, every encroachment of prerogative has been justified by EXPEDIENCY. It is an un-English and a false doctrine: alien from the principles of the British constitution—alien from the principles of British law.†

But even upon the ground of "expediency," do the advisers of such measures consult the true interest of the Executive?—Are they so short-sighted as not to see, that whatever tends to lower the authority and influence of the Judges, lowers at the same time the authority of the law and the respect due to it? and whatever tends to depreciate either the one or the other, eventually and necessarily reacts upon the government itself, and weakens its hold upon the minds, if not upon the hearts of the people, far more than it depreciates the sanction and authority of the bench.

"Quam temere in nosmet legem sancimus iniquam!"

"The slightest arbitrary interference with existing laws, an

* Raleigh's "Prerogative of Parliament."—See Appendix, post, No. XIII.

† See Appendix, No. XII.

attempt systematically planned, and tamely permitted to overawe, silence, or exercise an undue influence over the bench—no matter from what quarter, popular or unpopular, it may come; nor under what name, privilege or prerogative it may be made—is a blow aimed at the very foundations of society, and at once renders all the most cherished results of good government—life, property and reputation—insecure."*

It is the acute and sagacious remark of a celebrated writer, "Il seroit bon qu' on obeit aux loix et aux coutumes parcequ' elles sont loix, et que le peuple comprit que c'est là ce qui les rend justes. Par ce moyen on ne les quitteroit jamais, au lieu que quand on fait dependre leur justice d'autre chose, il est aisé de la rendre douteuse, et voila ce qui fait que les peuples sont sujets a se revolter."†

But even supposing that a temporary popularity were gained by "an attempt to crush the authority of the Judges," is this an object worthy of the advisers of the highest magistrate of the country? Lord Bacon has somewhere said, "A popular magistrate is a deformed thing, and plaudites are fitter for players than for him. Do good to the people, love them and give them justice: but let it be *nihil inde expectantes*, looking for nothing, neither praise nor profit."

* Quarterly Review, No. 121.

† Pascal. In the same spirit, a learned and very able writer of our day says of the question of privilege, lately agitated in the House of Commons—"Will not such an attempt be regarded by the people as an attempt to crush the independence of the judges, and substitute arbitrary power for law? Is there not reason to apprehend, that if the House of Commons should attempt to take the law into their own hands, the people may be provoked to take it into theirs? God forbid that such a crisis should ever arise; but lest it should, let us inquire what the claims of the House of Commons are, and upon what grounds of reason or authority they rest." (Letter to Lord Langdale on the recent proceedings in the House of Commons on the subject of Privilege. By Thomas Pemberton, M. P.—London, 1837.)

The words of Lord Chief Justice Mansfield on this subject are worthy of being engraved on tablets of stone :—

"I honor the King and respect the people : but many things acquired by the favor of either, are, in my account, objects not worth ambition. I wish popularity: but it is that popularity which follows, not that which is run after. It is that popularity, which sooner or later, never fails to do justice to the pursuit of noble ends by noble means. I will not do that which my conscience tells me is wrong, to gain the huzzas of thousands, or the daily praise of all the papers which come from the press. I will not avoid doing what I think is right, though it should draw on me the whole artillery of libels : all that falsehood and malice can invent, or the credulity of a deluded populace can swallow. I can say, with a great magistrate, under circumstances not unlike, "ego hoc animo semper fui, ut Invidiam Virtute partam, Gloriam non Invidiam putarem."*

But it is not only the Judges whom such appointments have, no doubt unintentionally, a tendency to degrade : the whole body of the country gentlemen of Ireland is no less concerned. To pass over as unworthy of trust or confidence those whom the Chancellor and the twelve Judges present to the Executive as the first gentlemen of their respective counties—to set them aside and to substitute others, cannot but alienate the great body of the gentry of the country—and here again, the words of that oracle of wisdom, whom I have just now quoted, apply with equal force—"My meaning is not," said Lord Bacon, when, as Lord Keeper of the Great Seal, he addressed the Judges before the summer circuits in 1616 :—"My meaning is not, that you should be imperious and strange to the gentlemen of the country: you are above them in power, but your rank is not much unequal : and learn this, that power is ever of greatest strength when it is civilly carried."

I trust, my Lord, there are no remarks in these pages calcu-

* Lord Mansfield's judgment in the case of the King against Wilkes, 4 Burrow, 2562.

lated wantonly to wound the feelings of any man. With regard to the Executive, it is my habit always to speak and to think with the respect due unto that high office. My object is not to impugn authority, but to support it. I do not arraign the motives of any man. It is not my part to judge of these. I have endeavoured to argue the question solely as a question of constitutional law. My only object is to ascertain the law as in truth it is. Could men lay aside the chilling spirit of party, which makes them shrink from the examination of anything that seems adverse to the cause they have espoused—honest men of all parties would soon arrive at one and the same conclusion. In this, as on every other subject, TRUTH will eventually prevail. It is, "as a gentle spring, warm from the genial earth, and breathing into the snow-drift that is piled over and around its outlet. It turns its obstacle into its own form and character, and, as it makes its way, increases its stream: and should it be arrested in its course by a chilling season, it suffers delay, not loss, and waits only for a change, to awaken and again roll onward."*

I have the honor,

My Lord,

To remain your Lordship's humble and obedient servant,

A BARRISTER.

* Coleridge.

APPENDIX.

CONTENTS.

APPENDIX.

No. I.

Page 1.—As the letter alluded to has been wilfully garbled and misrepresented by those who have undertaken to support the advisers of the Irish Executive in the recent appointments of Sheriffs, it is only justice to present it to the public as it was originally written. It has been made the theme of "leading articles," by the ministerial organs of the press in Ireland. Having been written obviously in haste, and professing only to refer *generally* to authorities upon the question, and not to discuss the matter with particularity or at length, it has excited much more attention than it either deserved or was intended to do.

(From the Ulster Times of March 22d, 1837.)

TO MR. SERJEANT JACKSON, M. P.

Armagh, March 21, 1838.

My Dear Serjeant,—The recent superseding of the Protestant Sheriff of Monaghan, and appointment of a Roman Catholic, just on the eve of the assizes, and after the first Sheriff had exercised in part the functions of his office in the summoning of Juries, &c., has naturally excited a strong sensation in this country. The individual substituted is moreover understood *not* to be one of the three nominated by the Lord Chancellor and the Judges. If the Crown should attempt such a measure in the most remote county in England, it would rouse the national feeling from Carlisle to Land's End. Every party would join in the outcry, and I feel confident it is only necessary to bring this measure of the Irish Government before the English people, as a legal question, apart from politics or from party, to awaken their sympathy and excite their indignation. The Irish Government is said to have appointed either five or

six Sheriffs this year, and eight last year, without reference to the nomination of the legal and constitutional tribunal,—the Chancellor and the Judges. This ought certainly to be brought before Parliament, and if there is any doubt as to what the law is, that doubt should be removed by a declaration of the Legislature. That there is, however, no doubt as to the law, it does not require many words to demonstrate to any impartial mind. The statutes regulating the matter are, *amongst others*, the 9 Ed. II., 14 Ed. III., c. 7, 23 H. VI., c. 8. It is a remarkable fact, that, since the reign of Henry the Sixth, there is only one reported case in England of the Crown venturing to appoint a Sheriff without the previous nomination of the Chancellor and the Judges. It occurred in the 5th year of Elizabeth, when the plague raged in London, in consequence of which, Michaelmas Term, when the nomination usually took place, was not kept at Westminster, and the Judges were unable to hold their meeting to nominate the Sheriffs. The Queen was accordingly obliged to name them herself, but she appointed, in almost every instance, one of the two remaining on the Judges' lists of the preceding year. The statute 34 and 35 H. VIII., c. 26, expressly recognizes the nomination by the Chancellor and the Judges, *as the law of the land*. We are furnished by one of the highest authorities in our law with the unanimous decision of the twelve Judges of England on this point, so long since as the reign of Henry the Sixth. In Lord Coke's 2d Institute, (p. 559, folio ed.) now before me, it is stated that the King appointed, of his own authority, a Sheriff of Lincolnshire. He refused to act. The Chancellor consulted the Judges as to what should be done. Sir John Fortescue and Sir John Prisot were Chief Justices. Lord Coke, referring to the original record, from which he makes his extract, and which record expressly refers to a statute as then existing upon the subject, proceeds thus:—"The two Chief Justices the same day came into my Lords of the King's Counsel in the sterred chamber, and upon the above said demande sayde that them seemed, and so it seemed unto the remnant of the Judges, that the King did an error, when

that he made another person Sheriff of Lincolnshire, than was chosen and presented unto his Highness after the effect of the statute in such behalf made." They also decided that the person appointed by the King was not liable to a fine for refusing to act, and "advised the King that the next year, to eschew such inconveniences, the order of the statute in this behalf might be observed." Again, in the same book, (2 Inst. 501) Lord Coke says expressly, "The King may *not* choose a Sheriff contrary to the statute of Lincoln *de Vicecomitibus*, and refers to 14 Ed. III., 11 R. II., and 23 Hen. VI." There is an excellent summary of the law on this point in the first volume of Blackstone's Commentaries. I have not the passage at hand to quote, but as I recollect it, after referring to the above case in the reign of Queen Elizabeth, and to the *dictum* either of Dyer or Jenkins, that the Crown might act, notwithstanding any statute to the contrary, *(non obstante aliquo statuto in contrarium)*, he concludes in these words: "But the doctrine of *non obstante*, which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the Revolution, and abdicated at Westminster Hall, when King James the Second abdicated the kingdom." The above remarks though written in haste, and upon circuit, may perhaps have the effect of directing the public mind to a question of great importance in a constitutional point of view. It ought to be brought at once before the Legislature. If the Law and the Constitution are infringed in Ireland with impunity, the time will shortly come when they will be so in England also; but I am sure that the sympathy of every honest Englishman, be he of what party he may, will be awakened in the cause of the sister country no less than if the case were his own. Yours, my dear Serjeant, &c.

A BARRISTER.

No. II.

10 Hen. VII., c. 1, "An Act authorizing the Treasurer to make all officers as the Treasurer of England doth."

(This Act is repealed by 35 G. III., c. 28, Ir.)

It enacted "that the Treasurer of Ireland shall have as large

power in all things belonging to his office as the Treasurer of England hath, as for to make all customers, controllers, farmers and other officers accomptants for the most improvement and increasement of the King's revenue of this land: and over that be it ordained and established, that all Acts made afore this time by the authority of any Parliament holden within the said land concerning the election or making of the Sheriffs and escheators of the shires of the said land, and all other officers, accomptants and farmers' accomptants, contrary to this present Act, be revoked, annulled and deemed void and of none effect in the law."

The effect of this Act, *since repealed*, was to give the Treasurer of Ireland the same power as the Treasurer of England possessed. The latter was authorized to sit with the 12 Judges when they met to appoint Sheriffs. (9 Ed. II., 14 Ed. III., &c.)

The office of Treasurer of Ireland was united with that of the Treasurer of England by the 56 G. III. c. 98, s. 2; and when there is no Lord Treasurer of England, the office may be executed by Commissioners. Neither of these statutes alters or affects the duty of the 12 Judges in the nomination of Sheriffs. It is still the custom in Ireland to address every Bill in Equity filed in the court of Exchequer, "to the Chancellor, Treasurer, Lord Chief Baron and the rest of the Barons of the Court of Exchequer." The absence of the Chancellor and Treasurer does not affect the power or duty of "the Lord Chief Baron and the rest of the Barons" to give judgment in the case.

It must be a desperate cause which stands in need of such an argument as has been pressed, from this statute, into the service of the advisers of the Executive, by those who have trifled laboriously in their defence. (See post, Appendix, No. XIV.)

No. III.

Note to page 13.—In the margin of this memorandum, in the old edition of Dyer (1688, folio), where a decision of the Judges is spoken of, the phrase is, "*fuit tenus per le justices;*" and in the memorandum itself, "the opinion of certain of the judges" is mentioned on another point, and the accordance of the ser-

jeants at law and the other justices in the same; but when the memorandum states what was done in the election of Sheriffs, it does not state that this was submitted to the Judges at all. It expressly states there was *not* a meeting of the Judges in Michaelmas term; therefore it is more than probable, that the expression "*was holden*," alludes to an opinion expressed in the Starchamber or Privy Council. (See remarks of C. B. Atkyns, post, No. XIV. note.)

No. IV.

Note to page 14.—These Bulls of Provisorship were charters of the Pope, directed to the different Bishops of England, acquainting them that his Holiness had provided for such a person or persons (in one instance to the number of three hundred persons) by appointing him or them to such a benefice or benefices, when a vacancy should occur, and strictly forbidding the Bishop to admit any other person on any account whatsoever. These bulls concluded with a *non obstante*, that is, notwithstanding any *laws*, custom or right of patronage, or any thing else whatever. This precedent was adopted by Henry the Third in his charters, thereby, as he could not repeal, at least making ineffectual, the laws of the land; and thus began the King's claiming a dispensing power over the laws. When one of the first patents which contained this clause was produced in court before Roger De Thurkeby, one of the Judges in the reign of Henry the Third, he said (as we are told by Matthew Paris) "Heu! heu! hos utquid dies expectavimus, ecce jam civilis curia exemplo ecclesiasticæ conquinatur et a sulphureo fonte rivulus intoxicatur."

See Sullivan's Lectures on the Laws of England.

"As to the doctrine of *non obstante*, we have clear proofs of its odious beginning, as an honest Roman Catholic lawyer confessed with a deep sigh, 35 Hen. III. This *non obstante*, Matthew Paris calls a detestable addition against all reason and justice: and when, the year after, King Henry urged the example of the Pope, the Prior of Jerusalem said, "God forbid you should use this unpleasant and absurd word: as long as you observe justice you may be King, and as soon as you violate it, you will

cease to be King:" which shows how little foundation it was then thought to have: and what the whole nation thought of the Pope's use of it may be seen at large in Matthew Paris and Mr. Prynne's animadversions on the 4th Institute."*

No. V.

Note to page 14.—Matthew Westminster mentions that in the 45th year of Henry III. "the King placed new Sheriffs in every county, superseding the Sheriffs the Barons and people had made, whereupon the people manfully resisted the Sheriffs, and would not obey nor regard nor answer them in any thing, whereat the King was much troubled." Matthew Paris, Daniel and others, record the same fact. See a paper by Prynne, Bencher of Lincoln's Inn, in the Harleian Miscellany, viii., 82. The passage from Matt. Westminster, as I find it in the old folio edition, page 45, is this:—"Et hoc anno tumultus et seditio fuit in populo per comitatus Angliæ pro novorum Vicecomitum institutione, singulis in pagis per regem positorum prioribus, videlicet, quibus per Barones et communitatem terræ fuerant prius commissi comitatus, regia remotis indignatione: sed Comitatuum comprovinciales quorundam optimatum regni juvamine animati ac consilio suffulti, necnon et sagacitate magnâ edocti, novos repulere viriliter Vicedominos, nec eis quicquam intendere volebant nec respondere: propter quod igitur Rex Henricus, gravi mentis anxietate turbatus."†

No. VI.

Case of the Earl of Mortimer (commonly called Jack Cade) not found in any of the law books.

Note to page 16.—In referring to instances of an illegal exercise of the prerogative, I find I omitted one which, to those who are in search of *precedents*, may be of service.

* Atwood's Examination of the Judgment in Sir E. Hale's case.

† Matthew Westminst. Flores Historiarum. 381. Ed. Franc. 1601.

Blackheath.

Enter George Bevis and John Holland, Dick the Butcher, Smith the weaver, and others in great number.

George. I tell thee, Jack Cade the clothier means to dress the Commonwealth, and turn it, and set a new nap upon it.

John. So he had need, for it is threadbare. Well, I say it was never merry world in England since gentlemen came up.

* * * * * Let the magistrates be labouring men, and therefore should we be magistrates.

Dick. The first thing we do, let's kill all the lawyers.

Cade. Nay, that I mean to do.

* * * * *

Dick. If we mean to thrive and do good, break open the gaols and let out the prisoners.

Cade. Fear not that, I warrant thee. Come, let's march towards London.

Enter a Messenger.

Jack Cade proclaims himself Lord Mortimer.
His army is a ragged multitude
Of hinds and peasants, rude and merciless:
All scholars, *lawyers*, courtiers, gentlemen,
They call false caterpillars, and intend their death.

Cade. Now is Mortimer Lord of this city. Henceforward it shall be treason for any that calls me other than Lord Mortimer.

* * * * * *

So, sirs:—now go some and pull down the Savoy, others to the Inns of Court,—down with *them* all.

Dick (the butcher.) I have a suit unto your Lordship.

Cade. Be it a lordship thou shalt have it for that word.

Dick. Only that the laws of England may come out of your mouth.

Cade. I have thought upon it: it shall be so. Away, burn all the statutes of the realm. My mouth shall be the Parliament of England!— *Henry the Sixth, part 2d, act 4, s. 3—7.*

No. VII.

The Legal Consequences of the Late Appointments of Sheriffs.

It has been anxiously asked by the public, what are the consequences of these appointments by the Lord Lieutenant, of his own authority, in six several counties of Ireland? If there was no legal Sheriff at the last assizes, was there a legal Grand Jury?—Were the presentments valid?—Were the convictions valid?—Could the prisoners have availed themselves of a plea, or challenge to the array, either of the Grand or the Petit Juries? If they could, will not the same difficulties, it has been further asked, embarrass the proceedings at the next assizes, if those who now act as Sheriffs, remain in office? If they could not, is not this an additional reason for some step being taken to prevent the illegal appointment of an officer, on whose returns of jurors the life or character of a prisoner may depend? It has been said that the opinions of eminent lawyers of former days have been given on similar questions: that Sir John Hawles, who was Solicitor-General in the reign of William III. and celebrated, as a constitutional lawyer, by the part he took in the debates on the question of privilege between the two Houses of Parliament, in the great case of Ashby and White, has left on record his opinion, "that Grand Juries, returned by such as are Sheriffs in *fact*, not in *right*, are illegal, and convictions on their presentments are illegal and void." It is said that he mentions Lord Chief Justice Herbert as having held the same opinion, and that Lord Coke seemed also to hold it, for which he refers to his Commentary upon the 11th Hen. IV.*

It has been also urged, that the 2nd of William and Mary, c. 8, which reversed the judgment on the *Quo Warranto*, brought by Chas. II. against the city of London, after which judgment the King nominated the Sheriffs until the charter was restored—that that Act of Parliament, to prevent the acts of the *de facto* Sheriffs being brought in question or set aside, which would have

* Hawles' "Remarks on the Trial of Fitzharris," are cited as an authority for this; also, 3rd Co. Inst. p. 33, 34.

been attended with the most serious consequences—after declaring the judgment by which the city was deprived of its charter illegal, specially provides by the 4th section, (which is in the form of a proviso,) that "no proceedings in law or equity made in the Sheriffs' Courts or other courts, &c., since the said judgment given, shall be avoided for want or defect of legal power in those that acted as Judges, Officers, &c., but shall be of such effect as if such officers, &c. *had acted by virtue of legal authority.*"

It has been further urged, that the Act 1 William and Mary, which annulled the attainder of Algernon Sydney, recites, as one of the causes moving the Legislature so to do,—"the illegal return of the Jurors" by whom he was tried, and his being deprived of the right of challenging those Jurors as incompetent, and it pronounces the conviction "unjust and wrong:" also, that the Act of 1 William and Mary, which annulled the attainder of William Lord Russell, recites as one of the causes of reversing that attainder, that there was "an undue and illegal return of Jurors"—and that he had been deprived of the right to challenge the Jurors as incompetent, "they not having a freehold, and that he had been wrongfully convicted, attainted, and executed for high treason."*

Upon these questions, and upon the inference which others have drawn from the statutes and the opinions referred to, I OFFER NO OPINION WHATEVER. They do not fall within the object of this letter, which is not to point out consequences, but to shew that the appointments are, in themselves, contrary to law. The case of the Appleby Assizes in 1825, has also been adduced as throwing light, by analogy, on these questions. The Earl of Thanet, hereditary High Sheriff of Westmoreland, having lately died, and his successor having neglected to renew the deputation to the under-Sheriff, or to appoint another, the Grand Jury were dismissed by Mr. Justice Holroyd, who adjourned the assizes, considering there was no person by whom they could be *lawfully* summoned.—(Lewins' C. C. post, No. XVIII.)

* See Hargrave's State Trials, viii., 471.

The strictness with which the courts act in England, where proceedings are taken *coram non judice*, is illustrated by the case of the Middlesex Special Commission, in 1833. The Session met regularly on Monday, and was regularly adjourned to Tuesday. The Court was not legally opened or adjourned on Tuesday or Wednesday, and did not meet for business till Thursday, but the witnesses were sworn on Tuesday and Wednesday to give evidence before the *de facto* Grand Jury, by the crier of the Court, in the usual form. Two magistrates attended on the Wednesday, and received the bills of indictment from the Grand Jury. This irregularity in the swearing of the witnesses prevented, in the opinion of the Judges, the prisoners from being legally convicted. Those who were convicted of trifling offences, on the former indictments, were discharged. Some had not been tried at all, and others were tried and convicted of serious offences These latter were tried again upon the Special Commission, which was issued on account of the aforesaid illegality in the former proceedings. (6 Carr. and Payne, 90.) These last cases are referred to only to shew the extreme strictness with which the English law deals with acts connected with the administration of justice, which are done *coram non judice*.

An indictment is defined by Lord Chief Baron Comyn, (Digest, Indictment, A.) an accusation or declaration at the suit of the King for some offence found by a *proper* Jury of twelve men. A case of the King against Keeffe and Carroll, tried at the Kilkenny assizes in 1813, is stated by Baron Richards, in his judgment on the Registry question at Sligo in Alcock's case, where an Irish Peer, Lord Desart, was called on the Grand Jury, and a bill of indictment for a felony was found, and the prisoners were convicted. The prisoners, who had not challenged on this ground, brought a writ of error in the King's Bench, and the judgment was reversed. It does not appear, on the statement of the learned Baron, whether this was the point on which the judgment was reversed, and it has been accordingly cited as bearing upon the Sheriff question. That it does not apply, see

extract from Crown Book, post, No. XXIV. The case of the King *v.* Verelst, 3 Campb. 432, has also been referred to. These cases and the statutes previously cited, are probably adduced, not as authorities on the precise point in question, which they are not, but only as showing that it is not enough that those who act in the administration of justice should be clothed *de facto* with the character in which they act, unless they are so *de jure* also. When, indeed, an individual is appointed by a competent authority, and the defect consists in the omission of the person so appointed to do some act required by law, as to take an oath, &c., (as in the Margate Pier Company *v.* Hannan, and that class of cases,) it is admitted, that the being clothed *de facto* with the authority is sufficient.

Such cases might be applied to the case of a Sheriff in this way. The 5th section of the 5th and 6th William the Fourth, c. 55, enacts, that no Sheriff or under-Sheriff shall act as such until he has taken his oath of office, nor until such affidavit is lodged with the secondary. If he should act as Sheriff when legally appointed, before he takes this oath, the class of cases referred to would apply. It may be said, indeed, that the interest of the public at large requires that the acts done, even by an illegal officer, should be sustained, and that the public inconveniences that would follow from holding him to be no officer at all, would be very great. There is much weight in such an observation, but it has been chiefly applied, by learned Judges upon the English Bench, (Lord Chief Justice Tenterden, and others,) to the construction of statutes which were considered reasonably to admit of two constructions, and where the restraining clauses were held to be only prohibitory upon the officer ; and where such officer acting contrary to such prohibitory clauses, would subject himself, either by the words of the Act, to a penalty, or by the spirit of the Act, to a prosecution by indictment. But in such cases no question of constitutional right or privilege arose. The public have a right—it is a privilege given them by the constitution—to have the Sheriffs of the country, whose election was originally vested in them, chosen

out of a list returned by the tribunal to which the law has exclusively intrusted such return, and it was remarked by a learned Judge, in a case tried under the Irish Convention Act, "that great constitutional privileges are not to be put down by arguments *ab inconvenienti—that* argument would strip the subject of some of his most legitimate and acknowledged privileges." It is remarked in a recent work upon the Prerogative of the Crown, that, "As the power of electing Sheriffs was originally in the people, the statutes which vest the right of appointment in others must, on principle, be observed: ..... and, if the point of naming a pocket Sheriff came judicially before the courts of law, it can hardly be doubted that its legality would be denied."* (See post, No. XXVI.)

It is a fundamental general rule, that the Crown cannot sanction any act forbidden by law. "Attribuat igitur Rex legi," says Bracton, "quod lex attribuat ei, videlicet dominationem et potestatem: non est enim Rex ubi dominatur voluntas, et non lex."

"The laws are the very ligaments and sinews that bind together the head and members, without which the body politic is but a rope of sand, or like the feet of Nebuchadnezzar's image, iron mixed with clay, that can never cleave one to another nor cement."†

However, upon the different points mooted above, I wish to be understood as not offering any opinion. My object has been to state what the law is—the consequences of the breach of it are questions for another place. But let it not be forgotten, that the greater the difficulty in which an individual, upon his trial for life or for character, is placed, in availing himself of pleading in abatement to a Grand Jury or challenging a petit Jury, or moving in arrest of judgment, the more imperative it is that the law and the constitution should be inviolate.

* Chitty on the Prerogative.

† Lord C. B. Atkyns on dispensing with Penal Statutes. Law Tracts, 8vo. London. 1734.

No. VIII.

Note to page 15.—Extracts from the animadversions on the Lists of Sheriffs in the reign of James II.

"*List of the Irish Sheriffs sent me by the Lord President, with Answers to the Reflections thereupon; sent to my Lord President, March 2d*, 1685—6.

Dublin. Henry Fernly, a weak man, and whiggish.

Answer. A quiet, sober, ingenious man; a very good justice of the peace, of very loyal principles, so far from being a whig, that he is a constant Church-of-England man.

Wexford. Robert Carey, an ensign, son of an old Oliverian.

Answer. Never a soldier; descended but meanly, his father and mother being mere Irish, and Roman Catholics, their former name M'Creane. He has an estate of £800 per annum, got by purchasing soldiers' debentures; and thought by some to be a Roman Catholic.

Kildare. Sir Arthur Jones, cornet of horse, and public railer against papists having power: for the new interest, and of the Cromwellian race.

Answer. A cornet of horse; but in his humour not apt to rail against Roman Catholics, or any others. His estate is all new interest, granted to his father, Sir Theophilus Jones, for his early loyalty, and activity in the late King's restoration.

Westmeath. John Phelips, of very ill reputation, and Sheriff last year.

Answer. Mr. Phelips, is so far from being of a very ill reputation, that there is not any man in the county, nor in the army, under a better character. He is son of a very loyal gentleman, Colonel Edward Phelips, and brother to Sir Edward Phelips of Somersetshire; a family that has deserved well of the Crown; and for whom I will be responsible at any time, having particularly known him ever since the King's restoration. But, after all, he is not Sheriff this year, but one Colonel William Murray, brother-in-law to my Lord Granard, who served the late King in his army in Scotland, and was presented there by the remonstraters, for his loyalty.

Leitrim. James Wynne, of Cromwell's race and principles.

Answer. It is true his father was a captain in Cromwell's army, and died, his son being young. But it is as true, that this gentleman, ever since appearing in the world, has shewn himself very zealous and active in the King's service, and has that reputation in his county.

Meath. Lane Dowdall, a factious, caballing whig.

Answer. This gentleman is of an ancient, old English family in that county, where he behaves himself with great sobriety, and is so far from being a favourite with the whigs, or caballing with them, that they are dissatisfied with his being Sheriff—concluding him a friend to the old natives of the county.

Cavan. Samuel Townly, rather worse, if possible; and between man and man, very dishonest.

Answer. This character seems to be given out of some particular pique, or want of knowledge of him, for he has always been loyal: never served Cromwell, but having lived privately till the late King's restoration, soon after was put into the commission of the peace, in which he has done his duty with activity and diligence; and particularly has been very active in the severe prosecution of tories, robbers, horse and cow stealers, with which sort of people the county Cavan very much abounds.

Donegal. John Forward, a zealous Protestant, and famous priest-catcher.

Answer. This gentleman is a very good Protestant of the Church of England, and very loyal; but never was a priest-catcher; and the occasion which draws this reflection upon him is, because at a quarter sessions, held at Raphoe, the 24th day of April, 1684, he, with other justices of the peace then upon the bench, was active in putting in execution that statute made in this kingdom, the 2nd of Queen Elizabeth, for the uniformity of the Common Prayer, which the said justices intended principally against the nonconformist Protestants, who swarm much more in that county than the Roman Catholics.

Lowth. Sir Thomas Fortescúe, a creature of the Chancellor, but loyal.

Answer. I hope it is no crime to be a friend of the Chancellor's. A very worthy gentleman; but being an officer in the army, has left his residence in the county, and is not Sheriff, but Norman Garston.

Antrim. Thomas Knox, a Presbyterian, Scotch whig.

Answer. The character must be given out of prejudice, or particular pique, for there is not the least shadow of truth in it; this person being notoriously known to be a constant frequenter of the church, and never resorted to any conventicle since he lived in Belfast, where he is the most considerable merchant.

Armagh. Arthur Brownlow, a loyal honest gentleman.

Answer. This requires no answer.

Waterford. Sir Boyle Maynard, loyal, *unless altered by his Protestant zeal.*

Answer. Certainly a most loyal gentleman, and therefore, designed to be Sheriff, *until he produced the King's letter to me,* dated 16th October last, *to exempt him* from being Sheriff in any county in Ireland; and one Richard Christmass is Sheriff, a very loyal, worthy gentleman.

Cork. Lawrence Clayton, a caballing whig.

Answer. It is not reasonable to conclude this gentleman a whig, his father being a very loyal old cavalier, and sufferer for the Crown; and was condemned to die in Cromwell's time. At the King's restoration, in reward of his services, he was made a trustee and register for the officers who served in Ireland before 1649; and out of the lands set apart for those old cavaliers made his fortune, which is since descended to his son, who has not yet, by any public actions, discovered any inclinations to caballing against the government, or whiggism."

Correspondence of Henry Hyde, Earl of Clarendon, vol. I. page 284.

No. IX.

Decision of the twelve Judges, in the reign of Hen. VI.

Note to page 9.—This unanimous decision of the twelve Judges of England, which, according to Lord Coke, is, for matter in law, of the highest authority, next to parliament, (2 Inst. 617,) is, first, the advised resolution of the twelve Judges, including "two such famous chief justices," as Lord Coke calls them, as Prisot and Fortescue, that the King did an error, that is acted contrary to law, when he made another person Sheriff than was chosen, and presented unto him according to the statute; in other words, "it is a decision," as Lord Chief Baron Atkyns remarks, "that the King could not choose any other than one of the three assigned to him." (Law Tracts, 256.) Next, it is an unanimous decision of the same tribunal, that not only was the appointment illegal, but that the person appointed could not be compelled to act. Now, as has been observed to me by a brother barrister, to whose learning, as a constitutional lawyer, I am indebted for some of the most valuable suggestions in the preceding letter, if such appointments were legal, it would have been compulsory upon the persons appointed to act. The Crown, by its prerogative, is the fountain of all public official dignity, honour and service, except where the law has vested the appointment in other hands. And so, until the statute altered the common law, if the Crown appointed a person of certain fortune to be a knight, it could compel him to accept it. (2 Roll. 167, 20. 7th Hen. VI. 14, *par faire service al Roy et al Realme in course de justice.*) So the Crown can compel a person, whom it names to be serjeant, to take the degree. (2 Roll. 167, 10.) But the King hath no prerogative but that which the law of the land allows hims; (12th Co. 76,) and no prerogative of the Crown can be claimed, contrary to Magna Charta. (2 Inst. 36.) The King had originally no prerogative in the appointment of Sheriffs, no more than in that of Coroner. The law vested the election of both officers in the people, and when the statute took the election of the Sheriff from the people, it vested it in the Chancellor, Treasurer, and the Judges.

No. X.

The Monaghan Sheriff.

The persons returned by the Chancellor and the twelve Judges as fit and proper persons to serve the office of Sheriff, for the county of Monaghan, for the year 1838, were, (as appears by the Dublin Gazette,) the following:—Thomas Crawford, of Fort Singleton; Thomas Coote, of Fortwilliam; and Robert B. Evatt, of Mount Lewis, Esquires.

Mr. Coote was selected by his Excellency, and appointed early in February. He and his sub-Sheriff proceeded to Dublin. He was sworn in before the Barons of the Exchequer, February 16th; his sub-Sheriff was also sworn in. On the 12th of March, it was intimated to Mr. Coote that "his appointment was revoked."

Mr. Kenny, not in the Judges' list for this or any preceding year, and whose name will be found in the requisition hereafter referred to, was sworn in on either the 16th or 17th March. The Grand Jury assembled on Tuesday, the 20th, and the assizes were fixed for Friday the 23rd.

The Dublin Evening Post, of March 3rd, contains a letter, purporting to be written by a Monaghan freeholder, dated Feb. 27th. It states that "the announcement of the Evening Post, considered here as the Government paper, calmed the alarming apprehensions of the Catholics." (The number of the Evening Post alluded to, contained a paragraph, stating that "none of the Grays were to have anything to do with the sub-Shrievalty, and that Captain Thomas Coote had not appointed James Gray, (son of Mr. S. Gray,) Sub-Sheriff.")

"Were it not," the writer of the letter continues, "for the above paragraph, there would have been a meeting of the Catholics of the county in the course of this week, or simultaneous meetings of all the parishes in the county, on Sunday next, to give public expression to their fears, and to memorial the Government to protect them from the Grays." This was written on the 27th February, but not published till March 3d. Whether the "simultaneous meetings of all the parishes in the

county" took place on the following Sunday, does not appear. The threat, however, seems not to have been deemed sufficient, for in the Evening Post of the 10th of March, the following requisition appears. It purports to have been written on the 5th of March, 1838. The letter from Mr. Drummond, superseding Mr. Coote, was dated on the 12th of that month, two days after the requisition was published.

From the Evening Post of the 10th March last.

COUNTY OF MONAGHAN.

" We the undersigned, request a meeting of the Catholics of the county of Monaghan, to be held at Castleblaney, on Tuesday, 13th March, instant, to express publicly their indignation at the outrage inflicted upon their feelings by the recent appointment of the Deputy Shrievalty of this county; and to adopt such means as may be deemed effectual, to prevent the evil consequences so much to be apprehended from the said appointment.

" *March 5th*, 1838.

W. H. Kenny, Rocksavage*
†Edward Kirwan, D.D.
D. Boylan, P.P.
D. Finigan, P.P.
H. Kindilen, P.P.
Bartholemew Callan
John O'Hagan
Peter Hoey
James M'Neill, (Admr.)
Edward Croker
Edward Carolan
John M'Keon
Wm. Murray, M.D.
Peter M'Quaid
Henry Lemon
John Sheill
John M'Gennis
Luke Adderley
James Goodwin, R.C.C.
Thomas Cuningham
Hugh Maguire
J. Owen, R.C.C.
Dominick Duffy
Thos. M'Evoy Garthan
George H. Gartlan
Plunket Kenny
Felix Keone, R.C.C.
Edward Kernan, R.C.C.

* This is the gentleman appointed High Sheriff in Mr. Coote's place, a few days afterwards.

Thos. Murphy, Surgeon
Patrick Bartley
Michael Fleming
Edward Carolan
Thomas Murphy, Sen.
Jas. Manon, Carrickmacross
Patrick Clarke
James Moynaghan
Jas. Duffy, P.P. Clones
Michael M'Evoy
Peter Donnelly
Pat. M'Mahon, R.C.C.
Thomas Cosgrave
Roger Sweeny
Philip Brennan, P.P.
Thomas Bogue, P.P.
Michael M'Caffrey
John M'Gennis
Michael M'Quaid
Patrick Bellew, P.P.
Owen Kelly
John Murray
John Caulfield, R.C.C.
Peter M'Cullagh
Patrick Kelly
John O'Hanlon
Bernard Elliott
Thomas Johnston
James Clarke
John M'Canon
Thomas Conolly
Wm. M'Clean
Philip Gorman
Charles M'Clusky, P.P.
John Connor
Peter M'Elerney, R.C.C.
Francis M'Sherry
James Manon
Jas. Duffy, P.P., Minno
Patrick Smith
Thomas Sweeny, P.P.
James Scott, R.C.C.
H. M'Donnell, R.C.C.
P. Murray, R.C.C."*

From the Ulster Times of March 27th, 1838.

"MONAGHAN ASSIZES, MARCH 24TH.

"The case of 'the Queen at the prosecution of Alexander Mitchell, Esq. against Plunket Kenny, Esq.' was called on. The indictment was for bearing a challenge, which the traverser followed up by calling the prosecutor 'a blackguard and a coward.' The prosecutor is a Protestant, agent to the Shirley estate, and a magistrate. The traverser is a Roman Catholic,

* It seems that in the above list of signatures, one is that of the present Sheriff, one that of a Roman Catholic bishop, and twenty are the signatures of Roman Catholic priests and curates. Is there the name of one Grand Juror of the county—one of the resident gentry—or one justice of the peace?

and brother to the new Sheriff, who was appointed in Mr. Coote's place, a few days before the trial. This case stood over for trial since the last assizes, and had acquired great notoriety in the county. The jury being returned by Mr. Kenny instead of the Coroner, the prosecutor had a clear legal right (on the ground of *affinity*,) to challenge the whole jury, as returned by the brother of the traverser! Such was, however, his confidence in the honesty of his case, that he declined exercising the right. The traverser, Mr. Kenny, appeared at the bar, attended by his agent and counsel. The jury were called, and just before they were sworn, a plea was put in, and handed to the learned Judge, *on behalf of Mr. Kenny*, declining to stand his trial, and challenging the whole array, 'because (he said) one Thomas Coote, Esq. was, at the time of returning the jury, and now is, in law, High Sheriff of Monaghan; and the said jurors were returned by one W. H. Kenny, Esq. who was not, and is not the legal Sheriff.' This was the substance of the plea. Utter amazement was exhibited by almost every countenance in the large and crowded court. One could scarcely trust his own ears or eyes when the plea was put in. The counsel for the prosecution requested time to draw a replication. In the mean time, however, the traverser reconsidered what was best to be done. Such plea, though successful in putting off the case, could not prevent its being tried at some future assizes; and when the counsel for the prosecution were about to hand in their replication, counsel for the traverser stated, that there had been a conference in the interval between the parties, or their counsel, and that it was agreed the matter should be settled."

From the Newry Commercial Telegraph, of March 27th, 1838.

"In the case of the Queen at the prosecution of Alexander Mitchell, Esq. against Plunket Kenny, Esq. considerable sensation was excited in the court by Mr. Kenny's counsel challenging the array of the petit jury, empanelled and returned by Mr. Kenny's own brother, on the ground that the appoint-

ment of his brother as Sheriff was illegal! This was certainly a remarkable feature in the case. The prosecutor, Mr. Mitchell, had an undoubted right to challenge the jury as having been returned by the brother of the traverser. This was illegal, as on account of the affinity between the Sheriff and the traverser, the jury ought, according to law, to have been returned by the Coroner of the county. Mr. Mitchell, however, trusting to the strength of his case, and indifferent what jury should try it, would not avail himself of the exercise of the right; while the traverser, Mr. Kenny, challenged the whole array on the ground that his own brother, who returned them, was not the legal Sheriff!

"The whole features of the case were, in truth, most remarkable. It had stood over from the last assizes; (the traverser having then challenged the jury on the ground that it was through the influence of Mr. Mitchell, that the sub-Sheriff of last year was appointed;) on several accounts it had obtained great notoriety in the county; and a few days before it was to come on for trial—the very week previous—Mr. Coote, the Protestant Sheriff, was put out, and Mr. Kenny, a Roman Catholic, and the brother of the traverser who was to stand his trial, was appointed Sheriff, and returned the jury who were to try his own brother."

Lest, however, an unfavourable inference should be drawn from the preceding notices of the Monaghan Shrievalty, it is only fair to state the words which the noble Lord at the head of her Majesty's government, is said to have used in the House of Lords: "I deny that the Sheriffs have, in any case, been appointed on political grounds."*

By some singular, fortuitous coincidence, there is scarcely a fact connected with the Sheriff question in Ireland, for which there is not a precedent in those palmy days of constitutional law and liberty, the reign of James the Second.

In the autumn of 1687, a letter, in the form of a requisition, was written to his Majesty, (found in bishop Tyrrell's papers,

* Mirror of Parliament, ii. 1226, debate of April 28th, 1837.

and given at length by archbishop King,) from which the following are extracts.

"MAY IT PLEASE YOUR MAJESTY,

"I humbly beg of you, for God's sake and your own, to read what I here presume to write..... Sir, as I am one that make it my business to study your interest, I took the liberty of telling you in former letters, that in order to replant religion in your dominions, you ought to begin with Ireland, where the work is more than half done to your hand; and where your prerogative allows you to do with that kingdom as you please.....nothing causes irresolution more than a medley of counsellors of a different religion with their prince, who will be on all accasions as industrious to prevent, as he can be for carrying on any design for re-establishing religion. .....

There is but one sure and safe expedient, that is, to purge without delay the rest of your Irish army, increase and make it wholly Catholic: raise and train a Catholic militia there: place Catholics at the helm of that kingdom: issue out *quo warrantos* against all the corporations in it; put all employs, civil as well as military, into Catholic hands.....

As to your revenues, you are cheated of them by the mismanagement and sinistrous practices of your commissioners, whereof the major part are in their hearts rank whigs, and of a whiggish race.....The seed is sown in many parts of England, and the harvest will, without doubt, be great and plentiful, but the workmen too few, if you do not provide yourself with Catholic Privy Counsellors, Ministers, Judges, officers civil and military, and servants.....When your Counsellors and Ministers are thus qualified, and not till then, you may hope to do what becomes a James the Second; and to furnish yourself with able men, you must follow your royal father's advice to the Prince of Wales, that is, with an equal eye and impartial hand, distribute favours and rewards to all men as you find them for their real goodness, both in ability and fide-

lity worthy and capable of them. Such as fear God, as the truly wisest will advise you to the best measures for promoting God's glory. Men of truth will, like TYRCONNEL, serve you faithfully, without trimming, though with never so apparent hazard to their fortunes and lives."

This letter was written in the autumn of 1687. It had its effect. Lord Clarendon was removed from the viceroyalty of Ireland, and TYRCONNEL was appointed in his stead.

No. XI.

SIR CONSTANTINE PHIPPS.—LORD ROCKINGTON.

Note to page 23.—The character and fortune of Lord Rockington, as delineated by the noble author of "YES AND NO," is an impressive lesson to all who are intrusted with delegated power. In describing himself he says :—"I had always enjoyed the substantial favours of fortune; for a time I had strutted in the tinsel trappings of fame. I was the people's idol; courted, caressed and rewarded—it was the heaven of an hour. At this time a distant and disturbed colony required controul. I was selected, from the difficulty of the task, and at once incurred the greatest curse that can befal the native of a free state—responsibility for the exercise of arbitrary powers. I know not now whether my acts were right or wrong—success did not sanction them.....the reaction of public opinion was overwhelming. I became the object of universal odium. The most subservient of my creatures, who had participated in my every action, sought to save themselves at my expense; and when I thought I had been confiding in faithful followers, I found I had been harbouring pseudo-patriot spies. I hastened to England to clear my character; every ear was shut against my discredited defence—every door was closed against my disgraced person." See a remarkable passage in Goethe's "*Dichtung und Wahrheit.*" (Chapter XI.)

No. XII.

Text of the Coronation Sermon of William III. *Doctrine of Expediency.*

Note to page 30.—Thucydides says of the degenerate Spartans of his day, τα μεν ἡδεα καλα νομιζουσι, τα δε ξυμφεροντα δικαια. "Pray, sir," says Swift, addressing Secretary St. John (afterwards Lord Bolingbroke) "pray, sir, find an expedient—finding expedients is the business of Secretaries of State." No writer of ancient or modern times has condemned this selfish doctrine of Expediency, "groping its way among partial and temporary consequences,"* more strongly than that great heathen philosopher, Plato.

Τα δικαια και τα αγαθα και τα καλα κακως κρινει, το αυτοῦ προ του αληθοῦς αει τιμᾶν δεῖν ηγουμενος. Ουτε γαρ ἑαυτον ὁυτε τα ἑαυτου χρη τον γε μεγαν ανδρα εσομενον στεργειν, αλλα τα δικαια, ἐαν τε παρ' ἀυτῶ εαν τε παρ' αλλω μαλλον πραττομενα τυγχανη. Νομοι, B. v. 4. Bekker's Edition.

How different from the doctrine of Expediency is the text which William the Third chose for his Coronation Sermon :—

"The God of Israel said—the rock of Israel spoke to me : he that ruleth over men must be JUST, ruling in the fear of God, and he shall be as the light of the morning when the sun riseth ; even as a morning without clouds ; as the tender grass springing out of the earth by clear shining after rain."

No. XIII.

Note to page 30.—The name of ELIZABETH will remind many readers of the prophetic language in which Archbishop Cranmer is represented as anticipating her glorious reign. What loyal subject would not gladly and hopefully apply it to our present gracious Queen—whose reign may God prolong for many a year, the glory and happiness of her people—now only entering upon life, and, in the freshness of youth and beauty, "cheering and adorning the elevated sphere in which she begins to move, full of life and splendor and joy."

* See a most eloquent pamphlet by Wordsworth, the Plato of philosophic poets, on the relations of England, Spain and Portugal. London, 1809.

"Yet now she promises
Upon this land a thousand thousand blessings,
Which time shall bring to ripeness: she shall be
A pattern to all princes living with her,
And all that shall succeed—all princely graces,
With all the virtues that attend the good,
Shall still be doubled on her; truth shall nurse her;
Holy and heavenly thoughts still counsel her:
She shall be loved and feared; her own shall bless her:
In her days, every man shall eat in safety,
Under his own vine, what he plants; and sing
The merry songs of peace to all his neighbours;
GOD SHALL BE TRULY KNOWN: and those about her
From her shall read the perfect ways of honor,
And by *those* claim their greatness, not by blood.
————————Our children's children
Shall see this, and bless heaven."

Henry the Eighth.

No. XIV.

(*Continued from Appendix, No.* II. *ante.*)

This application of the 10 H. VII. Ir. has not even the merit of originality. The Marquess of Lansdowne, in the excitement of debate, said upon a late occasion,—"Since I came into the House I have referred to the Irish Act of Parliament on the subject, (1 Hen. VII.) by which all the then existing regulations and laws, with respect to the appointment of Sheriff, were done away with, for the express purpose of vesting the appointment in the Crown, and from that time it has accordingly remained vested in the Crown—no Act or interference of Parliament having deprived the Crown of the authority which has been so reposed in it."*

His Lordship does not seem even to have known that this statute of Hen. VII. was repealed more than 40 years since, by the 35 Geo. III., c. 28, Ir., and that the statute repealing it treats it merely as a regulation concerning the accounting of

* Mirror of Parliament. Debate of May 17, 1836. 1 Hen. VII. must be a misprint for 10 Hen. VII. There is no stat. 1 H. VII. Ir.

certain officers of the treasury and revenue, and this Act (35 Geo. III.) is entitled, "An Act for the better regulation of the receipts and issues of his Majesty's Exchequer." Neither Act interfered, in any degree, with the tribunal which the law had appointed for the assigning of Sheriffs, save that the Act of Hen. VII. (afterwards repealed) gave the Treasurer for Ireland the same power which the Treasurer for England had under the English Acts; and HE never had the power of appointing Sheriffs independently of the Chancellor and the Judges.

Lord Chief Baron Atkyns, speaking of the selection of the Sheriff by the Crown, says, "It is true, that out of reverence to the King, the great officers who had the assigning of Sheriffs did afterwards use to name three persons, out of which number they left it to the King to choose one for every shire: but this was more out of deference to the King, than out of any strict obligation so to do, and the election made by the King was in law accounted an assignment by these officers."*

Again he says, "The making of Sheriffs doth not nor ever did belong to the King, neither at the common law nor by any Act of Parliament;" and again, "It neither is nor ever was in the King;" and again, "The law of King Edward the First, (which I take to be the Confessor) mentions this election (of the Sheriffs by the freeholders) as an use and custom." He cites Lord Coke as stating, that "by the 28 Ed. I.," by which the King granted or rather confirmed to his people the election of Sheriff, "the ancient usage which the people, that is, the freeholders, had, was restored to them."†

No. XV.

SHERIFFS IN WALES.

Letter, page 6.—The 1 Wm. & Mary, Sess. 1, c. 27, (which recites the 34th & 35th H. VIII. c. 26. and alters it) enacts

* Law Tracts. Power of dispensing with Penal Statutes, 256.

† Ibid, 255. That Lord C. B. Atkyns did not consider the memorandum in Dyer (see Appendix, ante, No. III.) as a decision of the Judges, see his Law Tracts, ibid.

(s. 3.) that the justices of the great sessions in Wales, shall yearly nominate three substantial persons for each shire, to be Sheriffs of the same, and shall certify their names to the Privy Council *crastino animarum*, to the intent the King and Queen's Majesties, and the survivor of them, and their successors, being thereof advertised, may appoint *one of the persons so certified* in any of the said shires to be Sheriff for that year."

No. XVI.

Letter, page 20.—Notwithstanding this letter of the Lord Chief Justice, the Mirror of Parliament represents his Excellency Lord Mulgrave as stating, "in Ireland there is no general meeting of the Judges, or of persons representing the executive for the purpose:" and again, "the Judge going the Assize makes a return of three names to the Government, and to the list so returned the selection is usually confined."*

No. XVII.

Letter, page 11.—The classical reader is familiar with the story of Cambyses, mentioned by Sir Walter Raleigh, in his history of the world, who asked his law lords "whether there were any law amongst the Persians that did permit the brother to marry his own sister." It was the intention of Cambyses to marry his own sister. The Judges answered, "there was not any thing written allowing any such marriage; but they notwithstanding, found it in their customs, that it was always left to the will of the Persian Kings to do what best pleased themselves." This was not the doctrine of the Lord Chancellor Fortescue, in the reign of Henry VI. "*Rex leges mutare non potest: potestas regiâ lege cohibetur.*"†

* Mirror of Parliament, debate of the 17th of May, 1836. Could the noble Lord have been misunderstood on the occasion?

† De laudibus legum Angliæ.

No. XVIII.

See the case of the Appleby Assizes, No. VII. *ante.*

Mr. Thomas Briggs, on his examination before the select committee of the House of Commons, in 1830, stated, that he had been sub-Sheriff of the county of Westmoreland, in which the Appleby assizes are held, from 1814—that he had served constantly from that year until the time when he was under examination—that he officiated at the assizes of the county as Sheriff, and that the Earl of Thanet, the High Sheriff, never attended. (See the published report of the evidence in the Parliamentary papers.)

No. XIX.

Deviations from the Legal Practice.

Not having ascertained with sufficient accuracy the facts contained in this note, until after the foregoing letter was written, I am obliged to put it in the Appendix. I have shown that, in 1776, and theretofore, the assignment of Sheriffs by the twelve Judges was the practice in Ireland. But as the sole aim of this letter is to canvass the question as a constitutional one, and not to serve the objects of party, it is only fair to the present advisers of the Executive to admit, that an occasional deviation from this practice did subsequently take place.* Whether this commenced about the time of the rebellion in 1798, when martial law prevailed in this country, and means, in many instances unconstitutional, were adopted, on the

* In writing on such questions, one should ever bear in mind the spirit of the remark with which Mr. De Tocqueville, whom I am proud to call my friend, concludes the introduction to his enlightened and profound work on Democracy in America, "Ce livre ne se met precisement á la suite de personne; en l'ecrivant, je n' ai entendu servir ni combattre aucun parti; j' ai entrepris de voir non pas autrement, mais plus loin que les partis, et tandis qu'ils s'occupent du lendemain, j'ai voulu songer à l'avenir."

plea of necessity, to strengthen the Executive, when many of the gentry fled from their respective counties, and when it was almost impossible to induce any one to execute the office; or what the precise time was when it first occurred, I have not clearly ascertained. It crept in, in this way: the Judges of assize, as appears by the Fifteenth Report of the Commissioners of Inquiry on Courts of Justice in Ireland, and also by Gabbet's Digest (infra,)* occasionally returned their lists for the respective counties, directly to the Lord Lieutenant, without previously submitting them for consideration to the Chancellor and the twelve Judges. This was illegal, and nothing but the necessity of the occasion could justify it. One illegal measure usually leads to another. The Executive adopted one of the names so returned, and in one instance, as I believe in the year 1816, when the Judges of assize had left the summer circuits without making their lists, and the morrow of All Souls was near, the Executive made appointments of his own authority, having previously applied to the Sheriffs of the preceding year to point out proper persons for the office. Nothing

* Mr. Gabbett, in his Digest of the Statute Law, (vol. i. 211,) written in 1811, and *before* Mr. Peel re-established the legal usage, as hereafter mentioned, states that, "the ancient method of appointing Sheriffs in Ireland, as far back as can be traced, was thus: the Judges of assize, on their summer circuits, required the Sheriffs (in office,) of the respective counties, to return the names of the persons in each county proper to succeed them; and at a meeting of the Judges in the Chancellor's chamber, on the morrow of All Souls, in the following Michaelmas term, the Lord Chancellor used to call on them for their returns, which, when received, he delivered to the Lord Lieutenant, who appointed one for each county *out of every such return*; but the Judges had a power before they made their returns to *alter the persons*, or any of them, in their discretion, which is nearly similar to the custom in England. The modern practice is for the Judges of assize of the several counties, to present to the Lord Lieutenant the list of names returned to them, without any previous meeting of the Judges upon the occasion."

but the necessity of the case could justify this. It is impossible to read the statute law upon this subject—the enactments passed year after year, reign after reign, to control the undue influence, the corruption, and the gross abuses which had been experienced in the office of Sheriff:—it is impossible for any man to read those enactments and the circumstances which occasioned them, and not be satisfied that, constitutionally speaking, the Sheriff is the very last person by whom the Executive should be governed in the appointment of a Sheriff for the succeeding year.

The opinion, indeed, of the Sheriff, would in most cases, be merely the opinion of his sub-Sheriff, who, for reasons of his own—especially now when the law allows him to continue in office if re-appointed by the succeeding Sheriff—is not the least interested person in the community in the appointment of the new Sheriff; and we find it stated in the Report of the Select Committee of the House of Commons, (printed by order of the House of Commons, in 1830,) that in England "exertions are made by solicitors, often with success, to procure the nomination of persons to the office of High Sheriff, from whom they may have reason to expect the appointment for themselves of under-Sheriffs." So far were this Select Committee, after hearing all the evidence adduced before them, from conceiving that the Crown should interfere in the nomination of sub-Sheriffs, that they recommend that the situation of sub-Sheriff should be permanent, and that the appointment should be vested in all the magistrates of the county to nominate three persons, of whom the Lord Lieutenant of the county should select one, subject to the approbation of the Chancellor, and that it should be competent to the acting magistrates of the county to remove every sub-Sheriff for misconduct, subject to an appeal to the Chancellor from their decision.* In the debate in the House of Commons, in 1817, Mr. Ponsonby deprecates the taking the

* Parliamentary Papers, Reports, Committees, vol. x. No. 520, p. 5.

names from the outgoing Sheriff, and remarks very justly, that he would always name those who were in the interest from which he had derived his appointment.*

I have said that the returning of lists by the Judges of assize without previous submission to the Chancellor and twelve Judges was illegal, and that the appointment by the Executive, either from these lists, or at the dictation of the Sheriff of the preceding year, was both unconstitutional and contrary to law; in doing so, however, the Executive was not chargeable with setting aside the lists returned by the legal tribunal, for there had been no previous meeting of the Chancellor and the Judges. The appointments were not however the less unconstitutional, and accordingly when Mr. Peel was Secretary in Ireland, his attention was called to this matter, which was made the subject of discussion in Parliament, and the opinion of the Attorney General, Mr. Saurin, was taken; and it being considered, as I am told by a right honorable member of the Privy Council of that day, that this deviation from what the statute law enjoined was unconstitutional and illegal, and might subject his Excellency for the time being to an impeachment at the bar of the House of Lords, for setting the law and the constitutional and ancient usage aside, the Lord Lieutenant, through his Secretary, Mr. Peel, insisted that the ancient and legal practice should be uniformly adopted. The Judges accordingly resumed their meetings "for the assignment of Sheriffs" in Michaelmas term, as required by law, and from that time, and whilst Mr. Peel continued in office, as also during the time that Mr. Charles Grant, now Lord Glenelg, filled the same office, there was not, I believe, a single deviation from the Judges' lists. So while Mr. Lamb, now Lord Melbourne, was Secretary in Ireland, I don't find any deviation. Since Sir Robert Peel's time it has indeed happened, that in the interval between the making of the list by the Judge of assize upon the

* Hansard's Debates, vol. xxxvi. Debate on the Irish Grand Jury Presentments, May 14th, 1817.

summer circuit, and the beginning of the succeeding year, when the Lord Lieutenant selects the Sheriffs from the lists, those returned had become incapable of acting, or had acquired some just excuse, and for this or for some other reason, it was thought right *by the Judges* to return a new list for a county so circumstanced. Such additional return was made in 1825, for instance, (as appears by the Dublin Gazette of the 25th January, 1826,) when Lord Wellesley was Lord Lieutenant, and Mr. Goulburn, Secretary, and his Excellency appointed the individual whom the twelve Judges had returned first upon their amended list. A question may arise whether, where the disability or matter of legal excuse arises subsequently to the meeting of the twelve Judges in Michaelmas term, and prior to the selection being made by the Lord Lieutenant, the jurisdiction of the Judges is not gone, and whether, in such case, they have power to return a new list. If they have not, and if the Executive is obliged, as a matter of necessity, to appoint a Sheriff of his own authority, the names ought to be, in such cases, selected from the Judges' lists of a previous year, as was done by Queen Elizabeth in the case in Dyer, quoted in the preceding letter. This was done also in the case of the county of Antrim, when the Duke of Northumberland was here; but on looking through the lists of the Judges from the year 1833 to the year 1838 inclusive, it will be found, (see the Dublin Gazette,) that in twenty-one of the instances in which his present Excellency has been advised, in the last three years, to set aside the Judges' lists of the preceding year, recourse has not been had to the list of *any* of the said preceding years. This is the more remarkable, as the Commissioners of Inquiry on Courts of Justice in Ireland, (of whom the son of the present Chancellor for Ireland was one,) state in their Fifteenth Report, page 3, "of late years *a marked improvement* in the selection of Sheriffs has been *universally felt*, owing, perhaps, partly to the restoration of the ancient mode of selection, and partly to the greater care and attention of the Judges, in the first instance, in preparing their returns.

Nay, it is the more remarkable, that while the Executive in Ireland is setting aside the Judges' lists and appointing Sheriffs without any regard to them, the Attorney General for Ireland is represented as openly declaring in his place in the House of Commons, that "he not only entertains the highest respect for the Judges of Ireland, but, if he may be allowed to say so, quite a filial affection for them;"* and the first minister of the Crown denies "that Sheriffs have in any case, been selected on political grounds."†

So scrupulous was Sir Robert Peel, when Secretary for Ireland, in the appointment of Sheriffs, that when a gentleman returned on the Judges' list in the province of Leinster, refused to act, the Attorney General (Mr. Saurin,) was directed to file an information against him to compel him, rather than advise the Executive to set aside the list and appoint a Sheriff of his own authority. In conformity with this practice is the opinion of the twelve Judges of England, in the reign of Henry the Sixth, as cited in the preceding letter from Lord Coke's second Institute, (559) "Though that sithence the said election, any of them hath got him an exemption that he should not be made Sheriff, yet them semeth that he should be charged to take the said office upon him." Indeed, as was remarked by a noble Lord in a debate in the House of Lords, on the 11th May, 1837—"nothing can be more obvious than that if Government be *ready* to release persons from serving the office, the lists of the Judges can be of little or no use."‡ If unwillingness to act is made available as a ground of exemption, it is to be feared that very few of the most respectable country gentlemen would consent just now to act at all; but the notions of exempting a Sheriff from service because he is disinclined to act, is unknown to the law of England. The 3 G. I. c. 16,

* Debate in the House of Commons, March 18th, 1838.

† Mirror of Parliament, Debate in the House of Lords, 28th April, 1837.

‡ See Lord Fitzgerald's remarks as reported in the Mirror of Parliament for 1837, vol. ii. 1451.

Engl. is a legislative declaration that to excuse a Sheriff on such ground is contrary to law. It recites expressly, that "the Sheriffs of this kingdom are *obliged* to take upon them that troublesome and expensive office *for the service of their country.*"* This practice of exemption, however, is not without precedent. It was resorted to by James the Second, under the guidance of Tyrconnel, as appears by the list of Sheriffs returned to Lord Clarendon, (see Appendix, No. VIII. the case of the Sheriff of Waterford,) and it was adopted with such success, that in the year 1687, one only of all the High Sheriffs in Ireland was a Protestant, and this person, the Sheriff for Donegal, had been left in by mistake in place of a Roman Catholic of the same name.†

Let the deviations from the lists of the Judges, since Mr. Peel re-established the legal and ancient practice down to the time of his Excellency, be examined, and they will all, I believe, be found to fall within one of the two classes mentioned above. Even if it were otherwise, if it should appear that one or two could not be thus accounted for—what is the inference? That such appointments were unconstitutional and contrary to law. Nay, if there were in the course of two years twenty-three instances of such illegal appointments, they might, indeed, be cited as "precedents;" but only as precedents of illegal acts—precedents of a systematic substitution of arbitrary power for law.‡

* The provisions of this Act, which regulated the mode of taking out letters patent, and the Sheriffs' fees, are repealed by the 4th and 5th Wm. IV. c. 99, but it is a distinct authority as a legislative declaration of what the law is.

† Reid's History of the Presbyterian Church in Ireland, ii. 431. King's State of the Protestants. Appendix, No. VII.

‡ In the adjourned debate in the House of Commons, 8th May, 1837, the right honorable Secretary for Ireland is represented as admitting that the Lord Lieutenant in the preceding year (1836,) had deviated in *nine* instances from the Judges' lists, which, with the deviations in 1837, and 1838, makes twenty-three. In other words, twenty-three lists of the Judges, each containing three

But there are are no such precedents since the reign of James the Second.

The question of the appointment of Sheriffs in Ireland excited the attention of the House of Commons twenty-three years since. Mr. Peel stated that he found on coming into office, that the legal practice had been deviated from—did he attempt to defend it?—did he threaten to persevere in it?—to

names, have been set aside since the commencement of 1836. A case which occurred on the Munster circuit in 1830, is stated to have been quoted as a precedent by his Excellency, in a debate on the 17th May, 1836.* The circumstances of the case were not stated by his Excellency. They are very peculiar, and were in part detailed by Lord Strangford in reply on the same occasion. His Lordship stated, on the authority of a correspondent, that "in December, 1829, one of the county members died. In January a violent contest took place; Colonel O'Grady, son of the then Lord Chief Baron, was a candidate, and was returned by a small majority, but unseated on petition. A general election was immediately expected. Parliament was then four years old. That was enough to make an honest Government particular in the choice of an High Sheriff for the next year, especially when a Judge's son was about to start as a candidate at the forthcoming election; the Government therefore passed over the return made by that learned Judge, (the then Chief Baron,) a gentleman was appointed of liberal sentiments, a Catholic Emancipator, and a Reformer, and who was one of the few members of the Grand Juries in Ireland, who signed an address in favour of parliamentary reform." If this case can be relied on—and it is difficult to see with what other view it could have been cited—if this case is relied on as a precedent, justifying the setting aside of the Judges' lists in twenty-three counties within the last three years, the advisers of the Executive, in justice to themselves, should put the public in possession of all its particulars. It is sufficient however, to say that after the meeting of the Judges, facts transpired in regard to that particular county, of which they were ignorant when the return was made. Those facts were of such a nature, that had they been known, the Judges would not have made the return.

* Mirror of Parliament of that date.

defy the Judges, and set at nought the law? No. He said that he felt assured "the ancient was the legal practice, and I have no hesitation," he continued, "in giving a pledge on the part of the Government of Ireland, that that system shall henceforward be recurred to." On the same occasion, the late Sir John Newport, alluding to the abuse of appointing a Sheriff without regard to the Judges, and upon the nomination of the preceding Sheriff, said, "It has been strongly, but I believe truly said, that this office, in its execution, is radically vicious, and justice is poisoned at the very source." Mr. Plunkett, who took a part in the same debate, said, "I will except, indeed, what has fallen from the right honorable gentleman on the nomination of the Sheriffs. For that he is entitled to much approbation, for I am sure, it will be productive of infinite good to Ireland."* Yet, in 1836, when that individual was

A remonstrance from persons of the highest respectability in the county, and not confined to any particular party, was forwarded to Government just before the selection was to be made by the Lord Lieutenant. The Executive was accordingly obliged, by the necessity of the case, either to send back the list to the Chancellor and the Judges further to consider it, which they could not do, as the term for holding their meeting was past, or to make an appointment himself. For this appointment, which was, in strictness, contrary to law, and which nothing but the necessity of the case could justify in a constitutional point of view, the Executive was clearly responsible. Feeling that responsibility, how did the noble Duke (who was then Lord Lieutenant) act? He appointed a gentleman of very ancient family, and of great influence in the county, whose political opinions and political interests were *opposed* to the Government that appointed him. I am afraid that in this particular, the case will not serve as a precedent. See Appendix, No. X. If cited, however, to justify the late appointments, it illustrates the political wisdom of the historian, "omnia mala exempla ex bonis orta sunt: sed ubi Imperium ad ignaros aut minus bonos pervenit; novum illud exemplum ab dignis et idoneis ad indignos et non idoneos transfertur."

* Hansard's Debates, vol. xxxiv. Debate of April 26th, 1816.

Chancellor, his Excelleney the Earl of Mulgrave is represented as having said, "Of this I can assure your Lordships, that in the course I have taken of nominating Sheriffs without applying to the Judges, I am borne out by the authority of all the law officers of the Crown, and in particular by the highest legal authority in Ireland, the Lord Chancellor."*

No. XX.

The superseding of Sheriffs.

It has been attempted to confound the question of the right of the Executive to supersede a Sheriff, with that which forms the subject of the preceding letter. The questions are quite independent of each other, and rest on wholly different arguments. Whether the Executive has a right to supersede a Sheriff, is one question: whether, having superseded him, he has a right to nominate whom he pleases, and while there remain upon the Judges' list those who are capable of acting, is another. If the Executive has such power, the lists of the Judges may be easily made waste paper. The Executive has only to comply with the law in the first instance, by nominating, *pro formâ*, a Sheriff from the Judges' lists—then supersede that nomination at pleasure, and appoint another who was not in the Judges' lists at all. This is too absurd to be worthy of serious argument. A "precedent," indeed, for such arbitrary superseding of Sheriffs by the Executive, (and somewhat turbulent in its consequences,) will be found in the Appendix, (No. V.) but as the recent superseding of the Sheriff of MONAGHAN, within a week of the assizes, has been put by the ministerial organs of the press on the ground of the political opinions of the sub-Sheriff, it is well to notice it. It is very unlikely, however, that the advisers of the Executive will venture to avail themselves of this plea, for every lawyer knows that such an objection, even if

* Mirror of Parliament, Debate in the House of Lords, 17th May, 1836.

founded in fact, furnishes no *legal* ground for dismissing the High Sheriff. The sub-Sheriff has been recognized as a servant of the High Sheriff, since the reign of Henry the Third, in the beginning of the thirteenth century. He is mentioned under the name *subvicecomes* in the statute of Westminster the second, and under that of shire-clerk in the 11th Henry VII. His appointment by the High Sheriff, and by him exclusively, is recognized by a long series of Acts of Parliament, down to the 5th and 6th William the Fourth, passed so lately as the year 1835; and so long since as the reign of Edward the First it was established, that "Bailiffs who are personally accountable at the Exchequer, shall be made by the Barons: but such of them as are accountable to the Sheriffs, by the Sheriffs." (See this, as quoted by the Record Commissioners, in the preceding letter.)

The Sheriff is responsible for the acts of the sub-Sheriff. He is required to take an oath on his appointment to office, which is administered in the Exchequer, before one of the Barons. He swears, amongst other things—"I will do right to poor as well as to rich. I will do no wrong to any man for any gift, reward, or promise, nor for favour, nor hatred. I will take no bailiff into my service but such as *I will answer for*, and will cause each of them to take such oath as I do in what belongeth to the business and occupation." The Sheriff is forbidden, under a heavy penalty, to sell or farm the sub-shrievalty, and in case of a default in the discharge of the duties either of the Sheriff or his sub-Sheriff, the former is liable for treble damages to the party aggrieved, and therefore, as remarked by the Commissioners of Inquiry on Courts of Justice in Ireland, (Fifteenth Report, p. 4,) "as the High Sheriff is answerable for the acts of his deputy, whose ignorance, imprudence or corruption, might deeply involve his principal, ample security is usually required from him for the indemnification of his principal." So entirely did the law look to the High Sheriff as responsible for every act of his sub-Sheriff, considering the acts of the latter as the acts of the Sheriff himself, and such was the entire confidence, and un-

restricted authority reposed in the Sheriff in the appointment of the sub-Sheriff, that it was not until the reign of Charles the First, (10th C. I. sess. 3, c. 18,) that the latter was required, in Ireland, to take any oath of office. The oath which he now takes is in the same terms as the former part of the High Sheriffs' oath, as cited above, and contains this further obligation—"I will disturb no man's right.....I will truly return, and truly serve all the King's writs, and make true panels of persons able and sufficient, and as appointed by the statutes of this realm. I will truly and diligently execute the good laws and statutes of this kingdom; and in all things well and truly behave myself in my said office for his Majesty's advantage, and for the good of his subjects; and discharge my whole duty according to the best of my skill and power—so help me God."

This oath, and the responsibility of the High Sheriff, and the heavy penalties which are incurred by an unfair return of jurors, &c. (see 3rd and 4th Wm. IV. c. 91,) are the checks which the Legislature has imposed on the misconduct of the sub-Sheriff. The law no where recognizes political opinions, or political character, as an objection to the appointment. To what monstrous consequences might not such a doctrine lead?

The very able editor of one of the most influential journals in Ireland, who lately discussed this question, justly remarks, "Suppose a trial were to come on at the next assizes, in which the character of the Government, or of the Lord Lieutenant for the time being, or of the servants of the Government, is implicated. An attempt is made to procure favourable Juries. The High Sheriff, (it might be added the sub-Sheriff,) is found upright and impracticable. Just before the assizes, before the Jury is returned, a mandate from the castle puts *out* the independent Sheriff, and puts *in* a furious partizan, or an approved and tested sycophant, who returns a Jury equally devoted with himself to the interests and wishes of his patrons. It would be absurd to enlarge on the probable or inevitable consequences of such a state of things as this. * * * * *

* * * * * * * *

"The question to be decided really comes to this—is a Sheriff an independent officer of the Crown, competent to exercise his own judgment or discretion in the discharge of the various duties of his high office, but legitimately amenable for misconduct; or is he the mere tool of the Government of the day, bound to do their bidding in all and every act of his office; and removable—we should rather say dismissable—like a common menial, at their will and pleasure? If Sheriffs can be thus compelled to appoint none but those whom the Government please to be their under-Sheriffs, and other inferior officers, then under the same despotic rule they may also be compelled to return on Juries none but those who will carry out the views of the Government; and if so, tyranny may walk unmasked; for constitutional freedom is at an end, and neither the lives nor the properties of individuals are longer safe."*

The law may have contemplated such a state of things, but it has done every thing which legislative enactments could do to prevent it. The appointment and removal of the sub-Sheriff is vested in the High Sheriff exclusively, and the only restriction upon the appointment, the only qualification required (and this is recently done away,) was that the sub-Sheriff should be a Protestant, and that he should not have acted in the same office for three years previously. (6th Anne, c. 6.—1st G. II. c. 20.—33rd G. III. c. 21.—11th Anne, c. 8, s. 3.)

A further oath is required by statute, to be taken by the sub-Sheriffs before the senior Judge at the spring assizes, and a penalty is incurred by neglecting to take it. This oath refers to the conduct of the sub-Sheriff, both retrospectively and prospectively; it points at the abuses most frequently practised, and is less general, less vague, and admits of less evasion than the preceding oath. It is very generally, in point of fact, neglected to be taken, but the imposition of it by the

* Ulster Times of March ult. 27th, and 31st.

Legislature, in addition to the restraints previously imposed, is a legislative declaration that the abuses of the office were to be controlled by moral and pecuniary checks, and not by interfering with the High Sheriff in an appointment, which the law and immemorial usage confined exclusively to him. (25th Geo. III. c. 36.) But there has been a solemn *decision* in England, on the Crown's interference in the appointment of the under officers of a Sheriff. Queen Elizabeth, by letters patent, granted the office of clerk of the county court for life. This office, like that of the under-Sheriff, was in the Sheriff's gift. Her Majesty then appointed Mr. Hopton to be Sheriff of the county. He disputed the appointment of the clerk. The Queen referred it to the Chief Justices. Lord Coke states, that "after many arguments, because the case concerned the validity of the Queen's grant, the two Chief Justices had conference with the other Justices, and upon consideration had of the letters patent, it was resolved by all the Justices, *nullo contradicente aut reluctante*, that the said letters patent were void in law; and that the Crown could not abridge the Sheriff of any thing incident, or appurtenant to his office; and as to the objection that there were precedents the other way, *quod judicandum est legibus non exemplis*, and it would be full of danger if others should be appointed, and yet the Sheriff should answer for them, &c., and, therefore, the Sheriff shall *appoint clerks for whom he shall answer at his peril, &c., and law and reason require that the Sheriff, who is a public officer, and minister of justice, and who has an office of such eminency, confidence, peril, and charge, ought to have all rights appertaining to his office*, and ought to be favoured in law before any private person, for his singular benefit and avail."*

*4. Co. 33. Mitton's case. So Chief Justice Hobart says, "though a Sheriff may remove a sub-Sheriff wholly, yet he cannot leave him a sub-Sheriff and abridge his power, *no more than the King may in case of the Sheriff himself*." Hob. 13. Norton and Simms. See Scrogg's Case, Dyer, 175.

The under-Sheriff may be discharged at any time by the Sheriff. He is removable at pleasure. (Hobert, 13.) If there is a reasonable objection to his being appointed to, or continuing in the office, the Executive might be justified in pointing out that objection to the Sheriff; but to dismiss the Sheriff on account of the political opinions or character of his sub-Sheriff, is proved by the statutes, and the solemn decision above referred to, to be both unconstitutional and contrary to law.*

It would naturally be supposed, that if a power is vested in

* I have heard that when Lord Stanley was Secretary in Ireland, a remonstrance was made against the appointment of a sub-Sheriff, whose political opinions were obnoxious. The Government replied that it would be unconstitutional to interfere. So, a few years since, a sub-Sheriff was appointed in a northern county, against whose appointment a remonstrance, on the ground of political character, was forwarded to the Government. The law officers were consulted, whether the Executive could constitutionally interfere. Their opinions can be known only from the course pursued by the Lord Lieutenant of that day, who refused in any way to interfere with the appointment. The High Sheriff was, however, apprized of the complaint which had been made. He was told, that it was not the wish of the Government to interfere at all in an appointment, which was vested by the law exclusively in *him*, and that they had formed no opinion as to the truth of the charges which had been made, but it was suggested to him, that it might be satisfactory to himself that he should look more particularly to the panels of jurors, and to other returns than might otherwise be requisite, that he might be satisfied that the person he had appointed acted in all respects as he would himself approve, and as the county had a right to expect. The present Chief Baron was then Attorney General, and Lord Leveson Gower, Secretary. This mode of addressing the Sheriff was calculated to win the gentry of all parties, and to shew them that the Government reposed in them that confidence to which every man appointed to the high and responsible office of Sheriff, is entitled. Self-respect would naturally suggest this policy to those who are entrusted officially to communicate with the gentry of the country.

the Executive to remove a High Sheriff on account of the political opinions of his sub-Sheriff, (which I have proved is not) *à fortiori*, such power must exist where the sub-Sheriff actually misconducts himself, and makes his office a means of evading, or setting at nought the law. It might be expected also, that the advisers of the Executive would especially recommend the exercise of such power in so flagrant an instance. The case of the Wexford Sheriff, in 1836, is remarkable. Mr. Leigh, whose name was in the Judges' lists, was appointed by his Excellency High Sheriff. He was superseded on rumours of his political character, which, it was afterwards admitted in the House of Lords, were unfounded. Mr. Derinzy, whose name was *not* in the Judges' lists, was immediately nominated in his stead. A new sub-Sheriff was appointed. He was involved in a variety of motions in the supreme courts, arising out of tithe executions, and obliged to pay the debt and costs. The particulars of one of several cases, as they appeared before the courts, are detailed by Mr. Lefroy, M.P. in the debate in the House of Commons, on the 8th of February, 1837.

It does not appear that either the Sheriff, whom the Executive had appointed of his own authority, or the sub-Sheriff, was superseded; and the case is the more remarkable, as the following circumstance is stated as one which weighed with his Excellency in relation to Mr. Leigh, who was previously appointed Sheriff. "It appeared that Mr. Leigh had appointed a Mr. Reid as his sub-Sheriff. Now in the unfortunately distracted state of the county at that time, *particularly with regard to the collection of tithes*, a circumstance occurred which shewed Mr. Reid to be destitute of that temper and discretion which it was most desirable that a gentleman filling the office of sub-Sheriff, and upon whom many of the duties of Sheriff must devolve, should possess."*

* Earl Mulgrave's speech, as given in the Mirror of Parliament for May 17, 1836. See the case of the sub-Sheriff of Sligo at the last spring assizes, post, No. XXVIII.

No. XXI.

Dalton, in his work on Sheriffs, published in 1670, and while the doctrine of *non obstante*, since declared illegal by the Bill of Rights, was in full vigor, does not pretend that the Crown has the right of setting aside the list returned by the Judges. He only says, that the King "by his prerogative may appoint a Sheriff *without this usual assembly*, that is, where there has not been a meeting of the Judges, as it happened anno 5 Eliz.;" and the only authority he cites is the memorandum in Dyer, already referred to, and fully explained in the preceding letter.

No. XXII.

The Louth Sheriff, (28 Ed. III. c. 7.)

Note to page 23.—The case of the Louth Sheriff falls within the principle, if not within the letter of this Act. In the summer of 1837, Mr. Michael Chester, whose name was not in the Judges' list, was appointed Sheriff of Louth, instead of Mr. Henry Chester, who also was not in the Judges' list, and who had resigned the Shrievalty in Michaelmas Term, 1837. The Chancellor and the Judges returned, as proper persons to serve for that county for the year 1838, Messrs. Fortescue, Brabazon, and M'Clintock. This was the fifth time that Mr. Brabazon was returned by the Judges. His Excellency however, in March, was advised to re-appoint, or, in the words of the Statute 28 Edward III. c. 7, to "*renew*" the commission of Mr. Michael Chester, who had been already Sheriff from the July preceding (nine months.) In the time of Lord Tyrconnel, Terence Donnelly was continued two years in the shrievalty of Tyrone.—(Memoirs of Ireland. 1716.)

No. XXIII.

The 12th G. I. c. 4, s. 7, Ir. prohibits the High Sheriff letting to farm the sub-shrievalty, but it expressly provides (s. 8.) that nothing therein contained shall any ways hinder or prevent such High Sheriff from constituting and appointing his sub-Sheriff *as by law he ought to do*, nor to hinder, prevent or abridge such Sheriff from nominating or appointing any such officer, &c.

No. XXIV.

The King v. O'Keeffe and Carroll. (See Appendix, No. VII.)

9th February, 1814, (Rule Book, page 289.)

Assignment of Errors—"That the matters in the record and process are not sufficient in law to warrant the judgment, or to convict of the trespass and felonies.

"That by the record it appears that the Earl of Desart, a Peer of that part of the United Kingdom called Ireland, was one of the Grand Jury who found said indictment, so that prisoners were not tried by their peers, as by the law of the realm they ought to have been, and that judgment appears to have been given against them, whereas judgment ought to have been given for them, and they thereof acquitted."

On the 3rd May, 1814, (page 309,) is this further entry—"Reverse the judgment on the *first* error assigned, *the insufficiency of the indictment*, and remand prisoners, &c. to abide their trial."

No. XXV.

SIR CONSTANTINE PHIPPS.

The proceedings relative to Sir Constantine Phipps are mentioned at length in the Report on the Corporation of Dublin in 1835, by the Corporation Commissioners, presented to both Houses of Parliament, by command of his late Majesty.

Curran, in his speech on the right of election of Lord Mayor of the city of Dublin, before the Lord Lieutenant and Privy Council in 1790, gives the following representation of the conduct of Sir Constantine Phipps:—"When, in the latter part of the reign of Queen Anne, an infernal conspiracy was formed by the then Chancellor (Sir Constantine Phipps) and the Privy Council, to defeat that happy succession which for three generations had shed its auspicious influence upon these realms, they commenced their diabolical project with an attack upon the corporate rights of the City of Dublin, and fortunately, my Lord, this wicked conspiracy was defeated by the virtue of the people."*

* 15. Howell's State Trials, 222, Note.

Swift, alluding to this subject in a letter to Chief Justice Whitshed, says, "Every citizen in Dublin, in Sir Constantine Phipps's time, perfectly understood, that disapproving the Aldermen lawfully returned to the Privy Council was, in effect, assuming the power of choosing and returning them."*

No. XXVI.

Argumentum ab Inconvenienti.

See Appendix, ante, No. VII.

It is very common to apply a maxim according to its letter instead of its spirit. The application of the legal maxim, *argumentum ab inconvenienti plurimum valet in lege,* is an instance of this. The very learned Mr. Hargrave explains the true meaning of this maxim. (Co. Litt. 66 a. n. 1.): "Arguments from inconvenience certainly deserve the greatest attention, and where the weight of other reasons is nearly on an equipoise, ought to turn the scale. But if the rule of law is clear and explicit, it is in vain to insist on inconveniences." The spirit of the maxim, as the same learned writer explains it elsewhere, is, that *private* convenience must yield to public benefit, not that *public* and constitutional rights may be defeated by arguments *ab inconvenienti.* "The true construction of the rule," says Mr. Hargrave (Co. Litt. 152 b. note,) "is this—it certainly means, as Lord Coke's addition explains, that the law prefers a private mischief to a public inconvenience."

No. XXVII.

Usage of Election of Sheriffs.

It should have been stated in page 17 of the preceding letter, that the defence of the Earl of Macclesfield, as reported in the 16th vol. of Howell's State Trials, p. 1282, shows that the assigning of Sheriffs by the Chancellor and the Judges, was the usage in the reign of George I.

* Scott's edition of Swift's Works, vol. vi. It seems doubtful whether this letter was originally written, or only revised by Swift. It is dated December, 1724.

No. XXVIII.

THE SLIGO SHERIFF.

The particulars of this case are given upon the authority of gentlemen who had the best means of ascertaining the facts, and who were present at the recent Sligo Assizes. Mr. Howley was nominated by his Excellency as High Sheriff of Sligo for the present year: whether the warrant required by the Act was made out, does not appear. He appointed Mr. Cogan his sub-Sheriff. This appointment was disapproved of by some of the active members of the Liberal Club of Sligo. Mr. Howley would not surrender the appointment of his sub-Sheriff, for whose conduct he was personally liable, and whose appointment the law vested exclusively in him. He was forthwith set aside, and Sir W. Parke, Knight, was appointed in his stead. On his examination, on the occasion of the challenge to the array hereafter mentioned, he admitted, "that he had been a member of the Liberal Club for the county, and that the object of the club was to attend to the registry of the claimants in the liberal interest, and that the funds were defrayed by voluntary subscriptions amongst the members."

Sir William Parke had taken an active part on behalf of Mr. Jones, the candidate who had been supported by the Roman Catholic Priesthood, at the recent election for the county.

Mr. Kelly, who had also been a member of the Liberal Club, was appointed sub-Sheriff: his brother was awaiting his trial at the ensuing Assizes, on a criminal information for defamation of the Registering Barrister (Mr. Robinson,) from whose decisions appeals were pending, which were to be tried by a jury returned by Mr. Kelly. See, in this respect, the case of the Monaghan Shrievalty, mentioned above, No. X. The appointment of Sir W. Parke was announced in the gazette early in March. The Sligo Assizes were to commence about the 8th of that month; there were 118 registry cases to be tried, which had been adjourned from the preceding Summer Assizes, besides 80 or 90 cases which were pending on appeal from the last registry sessions.

The learned Judge thought he had no jurisdiction to try the

adjourned cases. Richard Alcock's case was called on. This was, an appeal from the Assistant Barrister's decision, that the claimant had *not* a qualification to be registered as a voter. The array of the jury, returned to try the question of value, was challenged. There were two causes of challenge assigned; "first, because the panel was returned at the nomination of certain individuals (mentioned by name) and others interested; second, because the High Sheriff and his officers had contributed money to establish the claim of the said Richard Alcock to be registered, and therefore that the said High Sheriff did not stand indifferent between the parties." The two individuals who were appointed Triors, having considered the evidence, and being informed by the learned Judge that they must confine themselves to the specific charges set forth in the challenge, and being of opinion that the evidence did not establish the *particular* causes of challenge alleged, they found against the challenge.

Had the challenge been otherwise worded, and had it been open to the Triors to find generally that the officer who made the return of the panel, did not stand indifferent between the parties, the following evidence given on the occasion would have applied. It is thus reported by one of those professionally engaged on the *liberal* side, in support of Alcock's claim to be registered.

The High Sheriff, Sir William Parke, who admitted he had been a member of the Liberal Club of the county, stated, that "he did not go over the names on the panel, as he had a great press of business to attend to. He looked over it, but did not read every name; that he *confided in the integrity of his deputy*, and directed him to return a fair and proper panel."

Mr. Kelly, the sub-Sheriff, was then examined. He stated, that "he had been a member of the town club, but not of the county; he admitted having been one of the deputation which induced some voters to serve notices of registry; was himself at one time a claimant, but was rejected, because a map attached to his lease was not stamped: he had no conversation with Mr. Madden, or the other gentlemen, *named in the challenge*, on the subject of the jury in the appeal cases; he made out the

panels in his own office, when no one was present but his bailiff: he had heard observations in the news-room—not, however, directed to himself—on the subject of the registry jurors; he then had no idea of being appointed sub-Sheriff, nor did he know who applied to Sir Willam Parke to have him nominated to the office. There are 52 names on the panel, 36 of which are those of persons totally unconnected with any club whatsoever; he left out the names of the ultras on both sides; *he did so, because he believed some of the Conservatives would credit witnesses who were disbelieved by a respectable jury* before Mr. Justice Perrin, at the Lent Assizes of 1837."

To explain the last admission, which naturally gave rise to the question which is stated to have been put by the Triors to the learned Judge, when finding upon the challenge, it should be observed, that at the Lent Assizes of 1837, when persons came forward claiming to be registered on the liberal side, whose claims had been rejected by the Assistant Barrister, valuators were examined on the Conservative side, to prove, that the claimants had not sufficient property to entitle them to the elective franchise. The jury, however, decided in favour of the franchise, and against the decision of the Assistant Barrister, and in doing so, discredited the sworn valuators, who were produced on the occasion; and, accordingly, the sub-Sheriff of this year admits, that in preparing the panel, he left off what he calls the ultra Conservatives, "*because he believed some of the Conservatives would credit witnesses who were disbelieved*" on the former occasion.

It is stated by a gentleman, who was present on the trial of this challenge, that the Triors came into court before finding upon the challenge, and asked, whether they must confine themselves to the specific causes of challenge alleged, or whether they might find generally for the challenge, on the ground, that the officer, who returned the panel, did not stand indifferent between the parties. The learned Judge stated, that they must confine themselves to the specific causes alleged. As in the above report of the evidence, several matters seem to have

been overlooked, which were taken down in court by a gentleman who was present at the time, and as this latter report has been revised by others, who were also present on the occasion, it is only fair to give it here, more especially as the direct and the cross-examination seem to be indiscriminately blended in the report already cited. Having stated such other matters as are given in the report already referred to, Sir Wm. Parke is represented as stating—"The Liberal Club of Sligo was, witness thinks, dissolved about two or three months ago; cannot say whether it was dissolved by desire of Mr. O'Connell. The object of the Liberal Club was to attend to the registries of this county. I mean attend to the registry about which *we* were interested; as claimants were not rich, it was to assist them with means.

"The persons the club were to assist were brought up on the liberal side.

"Part of the object of the club was to oppose the registration of persons claiming to register on the other side, if they thought their claims invalid and fictitious.

"Don't believe there was any other club in the county for the purpose of registry; don't recollect any instance of persons of liberal politics opposed, on account of their votes being fictitious, by the club; don't recollect any such opposed by the club. The funds of the club were defrayed by voluntary contribution from the members of the club, and by witness amongst them. Can't say if the club was dissolved before January Sessions last; can't say whether it was dissolved before October Sessions last. Was waited on by three gentlemen of the Liberal Club, at his house at Dunally; asked them if they were come on the part of the club. This was since his appointment as High Sheriff. They said they wanted to mention some matters to witness: the gentlemen were Martin Madden, Robert Sherlock, and ———. There were other persons who wished to consult him on some matters. There were Mr. Verdon, (editor of the Champion Newspaper) and a Mr. O'Connell; can't recollect that there were any others at that time. It was after these interviews that

he made out the panel. Had a second interview with such persons. It was on Sunday at ten o'clock at night, a rap at door, and Mr. Verdon, Mr. O'Connell, and another came to him; told them he should not receive them on business of any kind connected with the Liberals of Sligo.

(To the Court.) "His reason for saying this was, that a previous deputation had waited on him, and that of so respectable a nature, he thought it a bad compliment to them to receive a second.

(To the Court.) "Means that having received the first would not receive the second. The object of the first deputation was to recommend to witness a gentleman as sub-Sheriff. Can't recollect any other conversation with the first or second deputation; can't recollect any conversation with them on the approaching registry.

"Before his appointment was spoken to, as to the person to employ as sub-Sheriff, has had conversation with some persons respecting the jurors at this Assizes, but no conversation with any person that he can recollect, as to the jurors to try the appeal.

"His conversation with his sub-Sheriff was, that he told him to be particular to appoint a fair jury; gave particular directions as to all the juries.

"Had no conversation as to the names or politics of them; had frequent conversation generally with Mr. Jones, but not on this subject; is not aware of what the funds of the club were on former occasions, or whether from voluntary contributions; witness contributed about a year ago.

"Does not know if his sub-Sheriff was a member of the Liberal Club. The funds were all expended when the club was dissolved; has no doubt but he gave his money to have those persons registered.

"Money now applied to registry as before; supposes there are law agents employed by the club.

"Mr. M'Dermott had a conversation with witness, and Kelly, the sub-Sheriff.

"Mr. M'Dermott advised witness not to attend to suggestion as to the panel; he (M'Dermott) walked out of the room when speaking to Kelly on the subject, and said he would have nothing to do with it, as it would be fatal to them; meant that so far it would be fatal, that the panel would be challenged or set aside.

"Mr. M'Dermott was anxious that witness should go forward in a straight-forward manner; don't know if there remain any funds to pay their registry; don't intend to contribute any more money, but if called on would afford every assistance in his power; would have no objection to contribute if applied to. On Monday last, approved of the panel, corrected it Tuesday morning; did not go over all the names on panel, did not read the appeal panel, gave no directions in respect of politics, except that of a fair and just panel. Supposing the panel turned out to be exclusively formed of members of the Liberal Club, witness would not think it consistent with the instructions he had given.

"Mr. Kelly was recommended to witness by two gentlemen, Dr. Hume and Mr. Fausett, both strong Conservatives."*

Examined by Counsel on the liberal side. "By saying he would contribute if applied to, did not mean to say he would do so during his year of office."

Mr. Kelly, the sub-Sheriff, was then examined. "Was a member of the Liberal Club, paid one subscription of One Pound; has not lately interfered in the registry of voters; does not recollect that he asked any person to claim to register; went out as one of a deputation, which was successful in procuring persons to claim to register; went out three times.

"Claimants on those occasions principally supported themselves.

"The Pound witness subscribed, did not go to defraying the expenses of those persons at registry; thinks money was sent from the Dublin Registry Association towards the registry;

* The sub-Sheriff seems not to have been aware of this. See his evidence supra, and the D. E. Mail, March 12th.

can't say if the claimants got any money. *Has an appeal respecting his own claim to register now pending.* Was rejected, because a map attached to his lease was not stamped; generally attended the club; attended there occasionally; does not think the county club has any funds subscribed to the town club; was a member of both clubs. During part of this year attended the club; never heard the panels returned by Mr. Jones, discussed in the club; can't recollect or state a word of the conversation which he held or heard at the club. Did mention to Martin Madden, that he had made out the appeal panel, and added, that he would show it to no man; no person spoke to him with respect to the persons to be returned on the appeal panel.

"Can't say whether all on the panel are members of the Liberal Club. Many of the members of the club he does not know; can't say if they are all on the jurors' book; did exclude some persons whose names appeared on the jurors' books; excluded some gentlemen, because he thought them too ultra."

On his examination by Counsel on the liberal side, he "meant, by saying that those persons were too ultra, that they were strong Conservatives; omitted them because he thought they might believe persons intended to be brought up as witnesses on the Conservative side, who were not believed by Judge Perrin, and the jury, on the former occasion. There are fifty-two names on the panel, thirty-six of which are not, within witness's knowledge, those of persons connected with any club whatsoever."

From the Sligo Journal of March 23rd, 1838.

SLIGO—WEDNESDAY.

Misconduct of the High Sheriff.

Mr. Baker moved that the High Sheriff of the county, Sir William Parke, be fined such sum as his Lordship should think fit to impose upon him, for disobedience of his duties as Sheriff, under the 7th Wm. IV. in not having called, in his proper place upon the Grand Jury, a resident person, properly qualified, to represent the Barony of Corran.....He might acquaint his Lordship with the fact, that Sir William Parke had returned several gentlemen, absentees, having no residence in the

county, and but small property in comparison with the others, who were residents.....Sir William Parke had sworn an answering affidavit, but he did not in that affidavit take upon himself to deny the explicit, direct and distinct charge which they brought against him, viz.—*that he wilfully disobeyed the directions of the Act*.....He had not ventured to deny the full knowledge of the residence of the gentry, and those were two main facts in the affidavit.

The clause in the Act of Parliament, under which this application was made, is the 31st section of the 6th and 7th Wm. IV. c. 116. "Any Sheriff who shall wilfully omit or neglect to follow the rules hereby made for the selection of the Grand Jury, shall be liable, on a complaint made to the Judge of Assize, to be fined for the breach of the provisions of this Act, such sum as such Judge shall think proper, in addition to any other penalty or punishment to which he may by law be liable." The application was grounded upon an affidavit of John Ffolliott, of Hollybrook, Esquire, one of the Grand Jurors, from which the following is extracted:—

"Saith that the Barony of Corran, in the said county of Sligo, is not properly represented on the present Grand Jury; no person residing and possessing property in that Barony having been sworn upon said Grand Jury. Saith he verily believes that Sir William Parke, the High Sheriff of the said county, has *wilfully omitted* and *neglected to follow* the rules made by the statute now in force in Ireland, for the selection of the Grand Jury. Saith that James Knott, of Battlefield, in the said county, resides in said Barony of Corran, and possesses therein, as deponent believes, freehold property far exceeding the yearly value of £50. Saith that said James Knott has acted as High Sheriff for the said county of Sligo, for the year 1836; and has also served upon several Grand Juries for said county. Saith that the name of said James Knott was called from said panel, when said James Knott attended and answered his name. Saith that the name of James Knott was called on said panel, to the best of deponent's recollection and belief, fifty-six in number in

course, in consequence whereof, said Knott was not sworn in said Grand Jury. Saith that Alexander Duke, Robert Weir, and James Fleming, Esqrs., to the best of deponent's belief, are resident within said Barony of Corran, and possess therein, either freehold property exceeding in yearly value £50; or leasehold property amounting in yearly value to £100, over and above the amount of rent payable out of, or for such leasehold lands; and believes that the residence and property of said James Knott, and of said Robert Weir, James Fleming, and Alexander Duke, are known to said Sir William Parke. Saith that on said occasion the name of Arthur Brooke Cooper was called from said panel without the addition of senior or junior, and same was answered by Arthur Brooke Cooper, jun. of Cooper Hill, when the Clerk of the Crown, as deponent believes, by the direction of said Sheriff, refused to swear said Arthur B. Cooper, jun. alleging that his father, and not said Arthur B. Cooper, jun. was intended to have been summoned; and deponent verily believes, that the father has ceased to be summoned, or to attend on Grand Juries for said county, since said Arthur B. Cooper, jun. has attained his full age, now some years. Saith that John Martin, Esq. who is, as deponent believes, to the full knowledge of said Sheriff, now in London, was also called on said panel, and therefore, Abraham Martin, the father of said John Martin, and the present owner of the property, in respect of which, as deponent believes, said John Martin was called, attended, and offered to be sworn on said Grand Jury, when said Sheriff refused to permit him so to do. Saith that the name of Alexander Percival, M. P. for said county of Sligo, called number four upon said panel, to represent, as this deponent believes, the cess payers in said Barony of Corran; but said Percival being absent in London, of which the said High Sheriff was, as this deponent verily believes and charges, well aware at the time of his so causing him to be called; but this deponent submits, that according to the construction of the Act of Parliament, the said High Sheriff was bound to have placed upon the

Grand Jury of said county, a gentleman resident in said Barony. Saith that the said Alexander Percival does not reside in said Barony of Corran; nor has he any residence therein. Saith that at the time of the calling and swearing of said Grand Jury, this deponent, and other landed proprietors of said county, apprized the said High Sheriff that there was no Grand Juror sworn on the Jury to represent the cess payers of said Barony, whereupon the said Sheriff asserted, that he had called the said Alexander Percival to represent said Barony of Corran; and this deponent saith, that said Alexander Perceval has no residence within said Barony; and has been, as deponent believes, to the full knowledge of said Sheriff, absent in London for some time past, attending his parliamentary duties."

Sir William Parke, in his answering affidavit, excuses his having placed Mr. Percival on the panel for the Barony of Corran, and that he had no reason to suppose that he would not have attended, as he generally attended the Grand Jury. The affidavit then proceeds:—

"Saith that James Knott, of Battlefield, Esq. had been called on the present panel, who he believes to be qualified by law to represent said Barony of Corran; and saith that James Fleming, and Robert Weir, in the affidavit of said John Ffolliott named, are persons, as deponent heard and believes, who have never been called on the Grand panel of this county. Saith that he admits that Arthur Brooke Cooper, of Cooper Hill, had been called on the panel, and that his son, Arthur Cooper, jun. had answered for his father when called by the Clerk of the Crown; and also admits, that he directed said Clerk of the Crown not to take his appearance, inasmuch, as deponent had directed summons to be served on Arthur Brooke Cooper, sen., and which deponent believes was accordingly served. Saith he also directed summons to be served to procure the attendance of John Martin, Esq. ex M. P. to procure his attendance as a Grand Juror; said John Martin having been in the habit of attending as a Grand Juror for several years, in the place of his father, Mr. Abraham Martin, and

saith he admits that the said Abraham Martin did suggest that his name be substituted for that of his son, the said John Martin, at the time that the Clerk of the Crown called the said John Martin. Deponent saith, that having taken possession of the county on Friday last, he made, or caused to be made, diligent inquiry to ascertain the names of fit and proper persons to be called on the Grand Jury of this county; and saith that the said John Ffolliott, who has made the affidavit in this matter, has not been resident in this county for some time. Deponent saith, he has called on the present Grand Jury panel, the names of six persons to represent the respective baronies of this county, from the Grand Jury panel returned by Daniel Jones, Esq. his predecessor: and saith the present application to this honourable court, is for the purpose of annoying deponent, and to expose him in the office of High Sheriff in the public prints, without any reasonable or probable cause whatever."

"This affidavit is a remarkable one. It does not deny a single *fact*, charged upon oath by Mr. Ffolliott, but, on a mere matter of opinion, the motive which influenced Mr. Ffolliott in making the charge, it swears *positively*, and not on *belief*, as in former parts, as if to a matter of fact." Alluding to this, the learned Counsel, who appeared to support the charge, remarked, as above quoted:—"Sir William Parke did not take upon himself to deny the explicit, direct and distinct charge, which they brought against him, viz. that he *wilfully* disobeyed the directions of the Act."

"Mr. Justice Crampton, on Thursday, having recapitulated the charges and referred to the Act of Parliament, upon which the application was grounded, observed, that there were two questions to be considered: first, had Sir Wm. Parke violated the provisions of the Act of Parliament, in the selection which he had made of Grand Jurors? and secondly, had he wilfully violated the law? It was quite clear, that Sir Wm. Parke had violated the provisions of the Act of Parliament, and the question which remained to be decided was, whether that violation

was a mere misconception, or a wilful act. He considered it necessary to define the sense in which he understood the word 'wilful' to have been used by the Legislature in the statute, especially as he thought the learned Counsel upon both sides seemed to have supposed, that a wilful omission to obey the statute implied corruption. Now he did not think it did: it was true that the High Sheriff had a duty to perform, and the means were in his power: and if from perverseness, obstinacy, passion, or without reason, he refused to discharge the duty which the Legislature made it incumbent upon him to discharge, it was a *wilful* breach of his duty, although no corrupt motive could be shewn, or said to exist. In fact, the word 'wilful' might be said to amount to this—it might be more, but at least it amounted to this—that Sir William Parke followed his own will, and not the will of the Legislature. Under all the circumstances, he felt himself coerced by the affidavits before him, to arrive at the conclusion that the omission in the present case was not a mere inadvertency or mistake, but a *wilful* omission upon the part of the Sheriff, according to the sense of the meaning of the Legislature, in using the word 'wilful.' Having arrived at this conclusion, it was his painful but bounden duty, for he was as much compelled by law to act as he was then acting, as the High Sheriff was to make a proper panel, to pronounce upon the Sheriff a fine for deviating from his duty. The fine was one which he had measured at a small amount, and a fine which he adjudged against the Sheriff rather as an example for future conduct, than as a punishment for the past. The learned Judge then concluded by saying:—'Let the Sheriff be fined in the sum of £10.'"