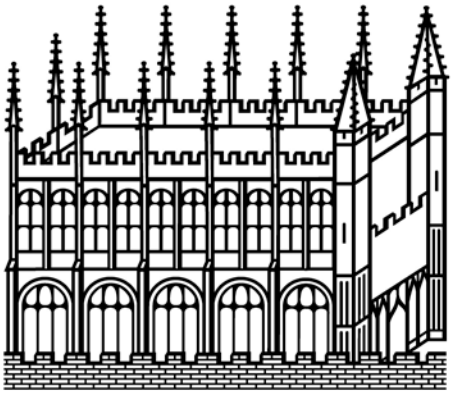

RATIONALE

OF

JUDICIAL EVIDENCE.

LONDON:
PRINTED BY C. H. REYNELL, BROAD STREET, GOLDEN SQUARE.

RATIONALE

OF

JUDICIAL EVIDENCE,

SPECIALLY APPLIED TO

English Practice.

FROM THE MANUSCRIPTS OF

JEREMY BENTHAM, Esq.

BENCHER OF LINCOLN'S INN.

IN FIVE VOLUMES.

IV.

LONDON:
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ERRATA ET CORRIGENDA TO VOLUME IV.

☞ For *scriptural* and *transcriptural* put throughout *scriptitious* and *transcriptitious*.

PAGE	LINE	
2	— 10	before *part* insert *small*.
2	— 11	dele *small*.
3	— 29	for *functions* put *service*.
43	— 32	for *he* put *the legislator*.
51	— 25	for *counted* put *united*.
103	— 27	after *enveloped* insert *anything of*.
104	— 29	for *depositious* put *depositítious*.
112	— 4	after *persuasion* insert *of the justice*.
113	— 5	after *settle* insert *and science*.
150	— 24	for *motives* put *motions*.
209	— 5	for *oral* put *real*.
210	— 16	for *which* put *whom*.
275	— 19	for *ruin* put *none*.
282	— 3	for *on* put *one*.
286	— line last,	after *Editor* insert *See Scotch Reform, p.* 59.
308	— 35	for *paws* put *pens*.
439	— 29	dele *made*.
418	— 20	for *converse* put *curiòus*.
460	— 17	for *it* put *this disposition*.
461	— 2	after *these* put *same*.
501	— 5	from the bottom, after *less* insert *real or extensive*.
531	— 5	after *which* insert *the*.
532	— 5	for *they*, put *these jurymen*.

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ON THE CAUSE OF EXCLUSION OF EVIDENCE—THE TECHNICAL SYSTEM OF PROCEDURE.

CHAPTER I.

OBJECT OF THIS ENQUIRY—ITS CONNECTION WITH THE SUBJECT OF THE PRESENT WORK.

THE mass of absurdity, the chaos, which, in the delineation of existing arrangements, it will be necessary to hold up to view, must continue to be (what it has hitherto been) a blind inexplorable labyrinth, until a clue be given to it: a perfect riddle, unless a key be added to it. This clue, this key, will consist in an indication of the views and designs of those to whose lot it has fallen,—from the time when the very foundation of the edifice was begun upon, to the present,—to be occupied in the erection of it: designs, the natural and necessary result of the position in which they have all along been placed.

In a work confined to the subject of evidence, an exposition, how brief soever, of the universally and necessarily corrupt state of the predominant system of judicial procedure in every country, may be apt to appear irrelevant: or at least of too mighty and disproportionate importance to be introduced, as it were, in a parenthesis,—as subordinate, not only to the subject of evidence, but to that comparatively part of the ground, occupied by the practice of small exclusion.

But it will be seen that, of that corrupt system, the doctrine of exclusion constitutes a fundamental part; a feature altogether characteristic and indispensable. The consequence is, that, unless the nature and origin of that system were brought to view, the prevalence of the practice could not be accounted for; nor, therefore, that sort of satisfaction given, which, on every subject which admits of it, the eye of the reader naturally looks for, and seems entitled to expect. His time will not be the worse bestowed, if, in addition to this comparatively narrow abuse, the source of so many other and still more crying grievances be pointed out: still less, if a glimpse should happen here and there to be caught of a feature or two of the only appropriate remedy.

In all discourses, authoritative and unauthoritative—at least in all discourses of a grave cast—that have had the system of judicial procedure for their subject, an assumption, explicit or implicit, seems constantly to have been made, viz. that the ends to which that course has, with more or less felicity, been directed, have been those to which of course it has all

along been professed to be directed, viz. the ends of justice.

Consider the position of the voices by whom the vocal concert on this stage has been led, nothing can be more natural than this assumption, *i. e.* than the fact of its having been made. Consider it on the ground of parallel experience, consider it on the ground of the known and incontestable principles of human nature, nothing can be more inconsistent or improbable than the truth of it: consider it on the ground of direct experience, nothing can be more false.

False in every country,—in every country far enough advanced in the career of civilization to have afforded a settled establishment in this quarter of the field of government,—it is in a more pre-eminent degree false, as applied to English practice: a proposition, the truth of which, howsoever unwelcome, will be found but too palpable, as we advance.

Into no man's conception does it ever appear to enter, that the securing the maximum of happiness to the good people of England was the motive, or so much as among the motives, which brought duke William upon a visit to king Harold;—that it was a regard either for the purity of the Jewish faith, or the symmetry of Jewish mouths, that rendered one of his royal successors so alert in rendering the functions of a dentist to one of his Hebrew subjects;—that it was the sympathetic apprehension of seeing their neighbours dissolved in luxury, that used to rĕnder Mahratta princes so diligent in the collection of Chout.

Notwithstanding so many professions as have been heard, (professions which, even from the

impurest lips, will, to one who duly considers the character of the nation and the temper of the times, sound rather as exaggerated than as altogether insincere); many there appear to be who regard with scorn and ridicule the notion that the augmentation of the comfort and well being of the Indian natives has had any share in so many exertions as have been made by governors-general in Hindostan for extending to those defenceless beings the protection of English laws.

If, in the very highest rank in society, social and enlarged affections were so completely smothered by narrow and self-regarding ones, is it natural that, in an inferior rank, the purer affections should, in the same stage of society, have reigned paramount or alone?

Whatever on this subject can, on the present occasion, be brought to view, must unavoidably be subjected to an extreme degree of compression. To a future occasion the task of development must, in a great measure, be deferred.

Hence it is that what is here delivered must be delivered in the form of thoughts or aphorisms, bearing the similitude of crude assertion: for proof and illustration (for by each example both purposes will be served) they must wait for details, of which a part only (though what for this purpose, perhaps, will be found a sufficient part) can find a suitable place in the present work.

CHAPTER II.

TECHNICAL OR FEE-GATHERING, AND NATURAL OR DOMESTIC, SYSTEMS OF PROCEDURE, WHAT?

IN consequence of the infirmities attached by nature to the infancy of society, the formation of the system of judicial procedure has nowhere (except here and there by bits and patches) been the work of the legislator; it has fallen everywhere to the share of the judge.

In consequence of the same infirmities, the judge received everywhere (or found means to make for himself) in the shape of fees* extracted from the suitors, a retribution, necessary or unnecessary, for his trouble, and the use of his power: for the service rendered or supposed to be rendered to them by the exercise of it.

The mode in which the will of a legislator (acting as such) is expressed, is by *rules;* mostly general, and at any rate laid down beforehand: the sort of law thus produced is called *statute* law. Very different was the mode in which the will of judges was expressed; of judges

* Definition of a fee:—Money or money's worth received at the expense of the suitors in a cause (all or any of them) on the occasion of a mass of writing written or supposed to be written, or other act done or supposed to be done, in the course or on the occasion of it.

acting as such, and, by the exercise of that will, developing the course of procedure, and collecting fees. No rules were laid down beforehand: as occasion called, what was thought right, or pretended to be thought right, upon each occasion, was done: and as to rules, it was left to suitors to collect or rather frame them for themselves as they could, from the observation of what had been done. Law produced in this mode of generation has been called *common* law: and sometimes *jurisprudence*, or jurisprudential law.

Rules which are laid down in determinate words, may (in so far as these words are well chosen, adapted to the habits and capacities of those for whose use they are intended), be understood without art. Rules which, not being laid down in determinate words, can scarcely with propriety be said to exist, cannot be understood,—or rather (since, where nothing exists, there is nothing to understand) guessed at,—without art. The system constructed by such hands, and constructed or left to be constructed in such a mode, may accordingly be termed the *technical* system of procedure.*

* The word *technical* is not unknown to jurisprudence. You may find it there in company with the word *reasons*. *Technical* is from the Greek, and scarce yet made English. If you have a mind to do it into English, instead of it put *absurd:* fear not the finding yourself mistaken in any one single instance. The mental endowment displayed in the manufacture of these reasons, is, in the same dialect, called *astutia:* to render this into English, say folly, or knavery, or both together: the connection is closer than men are apt to imagine; closer everywhere, but nowhere perhaps so close as in jurisprudence. In Folly, Knavery sees one of her most useful instruments and best friends.

When a man, empowered to pursue a public object, is by the same means empowered to pursue a personal one, it is not in human nature that this private object should be a matter of indifference to him. It will naturally and unavoidably exert an influence over the course taken by him in the pursuit of the public object. In consideration of this influence, the system here denominated the *technical* system may further be characterized by the name of the *fee-gathering* or *fee-collecting* system. The occasions of bringing it into view under this character will be but too numerous. The courts of justice in which the system or mode of procedure chalked out as above, and under such influence as above, is in force, may be termed, by one common appellation, courts of technical procedure. Everywhere they may be seen to be characterized by a common set of features.*

Before states existed, at least in any of the forms now in existence in civilized nations, families existed. Justice is not less necessary to the existence of families than of states. The mode in which, in those domestic tribunals, created by nature at the instance of necessity, justice was adminstered, and, for that purpose, facts were enquired into, may for distinction's sake be termed the *natural* or domestic mode of judicature.

It is among the characteristics of the natural or domestic mode of judicature, to be exercised,

* —— Facies non omnibus una,
Nec diversa tamen ——
Et documenta damus, quâ simus origine nati.

(if not absolutely, at least comparatively speaking) without forms: without rules. A man judges, as Monsieur Jourdan talked prose, unconscious of any science displayed, of any art exercised. One of your two sons leaves his task undone, and tears his brother's clothes: both brothers claim the same plaything: two of your servants dispute to whose place it belongs to do a given piece of work. You animadvert upon these delinquencies, you settle these disputes: it scarce occurs to you that the study in which you have been sitting to hear this, is a tribunal, a court; your elbow-chair a bench; yourself a judge. Yet you could no more perform these several operations without performing the task of judicature, without exercising the functions of a judge, without hearing evidence, without making inquiry, than if the subject of inquiry had been the Hastings cause, the Douglas cause, or the Literary-property cause.

It is among the characteristics of technical procedure, all over the world, to abound in rules and formalities. In process of time,—as occasion presented itself, and irresistible necessity urged inquiry,—spite of all prejudices, a discovery was made, that, with little or no exception, these rules and formalities, instead of being necessary, were repugnant to the ends of justice: that an option was to be made between the sacrifice of these rules and formalities, and the sacrifice of certain portions of substantive law, necessary to the existence of the state. Accordingly, certain portions of the field of judicature were marked out, and a course prescribed for the appointment of judges, with

authority to proceed and inquire, to hear and determine, as they would do in the bosom of their respective families, paying no sort of regard to any of these rules and formalities. For distinction's sake, the courts thus constituted may be termed *courts of natural procedure* or judicature: of natural procedure *restored*, or (if, in any odd nooks of the field of judicature, discovery should in any instance be made of any little spot which happened to have escaped the fangs of the technical system) natural procedure *preserved*.

The character of the natural system of procedure (it may already be perceived) is little more than negative. Health is the absence of disease. Liberty, in its original sense, is the absence of coercion. Natural procedure is the absence of those rules and formalities of which technical procedure is composed. But for verse, prose would not have had a name. But for technical, natural procedure would not have had, would not have needed one.

In current nomenclature, the distinction nearest to a coincidence with that between technical procedure and natural, as here explained, is that between *regular* and *summary;* but the coincidence is far short of being complete. Thus far, it is true, they agree,—that, in comparison of all technical procedure, all natural is always summary. But technical procedure has its branches which are called *summary*, as well as its branches which are called *regular:* for designating that which is not technical, the word *summary* has therefore been unfitted. Moreover, summary means *short:* and wherever one course is shorter than another,

it may, in comparison of that other, be termed *summary*. But, in a series of infinite length, the number of degrees is infinite: and in all that number there is no one that can have any exclusive pretension to the epithet of summary.

The final cause of this article of jurisprudential nomenclature, is not difficult to divine. The use of *regularity* is recognized by everybody: the term *regular* is eulogistic. Get people to believe that *summary* procedure is something opposite to regular procedure, you may prevail with them and accustom them to regard the more expeditious procedure with a jealous eye. In an underhand way, you may thus insinuate and get them to believe (what you durst not assert), that there is a sort of incompatibility between the superior dispatch observable in the summary mode, and the superior regularity observable in the regular (that is in the technical) mode. The utility of dispatch,—its title to be regarded as one of the ends of justice,—is too plain to be denied: in the technical mode, as compared with the natural, the want of dispatch is also too plain to be denied. To reconcile men, as well as may be, to the repugnancy of the technical system in relation to this end of justice, you thus take the best chance that in so few words can be taken, for getting them to fancy, on the part of the natural course, a repugnancy to the direct and ultimate ends of justice: a conception, the exact reverse of which is the true one.

In every country (so I imagine it would be found), men of law, unable to find the shadow of an argument, have trusted to the power of this prejudice, preserving a prudent or rather

necessary silence. Blackstone, in the fertile soil of England, has been fortunate enough to find another and a still stronger prejudice, applicable to the same purpose. Summary procedure is a mode of procedure to be regarded with jealousy, and with such a degree of jealousy as shall prevent as much as possible the extension of it. With jealousy? Why? Because in summary procedure there is no jury. No jury?—and what then? Is the use of trial by jury to be regarded as an end, or only as a means? Taken altogether, are the ends of justice more completely fulfilled by regular procedure with its jury, than by summary procedure without a jury?—another inquiry in which no lawyer ever ventured to engage in, and from which Blackstone knew better than not to start. No: where prejudice reigns, everything is to be lost by inquiry, nothing to be gained: by prejudice the same business is done (when it is done) upon much easier terms.

But, in the very word *summary*, may be seen an indication which, if it does not of itself afford, at least points out the path to, a complete demonstration of the incongruity of that mode to which it stands opposed. What is a summary mode? It is a mode, in and by which an efficient decision is obtained, with a less quantity of delay, expense, and vexation, than that which is attached to the other mode, termed the regular. To the use, then, of the regular mode, a quantity of collateral inconvenience attaches, which does not attach upon the summary mode. From this single statement, admitting it to be true, follows a necessary consequence: viz.

that,—unless under the summary there be some deficiency in respect of the security against misdecision, and that deficiency such that the mischief of it is of a magnitude to outweigh the advantage obtained by the defalcation from the mass of collateral inconvenience in the shape of delay, expense, and vexation,—the existence of the regular mode, be it what it will, is an enormous nuisance. Is the summary mode then attended with any such disadvantage? Is the regular mode attended with any such disadvantage? If so, in what particular respect? What are the arrangements which, being necessary to the giving the completest security that can be given against misdecision, are to be found in the regular, and not to be found in the summary, mode? The question is a conclusive one: no answer has ever been, none ever will be, given to it. All the wits of all the lawyers by whom civilized society is infested, would sink under the task.

CHAPTER III.

CAUSE OF THE VICES OF TECHNICAL PROCEDURE, THE SINISTER INTEREST OF THE JUDGE.

SECTION I.—*Ends of judicature, under the fee-gathering system, opposite to the ends of justice.*

VARIOUS are the channels through which, under the fee-gathering system, the matter of corruption may find its way into the bosom of the judge.

1. The fee is received into the judge's own hands, or, being received by another hand, is placed openly to his account.

2. The fee is received by some subordinate officer, by the hand or on the account of the subordinate; but the office is at the disposal of the judge, and sold by him for his own benefit: the whole of the purchase-money being put into his own pocket.

3. —— or, upon the admission of the officer, the judge receives a bonus, avowedly or tacitly proportioned to the quantity of the emolument constituted by the aggregate of the fees.

4. The office thus endowed is at the disposal of the judge; but, being (by law, or fear of

public censure) inhibited from selling it, he gives it to some person connected with him by the ties of blood, alliance, or service: thereby saving to himself the charge of a provision which he would or would not otherwise have made for the same person at his own expense: the possessor of the office thus endowed doing the duty of it in person.

5. —— or by deputy: that is, by doing nothing for it but receiving the fees: the deputy receiving a consideration for his trouble, by a fixed salary, or by a share of the fees.

6. The fees, having been received by a deputy, by whom the duties of the office are performed, are paid over to two or more persons in conjunction, nominated by the judge: which persons, not doing either of them any part of the business, appear upon the face of the transaction to be trustees; the person for whose use they are trustees not being declared, and thence appearing to be the judge himself, by whom the trustees were nominated.

If the aggregate of fees liable to be paid had, in the instance of each suitor, been no greater than it would have been in his power to pay without any inconvenience worth regarding; if, at the same time, it had been out of the power of the judges, or their subordinates, to add, either to the amount of the fees exacted on each occasion, or to the number of the occasions on which they were exacted; in such case, between the interest of the functionary and his duty, no opposition would have been created by this means.

But, in the nature of things, it was scarce possible that, in the situation in question, and

with the powers inseparable from it, power should not be possessed of adding either to the quantum of the fee, or to the number of the occasions on which it comes to be exacted.

The mischief became much greater, the opposition of interest to duty much more strenuous and disastrous, when a given sum was raised by multiplying the occasions of receiving fees, than when it was raised by adding to the quantum of this or that fee. By merely adding to the quantum of this or that fee, no other mischief would have been produced than what would have been produced by the addition thus made to the quantum of the expense. But, by adding to the number of the occasions, corresponding additions were made, inevitably made, to the vexation and delay, over and above the additions made to the expense.*

* What a blessing, could judges have contented themselves with increasing fees in a direct and open way, without making business, or, at any rate, without making delay for the sake of making business! Take an example of this abstinence.

In equity, in a *subpœna ad respondendum*, (that sort of instrument by which a man is called upon to take upon himself the character of defendant), the number of names on the same parchment, originally unlimited, was reduced afterwards to three. In lord chief baron Gilbert's time, before and consequently exclusive of stamps, expense before the reduction, 6d. per defendant; after it, 1s. 2d.: difference, 8d.

Gilbert's reasons for the reduction:—Reason 1. Preventing a plaintiff from making a man defendant for the sake of vexing him;—the parchment never going out of the office, nor the defendant, unless by accident, knowing anything about the matter. The works of Gilbert are a very galaxy of reasons; all of them of this stamp: the same logic, the same sincerity. *Ex pede Herculem:* and Gilbert is a very Hercules among lawyers. For the pleasure of frightening

Unfortunately, it became, on various accounts, easier, much easier, to add to the number of the occasions on which fees came to be exacted, than to add to the quantum of each fee. Additions to the quantum of each fee could not escape notice, and would be apt to produce complaint. What did not come under notice, could not produce complaint: and the occasions of realizing additions to the quantity of writing manufactured, or number or duration of other acts done,—in a word, to the quantity of business rendered necessary to be done, and thence to the number of the fees exacted on the occasion of it,—might very easily, and on a variety of undetectible, though false, pretences, be augmented almost without stint.

Accordingly, under this system, the judges, to the power, added the effectual inducement, to produce factitious vexation, expense, and delay, (or, more briefly, to make business), in a quantity almost without limit, and continually tending to increase: the vexation, expense, and

an adversary with an equity suit, six-pence would not be grudged by Irus; eight-pence more would by Crœsus.

Reason 2. Preventing the mistakes, which would result of course, were an attempt made to write upon the same parchment any more names than three. "In the multitude of counsellors there is safety:" and it is the same with parchments. But juries?... Four and twenty names always on the same parchment: quære, how many mistakes?

In the character of a specific against the appetite for creating vexation,—the virtue of eight-pence disbursed, eight-pence once paid, irresistible. In the character of a final or efficient cause of made business,—the virtue of the same sum received, repeated every day, and any number of times in every day, imperceptible. Behold what it is to have learned eyes!

delay, for the sake of the profit extractible, in the shape of fees, from the expense. Hence the production of vexation, expense, delay, and official profit, became the real, and in a manner the sole, ends of judicature: profit the ultimate end; expense and delay, so many intermediate ends; the production of the vexation, not an end, but a collateral result.

Had not collateral mischief been contributory to the profit, (or, what came to the same thing, inseparably attached to the production of it), it might not have been any man's study to produce any part of that collateral mischief: but, being either contributory to the profit, or inseparably attached to the production of it, it became every man's interest, and consequently every man's study, to produce them to the greatest amount possible.*

* Like causes produce everywhere like effects.

Extract from the speech of lord Henry Petty in the House of Commons, (Morning Chronicle for 22nd May 1806).

"The matter was so contrived," (viz. under the existing establishments for the auditing of the public accounts), "that the fees of the different officers depended on the number of accounts which they passed, so that he who was determined to do his duty strictly, and to examine narrowly into any accounts that came into his hands, was left almost without any business or fees; while he who was most negligent of his duty, who passed accounts without being very particular as to the justness or amount of the charges, was in high employment, and had his office crowded with accountants and with fees. If the vouchers were regularly drawn up, this was all that was here required. No particular inquiry was made as to the nature of the vouchers, and the manner in which they had been procured. The consequence certainly was, as may be presumed without fear of being in error, that great frauds and abuses were committed. Under these circumstances, the right honourable gentleman now no more, to whom I before adverted, saw that some change was

So far as these ends of judicature are pursued, so far must the ends of justice be sacrificed. But what the people and the sovereign expect and demand is that the ends of justice be pursued. Here, then, it becomes necessary to make a sort of compromise, and, to preserve appearances, for the purpose of keeping the public deceived and quiet, to sacrifice, to a certain degree, the pursuit of the ends of judicature: for, that the ends of justice might in general be supposed to be pursued steadily and exclusively, it was necessary that, to a certain degree, they should be actually pursued,—that they should be pursued in all cases in which the pursuit of them was not adverse, and even in some cases in which it was adverse, to the pursuit of the ends of judicature. Thus, when, in other stations, public functionaries receive public money with a view of extracting what

necessary in the management of the public accounts, and, accordingly, in the year 1785, a bill was brought in, appointing five commissioners for the administration of the public accounts."

Amongst the objects of the inquiry instituted in 1792 by a committee of the House of Commons on the subject of imprisonment for debt, was that of the number of premature deaths produced by the abuses connected with that practice. No proposition in history is more completely out of doubt, than that this practice was set on foot by the judges, in the teeth of the then established law, to serve as an instrument of extortion in their hands.

Were it possible to distinguish from other deaths, those which had for their cause the rapacity of those official guardians and protectors of life and liberty,—to distribute the imputation of the misery in due proportion among those by whose power it has been produced, and by whom the profit of it has been reaped; how innoxious would the murderer appear, in comparison of the judge from whose lips he receives his doom!

they can of it to their own use, in the way of embezzlement or peculation,—it becomes necessary to them notwithstanding (to the prejudice, and *pro tanto* to the sacrifice, of these their objects) to apply a part of such monies, commonly by much the greater part, to the services for which it was designed.

But, to raise the mass of official profit in this line to its maximum, it was not sufficient to raise to its maximum the quantity of profit extracted on the occasion of each suit. It became also necessary to raise to its maximum the number of suits: understand, of such suits, and such suits only, as would yield a mass of profit worth acceptance on such terms.

Whatever suit would either yield no profit at all, or none that were worth acceptance,—none that, by the mass of its profit, would outweigh in the mind of the judge the trouble of doing the business; in regard to every such suit, it was his interest that it should never be begun, or, being begun, should come to an end as soon as possible: for the trouble, the labour, attached to the doing of the business, is, in other words, so much vexation to the judge.

Hence, the end of actual judicature became distinguishable into two principal branches: positive and direct, the augmentation of profit; negative and collateral, the diminution of trouble. By the augmentation of the aggregate mass of fees collected, both these ends were served at once. By the money paid by such of the suitors as could and did pay, profit was augmented. By the exclusion of such suitors as were either not able or not willing to pay, trouble was diminished. In the first case, the

imposition operated as a tax, and yielded revenue; in the other case, it operated as a prohibition, and yielded ease.

So successfully has this fee-gathering system acted in the production of one of those results which it has converted into the actual ends of judicature, viz. *delay*, that we shall see the same suit, which, under the natural system, regularly occupies on an average a space of a few minutes, occupying with equal regularity, under the fee-collecting system, a space of some hundreds, not to say thousands of times that magnitude. So successfully again has it acted in the production of another of those ends of judicature, *denial of justice*, that (as to all remedies other than such as are applied by criminal suit) we shall find from six to about nine tenths of the people in England fixed by it in a state of perpetual outlawry.

If, by the system of which this delay and this denial of justice were the ends and are the fruits, a greater chance of right decision were afforded, than by the natural system above contrasted with it; the mischiefs of the technical system might receive some set-off, some compensation, though it could scarcely be anything near an adequate one. But, in proportion as both systems are seen into and understood, and even in the course of the very small part of the examination contained in the ensuing pages, it will be seen that the chance of right decision is, by the technical system, decreased in a variety of ways, increased in none.

SECTION II.—*Alliance between the sinister interest of judges and that of professional lawyers.*

Under every system of procedure, and in the very earliest and rudest stages of society, some individuals there must always have been, to whom, by infirmity, bodily or intellectual, (on this as on other occasions), the assistance of others must occasionally have been rendered necessary. So far as persons standing in need of this assistance could find friends that were at the same time sufficiently qualified to afford it, and able to afford it gratis, so far society could exist, and did exist, without professional lawyers. But, so soon as one instance manifested itself, in which a man, unable on other terms to obtain the assistance he looked upon as necessary, had recourse to pecuniary retribution for the purchase of it; that instant the profession of a lawyer came into existence.

The same motives by which, in every other line of money-getting business, a man is stimulated to raise to its maximum the quantity of his business, will of course apply themselves to this, and with equal energy. The interest of the judge was, that there should be as many suits as possible: the interest of the professional lawyer was the same. Here then is a community of interests, between the judge on the one part, and the professional lawyer on the other: and this community of interest is, upon the face of it, perfect and entire. It was the interest of each, that the mass of business (understand always profit-yielding business) should be as great as possible: it was the interest of each, that any exertions of his own, by which

any addition could be made to that mass, should not be spared. Fellow labourers towards one common end, the acquisition of pecuniary profit; co-operators throughout the whole of the career, yet in no part of it competitors; a sort of virtual partnership was thus established between these two species of lawyers: a species of connection (be it ever remembered) constituted entirely by the mode of payment established in the case of the judge; a connection ever existing where that mode of payment exists, never existing either where the judge receives no pecuniary retribution in any shape, or where, receiving one, he receives it in the shape of salary only, and without fees.

Under the fee-gathering system of procedure; the main and never failing branch of the art of judicature, a branch which is sure to be cultivated, and in perfection, whatsoever comes of the rest, is the art of *making business*. In the exercise of this art, we now see one sure and ever ready assistant to the judge; the professional lawyer, his partner, as aforesaid.

Whenever it happened that, in the transaction of the business, the party, the client, was himself present, as well as the professional lawyer, his assistant; the presence of a person whose interest it was, that, of the business for which he was to pay, not more should be done than was necessary to his purpose, operated as a check to the exertions of the partnership in that part of their industry which consisted in the art of making business. Both parties felt themselves stimulated by the strongest and most constantly acting interest, to make every exertion for the removal of so troublesome an obstacle. An iniquity so glaring, so repugnant to the most obvious ends

and perpetually recurring principles of justice, so opposite to the practice of every man that ever lived, in every case in which he had the discovery of truth really at heart, could not in any country be the work of a moment. In England in particular, it cost several centuries to bring this part of the system of exclusion to the perfection in which it exists at present.

To make a direct rule of court, saying, in so many words, No suitor shall be allowed to transact, or join in the transaction, of his own business,—no suitor shall ever be admitted into the presence of the judge, or of any of the officers acting under the direction of the judge,—would have been too monstrous. The resource was, so to torment and vex the suitor by delays and fruitless attendances, as to make him regard the faculty of saving himself from this torment as a special grace and favour.

No system can ever be made so absurd or atrocious, as to appear so to the bulk of those who are born under it; much less to those who are paid for upholding it. In Mexico, human victims were understood to be an acceptable fee, human blood a *bonne bouche*, to the supernatural and immortal judge. In England, so late as the seventeenth century, duelling was regarded as the surest mode of obtaining his judgment: and, in the presence of his natural and mortal deputies, champions were, as attornies and barristers still are, regarded as being, on many occasions, eligible substitutes to parties and witnesses.

A capital improvement was made in the art of making business, when one professional lawyer had contrived to make pretences for calling

in the assistance of another. Each made business of his own, and business for the other. John was paid for attending Thomas; Thomas for being attended by John. John was paid for writing what Thomas was to read; Thomas, for reading what John had written. In operations of the mechanical kind, by the division of labour, the sum total of labour necessary to be bestowed is *lessened*. In the case of the species of intellectual labour here in question, (at any rate where it is paid for in this mode), the result is reversed: the sum total of labour bestowed, or (what comes to the same thing) pretended to be bestowed, is *increased* by what is called division, by the allotting of different portions of labour, or pretended labour, to so many different hands.

Of a cause the same in denomination, how comes it that, in the two cases, the effects are so opposite? A seeming paradox: but the direction in which interest acts, explains it. In the physical case, the profit of the directing hand augments, as the quantity of labour employed in the production of the given effect diminishes. In the psychological case, the profit of the directing hand is increased, not by the diminution, but by the augmentation, of the quantity of labour bestowed, or pretended to be bestowed.

The quantity of business made in each given cause being thus made to increase, by and with the number of hands employed in it; it has become the interest of all hands, and in particular of the superintending hand, to give every possible increase to the number of such hands. In other words, the quantity of profit flowing

under this system into the coffers of the judge receives a natural increase from the number of the channels through which it flows.

In ordinary partnerships, an increase in the number of the partners is rather a consequence than a cause of an increase in the quantity of profitable business: where it becomes a cause, it is always in virtue of, and in proportion to, the aptitude for the business on the part of each such additional partner, whether in the way of capital, connections, industry, or skill. But, in this great law partnership, an increase of the number of the partners has never been a *consequence* of the increase of business—has ever been a *cause;* and,—as to skill and industry,—to the augmentation of the factitious part of the business, the absence of those qualities is much more favourable than their presence: the more neglects and the more blunders, the more business.

To the grand object of raising to its maximum the quantity of business, or the manufactory of made business, there is no one article so essentially useful, as a stock (as copious as possible) of lies. Utterance of lies is business: refutation of lies is business: decision and operation in every way upon the ground of those lies is business: reversal of that decision, undoing, or repairing, or pretending to repair, the mischief done by those operations, when the lies come be detected, is business.*

* What is here said of the use of lies must not be understood without distinction. There are lies which the interest of the judge has called upon him to punish; there are lies which his interest has called upon him to cherish. Where the line of distinction ought to be, and accordingly where it has

But the greater the number of professional substitutes on the same side, the greater and more efficient the stock of lies: the generation is more easy, the refutation and detection more tardy and more difficult, the danger of punishment (a danger which, if it were realised, might operate in the way of prevention) the less formidable. Moreover, the greater the number of professional channels through which a profitable lie can be made to flow, the more effectually is detection prevented, or at least retarded; and, by the destruction of all individual responsibility, the more effectually is all danger removed of punishment or shame.

If the party for whose benefit (real or pretended) the lie is uttered, to and in the presence of the judge, is present at the uttering of it, (whether it be by his own lips or another's that it is uttered), there is a somebody who is responsible for it, and that somebody is he. What you can do, if there be any use in it, is to exempt him from all factitious punishment; what you cannot do, is to exempt him from the natural punishment of present shame. On the other hand, keep him out of the way, providing at the same time a gang of professional lawyers of different classes, through whose pens and lips it shall have to flow till it comes to the ear or the eye of the judge; the more numerous the band (lawyers alone, or, if the client be the

been, drawn, will soon be shewn in its place. But, on condition of observing a distinction which has never yet failed to be observed, the encouragement given to lies is one of the most useful of those main branches, which we shall presently have occasion to display, of the art of making business.

author, lawyers and client together), the more secure they are, all and each of them, from every the slightest flush of shame. The lawyers are there; but they (such is their misfortune) are misinstructed and deceived: the client, if he were there, would be exposed to shame; but he is not there: care has been taken that he shall not be.

So, in another branch of trade, the *hustling* trade, the greater the number of the partners, the more difficult it is to ascertain, at each given moment, in whose possession the purse or watch is to be found.

In a partnership (it may be said) in a partnership properly so called, as between one attorney and another, the community of interests is constant and complete: Stiles cannot pocket a sixpence, but Nokes comes in for an equal, or, according to the terms of the partnership, (which comes to the same thing), a proportional, share. But many and many are the operations on the occasion of which, while the attorney receives so much, the barrister gets nothing, the judge as little: many again are the occasions on which, attorney and counsel each getting his profit, the judge still receives nothing, as before.

Doubtless: but, to any practical purpose, what effect results from these exceptions? Not absolutely none; but next to none. To constitute the effective partnership, to render the community of interests strong enough for every pernicious purpose, it is not necessary that the judge should come in for his share on every occasion; it is sufficient if there be any occasion on which he comes in for any share: sufficient

on every other supposition than this, viz. that the aggregate amount of his share does not, *communibus annis*, constitute a sum sufficient in his station in life to exercise any corruptive influence.

The case is, that,—although, upon a minute search and analysis made with this special view, a separation might be made between the two classes of cases, viz. those in which the judge does participate in the profits made by lawyers of the other classes, and those in which he does not,—yet so thoroughly intermingled are the cases that belong to one of the two classes with the cases that belong to the other, that, without such express research (a sort of research which one may venture to say no man ever made), it is not possible for any man in the station of a judge to have retained in his mind any such conception clear enough to have maintained an influence on his conduct. What it may happen to him to say to himself, is, By this or that part of the present suit I shall not get anything: what it never can happen to him to say to himself, is, By two such suits I shall get no more than I shall by one.

What then is the result? That, literally speaking, there is no partnership, because there are no articles:—but that in effect, at least to the purpose here in question, and on the occasions on which the word partnership is here employed, the partnership is undeniable. There exists that sort of community of interests which it is the effect and the object of a partnership with articles to create, and for the expression of which the term *partnership* is preferable, as being so much shorter than any phrase by which

the equivalent of it could be expressed in other words.

Considered in one point of view, the corruptive influence may in its effect be stronger than if there were an actual partnership, declared and confirmed by articles. In the case of a real and declared partnership, all eyes would be open to the existence of it, all hands upon their guard against its corruptive tendency. Acting under this check, the judges, the ruling members, would be more cautious, and abstain from serving the partnership interest, and (which is the same thing in other words) from vexing and pillaging the people, in many instances in which, for want of such a check, they now act at their ease. Whereas, at present, the thread by which the interests of the several members of the firm are bound together being of so fine a texture as to be invisible to vulgar and incurious eyes, that check can scarcely be said to have existence.

That the existence of the corruptive connection is generally unperceived, seems indubitable: else, how is it that, not from lawyers only, but from non-lawyers of all classes, the boasts should be so incessant of the purity of English judicature?

That, in a certain sense, the purity is complete, seems altogether probable: viz. that, within the memory of any man living (to go no higher), no English judge of the superior class ever received from a suitor anything that could with propriety be termed a bribe.

What is more; were it possible to know, I should not be surprised to learn, that no instance had ever happened, in which any judge now

living was instrumental, knowingly and willingly, in the establishment of any fresh rule or practice, the effect of which was to make any addition to the amount of the profit of the firm.

Were I to hear of the existence, without being apprized of the purport, of a new regulation, emanating from any of the courts of Westminster; and were I obliged, as suitors are sometimes in those courts, to make a bet; I would lay the odds that the regulation had both for its object and its effect the promoting the interest of the people, in the character of suitors, and not that of the learned partnership. For inasmuch as, every day, at however slow a rate, the legislature and the people come to see further and further into their own interest in respect of matters of judicature; every day, in point of obvious prudence, it becomes more and more necessary for the partnership to consult that interest.

But, having gone thus far, here I must stop. And, admitting on the part of the existing generation and their probable successors all this purity, no admission is made that is in any degree inconsistent with the supposition of a system rotten to the very core. Nothing is done by any man to make the practice worse. Some things are done now and then to make it better. But so thoroughly bad is it, having been so from the beginning,—so thoroughly adverse to the people, so thoroughly favourable to the partnership,—that to attempt in any way to do anything to make it worse, would be an enterprize as unnecessary as it might be imprudent and unsafe. At the pace here supposed, improvement might go on century after century; and,

after as many centuries as have elapsed since the Julian period, the system, in respect of its essential characters, might remain still the same; still subservient to the ends of judicature, still repugnant to the ends of justice. What these characters are, or at least some of them, will be endeavoured to be shewn in the course of the next succeeding chapters.

SECTION III.—*Interest of the partnership in depraving the moral and intellectual faculties of the people.*

Whatever mischief is done from the seat of judicature, must have a veil to cover it. It must be taken for justice, or it would not be endured. What is done by the authority of a judge acting as such,—were it avowed, or even, without being avowed, clearly understood, that it was contrary to justice, and by the judge himself known to be so; in the first place, the sovereign, whoever he were, would not endure it; in the next place, if the sovereign would, the people would not: they would rise upon the judge, as they did upon Jefferies, and tear him piece-meal.

To keep the moral and intellectual faculties of the people in as corrupt and depraved a state as possible (under the exceptions dictated by a regard to personal safety), may therefore be set down as among the constant studies of the man of law. To construct and keep at work such engines as should be best adapted to the purpose, has been the subject of his constant labours.

Suppose a people reduced to such a pitch of

stupidity, as to be persuaded that to convert injustice into justice was a transformation in the power of every judge, and that, to effect it, nothing more was in any case necessary, than to pronounce one or other of three or four words, such as *null, void, bad, quash, irregularity*. What is easy enough to conceive is, that, supposing this point accomplished, the actual ends of judicature are fulfilled; the one grand problem solved.

Suppose, again, a people brought into and kept in such a state of stupidity, as to believe, upon the word of a judge or any body else, that wilful falsehood, when uttered by or by order of a judge acting as such, becomes not only an innocent, but a useful, a meritorious, and even a necessary, practice; insomuch that, without it, justice either could not be administered at all, or at any rate could not be administered in anything like the same perfection as with it, and by the help of it. Here again (supposing this done) what is easily understood is, that in such a state of things a judge need never be at a loss: for that, under favour of it, it is in his power at any time to commit, with impunity and safety, whatever wickedness is most to his taste.

All this is plain and easy. But the difficulty, I do not say *is* now, but one day *will be*—(posterity will feel it in all its force)—the difficulty will be, to conceive how it should be, that, in a state of society in many other respects so highly enlightened, a whole people, including the members of the sovereignty, should have been in such a state of infatuation as to give, in language or in practice, assent to two proposi-

tions, in which so much absurdity is combined with so much wickedness: propositions, the persuasive force of which depends upon a constant and universal habit of blind assumption: propositions in defence of which, when once put into question, not all the wit of mankind could furnish, in the way of argument, the value of a single syllable.

For reconciling the understandings of the people by argument and reason to the practice of these enormities, it is needless to say how vain the attempt would have been, how hopeless the task could not but have appeared to be. For reconciling their affections, and attaching them to the practice of these enormities, the course taken was, to give it a connexion as close and extensive as possible with such results as in themselves were most agreeable to those affections.

To do away the antipathy naturally excited in this or that man's mind by the view of an immoral act habitually practised by another, no course can be so effectual (where it is a possible one), as to engage him in the practice of it himself. This done, it is no longer in his power to accuse the other man, without accusing himself. His mouth is stopped for ever; and, to keep at peace with himself, an indispensable task is to reconcile himself in opinion, as well as he can, to that sort of conduct to which he has already reconciled himself in practice. From thence forward, his thoughts on the subject will be as few as he can make them, and those all of them on one side. Whatever idea tends, in his view of the matter, to present the practice in an agreeable light, will be embraced

with avidity: whatsoever tends to place it in an unfavourable point of view, will be studiously repelled with aversion and disgust.

Hence it is that, under the fee-gathering system, it has been to the partnership so desirable an object, and (with the help of the powers inseparable from the office) unhappily so easy a one, to convert the whole body of suitors, little less than the whole body of the people, into a company of liars; to make the practice of that vice a condition *sine quâ non* to the receipt—let us not say of *justice*—but of all those necessary benefits which are ever prayed for or granted under the name of justice.

Accordingly, in the road of moral filth and corruption thus elaborately made, not a step can a man stir without either uttering some lie, or acquiescing in the utterance of it by some one else. As nonsense succeeds to nonsense, absurdity to absurdity, so does lie to lie, from the beginning of the career to the end of it: all forced into men's mouths by these pretended guardians of the public morals.

To the youth of both sexes, when flocking to a ball-room or a theatre, it has never yet been proposed, as a condition precedent to their admission into those seats of social pleasure and innocent delight, that they should, each of them, before the delivery of the ticket, take a roll in the contents of a night-cart, kept in waiting for that purpose. But an initiation of that sort cannot be more repugnant to the ends that attract the children of gaiety to a theatre or a ball-room, than the being rolled, as suitors are, through the mire of mendacity, is repugnant to the ends in pursuit of which they find them-

selves under so unhappy a necessity as that of betaking themselves to that seat of affliction called a court of judicature.

SECTION IV.—*Interest of the partnership in the irrationality of the law.*

It was and is the interest of the partnership that the law be throughout as irrational as possible. Why? That it may be as unconjecturable as possible. The more rational, the more easy to discover by conjecture; the more irrational, the more difficult:—no, for that implies proportion; whereas nothing was more easy than to give it that degree of irrationality that should set conjecture at defiance.

In every country that is not plunged in barbarism,—the inhabitants of it subject to the yoke of corruption or caprice under the mask of justice, (but where is the country that in this respect has completely emerged out of the sink of barbarism?)—the will of the sovereign has, throughout every part of the field of justice subject to it, clothed itself in a determinate assemblage of words: and those words adequately conveyed to the notice of each individual whose conduct is respectively required to conform itself to the respective portions of it. So far as this fundamental duty of the sovereign has been fulfilled, the office of conjecture is a sinecure. When and so far as this duty has been left unperformed, there extends the province of conjecture. The materials which conjecture has to work upon, have by some means or other been locked up, and rendered inaccessible to the great mass of those whose conduct is to be

regulated, or rather whose condition is to be disposed of, by a decision impossible to be foreknown, because not previously in existence. Here then it is that the demand for conjecture comes in, and the use of rationality, for the assistance of the individual in the performance of a task at once so important and so difficult.

Applied to law, *rational* is as much as to say subservient to *utility*. Seeing that general utility is for the most part the object actually aimed at, always the object professed to be aimed at, by the authors of statute law; men take for granted that the same has been the object aimed at by jurisprudential law. This being taken for granted; each man,—when, for the purpose of determining at the moment how to conduct himself, it becomes necessary to him to form a conjecture relative to the state of the law, actual or future, in that behalf,—thinks with himself what sort of decision is most conformable to the conceptions he has been led to entertain concerning the dictates of general utility, viewed either immediately in themselves, or through the medium of the dictates of justice.

Utility being the object towards which, with more or less skill and felicity, all eyes are directed; what appears to each man the track of utility, is the track in which he expects to find, on each occasion, the footsteps of the judge. Positive law, actually created statute law, or known decisions of jurisprudential law, excepted,—this is the only chance which the ideas of any one individual have of meeting with the ideas of any other, the judge himself included. The track of utility is the common

place of rendezvous for all minds: meeting in it is the only chance which any one mind has of finding out any other. The road being one which they are all but too apt to miss, hence the expectations of each concerning what will be the opinions of this or that other are proportionably apt to be disappointed: but, be the disappointment ever so frequent, this is the only chance they have for escaping from it.

But, as it is the interest of every individual, in the character of subject (viz. to the law) and eventual suitor to the judge, to possess the greatest possible chance of finding out by conjecture what will be the eventual decision of the judge; so, on the other hand, under the fee-gathering system, it is the interest of the judge that, in the endeavours thus employed to find out what will be the decision, the suitor shall be as seldom right as possible: in other words, that, with reference to the suitor, the state of the law should be throughout not simply uncognizable, but as unconjecturable, as far out of the reach of conjecture, as possible.

From this unconjecturability, two intimately connected but perfectly distinct advantages accrue to the partnership, and, *pro interesse suo*, to the judge. 1. In proportion as the law really is unconjecturable, the failures made by the suitor in his attempts to find it out are frequent: and, as often as the conjecture of one party points one way, while the conjecture of the adverse party (both being in a state of affluence adequate to the maintenance of a suit) points the opposite way, a suit takes place, and the partnership have the benefit of it. 2. In proportion as, to him who, in the quality of even-

tual suitor, thinks of it, it appears to be, with reference to himself, unconjecturable; in that same proportion rises the obligation he feels himself under of having recourse to the professional lawyer, by whom that faculty of conjecturing, of which he feels himself destitute, is supposed to be possessed: here then, suit or no suit, so much business is made for the professional lawyer in that shape, in the character of law-adviser or opinionist, whose business it is in each case to form conjectures concerning what in that case will be the eventual decision of the judge. The judge's mind the firmament; the opinionist the astrologer, whose horoscope points itself to that seat of supercelestial influence.

To accomplish the object of the partnership, (his own of course included in it), it is evident enough how easy, on this occasion, is the task of the judge. Appoint a place of meeting with a man, if in fact it be your wish not to meet with him, nothing can be more easy: a very slight deviation from the spot is sufficient to secure you against the misfortune it is your wish to avoid. By stepping aside but a little way out of the track of reason, a judge may thus be sufficiently assured of having placed his decision, and all future decisions capable of being built on the same ground, out of the reach of conjecture.

On this occasion he has but two purposes to accomplish; and neither of them very difficult to accomplish:—1. that the decision, with the ground he places it on, shall be irrational; and 2. that, howsoever irrational, they shall not be in such sort and degree irrational, as that it

shall be impossible to find for them any pretence which may serve to prevent their irrationality from presenting itself in its genuine colours to the eyes of the non-lawyers, whose interests are sacrificed by it.

The more unconjecturable, the more abstruse: the more abstruse, the greater the degree of sagacity and appropriate information (the sort of information called *learning*), which becomes requisite to the possession of any tolerable chance of pitching upon the eventual decision by a fortunate conjecture.

The more irrational, the more unconjecturable: the more unconjecturable, the greater demand for learning.

But, with respect to *learning*, (whatsoever be the subject); the more abstruse it is, that is, the greater the force of mind it is supposed to require, and to attest the possession of, the greater the admiration it is wont to excite.

Thus it is, that, out of the sink of those iniquities, in which, if seen in their true light, they would have found a source of shame—of well-merited odium and contempt; out of that same sink, they have contrived to draw a fund of glory. Out of the den of iniquity and nonsense dealt out blindfold, and in return for such dispensations, not wealth alone, but honour, wealth, and reverence, are poured into their laps by the deluded multitude.

The excrements of his body are the presents distributed by the Grand Lama to such of his votaries as he expects to find his account in honouring: jewels, gold, and silver, are the presents sent to him in return. The excrements of his brain are the dole distributed to

the non-lawyer by the man of law; and the expected return comes to both impostors in the same valuable shapes.

Section V.—*Limits to the operation of the sinister interest.*

The mass of mischiefs to which the authors of the technical system were led by the influence of this sinister interest to give birth, was not mischief in all shapes without distinction: the extent of it was bounded by certain exceptions, conditions, limitations.

1. The subject of depredation is the matter of property or wealth, considered as liable to be transferred from hand to hand by such means. If wealth in every shape had been destroyed, profit, judicial profit, would thus have been dried up in its source. Fees are the golden eggs: national wealth, the hen that lays them.

2. A lawyer, besides being a lawyer, is a man. He sleeps commonly in a house, he travels frequently on a road. Were any such misfortune to happen to the man, as that of seeing his house burnt, or feeling his throat cut, the sympathy of the lawyer would hardly be altogether idle. This is another motive for prescribing some sort of limitation to crimes in general, and more particularly to those more violent ones, of which, if too liberal an encouragement and indulgence were to be extended to them, the destruction of society would be a speedy consequence.

By the same principle by the action of which he is induced to nurse and encourage some sorts of misdeeds, he will be induced to aim

with more or less energy and felicity at the prevention of others. The misdeeds he nurses will be those from which he has most to gain, and least to fear; the misdeeds he combats will be those from which he has most to fear, and least to gain.

A great majority of the whole number of misdeeds have ever been, and will ever be, offences of the predatory class: and of these, again, a great majority will have for their authors a set of miserable wretches from whom little or nothing is to be extracted in the shape of fees. They will be, in a word, crimes of indigence: theft, highway-robbery, housebreaking, and so forth. Thus far, then, clients and suitors are hardly worth multiplying in the character of defendants. Moreover, the persons exposed to suffer by these offences are persons of all classes, poor as well as rich; and, taking persons of all classes in the aggregate, a great majority will be too poor to yield a mass of fees worth stooping for. Thus far, then, they are but little worth nursing and multiplying in the character of prosecutors.

When a mass of property constitutes a stake contended for by two parties, or sets of parties, and that capable of being at an early stage impounded, or at any rate sure to be forthcoming; when an estate in any shape is at stake, and it can be so ordered that costs shall come out of the estate; this is the sort of cause worth nursing above all others.*

* At the Old Bailey, in a case of theft, the same day has seen the offence committed, and the malefactor apprehended and definitively convicted: while in the Court of Chancery, if so it happened that a man who by a fraud had got posses-

Taken together, the aggregate of criminal suits compose an object very little worth nursing, in comparison of the aggregate of non-criminal suits. Accordingly, it is in the former class of causes that the greatest regard will be

sion of an estate, was disinclined to part with it,—a decree being, after a certain or rather uncertain number of years, obtained, another year was employed in "*spending the process of the court*," before the effect of the decree could be obtained; before "the plaintiff could have any effect from the suit:"* the defendant having that time given him to spend the plaintiff's money, while the partnership were feeding upon both.

The court had a certain quantity of process, which was to be expended; and till the expenditure was consummated, neither justice, nor so much as a semblance of justice, was to be had:—a certain quantity of "process to be spent:" that is, among a certain set of officers, a certain mass of money to be distributed in the shape of fees. Could the harpies but have been let in upon the carcase all at once! but decency forbade: appearances were to be kept up.

In French judicature, in the case of those crimes which are most frequent and most formidable, (such as theft, house-breaking, highway robbery, murder on the occasion of robbery), if the defendant were insolvent, the costs were borne by the king, or the grantees by whom the burthen and benefits of judicature were shared. In France, accordingly, criminal suits were frequently no less dilatory, no less expensive, no less profitable, than civil ones. In England, individuals, in the character of prosecutors, bearing their own costs, and little being to be got from the vulgar herd of malefactors, the general interest prevailed over the particular official and professional interest; and, in comparison of criminal causes under the French system, and non-criminal under the English, criminal causes, such as the vulgar herd of malefactors are most apt to be concerned in, are undilatory and unexpensive. In comparison, viz. with what *is* the practice in those other instances: for as to what it *might be* in the same instances, the case is widely different: factitious delay and expense are sufficiently copious.

* Gilbert, Forum Romanum.

manifested for the ends of justice; that most care will be taken for securing the conviction of the wrong-doer, the acquittal of the guiltless; and that the quantity of factitious expense, vexation, and delay, will be least considerable.

3. To the absolute and exclusive pursuit of the ends of judicature, the power of the legislature would always be an obstacle, resisting with a greater or less degree of force.

Of the abuses of which the technical system was naturally composed, some of the grossest and most intolerable would now and then be removed; and the idea of censure, and even punishment, how little soever to be apprehended by such hands and from such hands, could never in this line be altogether without influence.

But, though, in the character of a check, as well as a remedy, this superintending power would never be altogether without its influence; yet, in the character of a bar, as well as a remedy, it could never be other than a very unsteady and inadequate one.

It was only because the hands in which the power of supreme legislation resided, were in some way or other, in respect of some other necessary endowment, more or less deficient,—that the task of laying down the rule of action could ever have been entrusted (or rather left and abandoned) to hands so essentially and incurably incompetent.

In this or that place he would be for a length of time (like John Doe) not to be found any where:* in one place he would be for a score

* England before Henry III.

of years together,* in another for a century or two,† in the state of a dormouse: the day of his resurrection uncertain, or destined never to arrive.

When he exists, if he be a *corporation sole*, this corporation will be a puppet in the hands of some member of the fee-gathering partnership: no one else uniting the experience, industry, and reputation, necessary to the faculty of coping with a mass of accounts screwed up by ages of exertion to the maximum of intricacy.

If he be a corporation *aggregate*, the same causes will still operate to make him yield to the current against which his power should be as a dike: to lay him, more or less, at the mercy of those to whose enormities he should operate as a check.

Even though adequate knowledge and skill, as well as power, should not be wanting; still the public affection by which he is urged to oppose the torrent, will be apt to prove but a feeble counterpoise to the strong and concentrated interest which gives motion to it.

4. To the sort of check last mentioned, the apprehension of popular discontent would always add another, though always one still more feeble. It is only through the medium of the legislature, that the people at large can act in this direction with any considerable effect: unless it be with such violence and irregularity, as to render the remedy worse than the worst paroxysm of the disease.

* England at various times during the cessation of parliaments.

† France and Spain.

Even at the height of absolute or ill-checked power, reputation it is true can never be altogether without its value. But the opinion of the public at large can never operate as a check upon the enormities of lawyers, any further than as the people are in a condition to see through the artifices of lawyers: and so completely has the field been everywhere rendered impenetrable and repulsive to unlearned eyes, that the people, be their sufferings ever so acute, know not so much as to point to the seat of the disease, much less to choose and call for an appropriate remedy.

Success has long ago crowned the machinations of the man of law. The ends of justice have been thrust by him out of sight. Spurious ends, adherence to this or that pernicious prejudice, have been set up in their stead. These spurious ends have habitually passed upon the people for the legitimate ends. The Baal to whom his priesthood bow the knee, the people have been taught and have learnt to worship as the true God.

What the effect of the law may be upon the fate of some individual, who at the moment happens to be an object of popular favour or disfavour, is the only sort of law question in which the great body of the people are apt to take any very strong or steady interest. So the point of the day be gained;—at what expense it is gained, (I mean at the expense of what mischief done to the whole body of the laws), is no concern of theirs.*

5. To the above checks, which, with more or

* See Wilkes's case, *infra*. Chap. XIV. *Nullification.*

less efficacy, operate all over the civilized world, (for throughout the whole of that extent spreads the plague of technical judicature), English jurisprudence adds one peculiar to itself. As, in another line of practice, thief is sometimes caught by thief; so in this one it has happened, in more instances than one, that one abuse has received a sort of correction from another.

Subordinate judicatures of narrow extent excepted, originally there was but one court for everything. Business overflowing, a division was made (such as it was) of the field of judicature. The line drawn, or attempted to be drawn, being not geographical, but metaphysical, the limits were of course, in a multitude of points, obscure and ill-defined. Four great shops, with a quantity of custom allotted out for each, were opened at once for the sale of that commodity which went by the name of justice: four great shops: the original universal shop, with the king at the head of it, being parted off into four quarters for that purpose. *Honest* men might have found difficulty enough in settling which belonged to each: *these* men strove might and main, each of them to steal what, to the knowledge of every man, and of himself more particularly, was the indisputable property of his next neighbour. No contrivance, no wickedness, was spread. Mendacity, being the weapon every body was most expert in the use of, was employed by every body. The natural arbiter, the king, looked on and stared. Parliament, sometimes in existence, sometimes in abeyance, never acting but upon the spur of some pressing or rather excruciating exigence, either thought nothing of the affray,

or knew not what to think of it. Universal lassitude put at length a period to the war, by a sort of *uti possidetis*. The brethren parted like two fish wives, each with a handful of the spoils of her antagonist in her hand.

Be the cause of this chance-medley what it may; the result has been, that, for a considerable part of the aggregate stock of commodities taken together, the suitor has two, or even (for some articles of it) three, shops, among which to take his choice. From the competition, it has been supposed that, in the case of this as of other branches of trade, the customer derives a considerable advantage. Each shop stands engaged by interest to vie with its rivals, either in respect of the cheapness, or in respect of the goodness, of the articles in which they deal. The principle which operates as a cause of this benefit, of the service thus rendered, or supposed to be rendered, to the ends of justice, may be termed the *double-shop*, or *rival-shop* principle.

The advantage, such as it is, flowing or supposed to flow from this principle, seems to be attached, if not in an exclusive, at least in a pre-eminent degree, to the fee-gathering system. Supposing the retribution given in the shape of a fixed salary, the motive of love of reputation (it is true) might act with a certain degree of force, in the character of a cause of exertion; but suppose it to present itself in the shape of fees depending upon the number of suitors, and thence, in a certain degree, upon the reputation of the court, there would still be the love of reputation, and the more substantial motive, the love of fees, besides.

The advantage, such as it is, is well worth consideration: not the less, as being the only one (and that altogether casual and undesigned) which the fee-gathering system has to set against so many pernicious consequences as have been already under review.

That it is not altogether imaginary, seems indubitable; but it applies not with equal force to all the ends of justice. The way in which it is of use, seems to be by diminishing the probability of misdecision to the prejudice of the plaintiff's side. It being the interest of the judge to draw into his court as many suits as he can; and the party on whom it depends whether the suit shall be instituted in one or other of the two courts being the plaintiff; he will, in proportion to the quantity of emolument at stake, be stimulated to exert his faculties in the endeavour to render justice in favour of taht side.

Section VI.—*Vices of established judicature, how far the effect of design.*

Though, of so many unjust rules and practices as the system of regular procedure teems with, or rather is composed of, there is not perhaps a single one that is not in some way or other, directly or indirectly, subservient to the actual and false ends of judicature; it would be an error to suppose that in every instance the mischief has been the fruit of design on the part of any one of the authors: much less of a general concert, official and professional.

The leading features having been traced by

design; a large part, perhaps in bulk the largest, may easily have been filled in by imbecility and indifference.

Imbecility (understand always *relative* imbecility) was a natural consequence of the original choice made of the sinister ends. To delude the other branches of the government, and the people in the character of suitors, it was necessary that the real mischief underneath should receive a covering of apparent good, from something wearing the name of reason. The nature of things not affording any good reason, a bad one was to be fabricated. But the same sinister interest that produced the fabrication of the bad reason on the part of one man in the character of judge, produced the adoption of it on the part of his colleagues and successors: and to adopt the bad reason with as little violence to conscience as might be, it was necessary to take that course which is taken by all men under the influence of sinister interest, viz. to turn aside from all considerations tending to evince the absurdity of the doctrine; to pin down the attention to all considerations tending to conceal the absurdity from view. When the practice is completely absurd and mischievous, without a grain of utility among its effects, the considerations tending to *shew* the absurdity of it will be all the considerations belonging to that particular case: the considerations tending to *conceal* the absurdity of it will be those general considerations which for this sort of work compose the standing stock of instruments: the great learning and venerable character of the prime author (known or unknown); the diffi-

culty of fathoming the depths of the science; the danger of forming a hasty conclusion from the superficial and partial appearances presented by a first view; the observation, that when, in consequence of any such hasty and incorrect views, alterations have been made, the mischief of the alteration, and thence the wisdom of the preceding practice, has been manifested by subsequent experience.

It is in this way that, as in religion, so in jurisprudence, there is no absurdity so gross as not to have found its zealous, and in a certain sense even its disinterested, defenders: for,—howsoever the habit of false reasoning may have had, at its origin, the influence of sinister interest for its efficient cause,—yet, when once in train, it is driven on by the *vis inertiæ* in the beaten track, till at length it acquires an independent existence, having lost all recollection of the impure source that gave it birth.

Thus it is, that, in all that train of reasoning which exercises itself over the particular field in question,—in all that quarter of the psychological frame, a sort of local palsy establishes itself: a habit of imbecility, a distempered relish for the convenient absurdity, a nausea for inconvenient truth.

This partial sort of mental palsy is not incompatible with an ordinary, nor even with an extraordinary, degree of strength in the other part of the mental frame. The Herculean mind of Johnson, driven to the confines of insanity by the *veteres aviæ* that had taken possession of his bosom in early youth, laboured under a palsy of this kind, and had lost the faculty of reason-

ing on certain topics connected with religion, as may be seen in the hints given by his biographers.

Alchymy, judicial astrology, judicature under technical procedure; under these names may be seen so many systems of profit-seeking imposture: alchymy, the art of cheating men on pretence of making gold; judicial astrology, the art of cheating men on pretence of foretelling future events; judicature (under technical procedure), the art of cheating men on pretence of administering justice.

That among alchymists and judicial astrologers there have been those who have been dupes to the impostures by which they profited, cannot be doubted. That, among technical lawyers, prejudice, and the concealed workings of self-interest, have been productive of the like illusion, is equally indubitable. Between the company of dupes, and the fellowship of hypocrites, who shall draw the line? No one under omniscience. And to what use would it be drawn? To none whatever. On the physical ground, how often must the dupe and the impostor have been counted in one person,—a dupe at the commencement of his career, an impostor in the progress of it! The same delusions by which he had been himself deceived, would, after the cloud was dissipated, and when the jargon had become sufficiently familiar, serve him for propagating the delusion to other minds.

Thus on physical grounds. And what is there that should render it otherwise on the moral?

Neither on any of these grounds are the cha-

racters of dupe and impostor incapacitated from meeting in the same person at the same time.

The alchymist sells the art of making gold: what he knows is, that as yet he is not himself in possession of that art: what he is not yet satisfied of, is, that no other artist has ever been, or has had any reasonable hope of being, more fortunate.

The astrologer foretells future events. What he cannot but know, is, that the event has belied the predictions hazarded by him in former instances. What it may be that he is not yet satisfied about, is, that the fault lies not in the artist, but in the art.

What, under the system of technical procedure, the judge cannot but see, is, that the decisions he pronounces are frequently, the course of procedure to which he sees the suitors confined is constantly, in a state of repugnance to the ends of justice. What it is possible he may not see, is, that this repugnance is the work of his predecessors in power and office: that it has not its root in the nature of things. To the ends of justice, from his first entrance upon the career, he has never been accustomed to turn his eyes. The objects, the only objects, towards which he has been accustomed to look with any degree of complacency, are the principles and rules actually established: established, probably under the pretence, possibly under the notion, but, whether pretence or notion, certainly false, of their being so many means conducive to the true ends of justice. Are they really thus conducive? A proposition this, which he has ever found it altogether easy and con-

venient to assume and take for granted; not at all easy, and altogether inconvenient, to inquire into. For appearing to regard them as being thus conducive, as being practically necessary, to the ends of justice, he has as good a pretence and (as towards the public) a justification, as heart can wish: he has the unanimous certificate of all those who are generally supposed to know, or to be capable of knowing, anything about the matter. That the decisions prescribed by the system he pursues are, in abundance of instances, repugnant to the direct ends of justice, is a truth continually before his eyes: what he does not see is, that there exists any other system, by the observance of which the frequency of such repugnance would be diminished. How happens it that this better system is never seen by him? Because there would be no profit, no pleasure, nothing but difficulty and toil, in looking for it; no profit, no pleasure, nothing but shame and fear, in finding it.

Under his eye lies the natural, the summary, system, in all its various branches; in which such unjust decisions cannot but be incomparably less frequent, since in them there are not any rules, as in his system there are so many rules, the effect of which (as far as pursued) is to render such injustice necessary. There it lies under his eye: but what is there, that to any use, with any reference to his own practice, should engage him to bestow a glance upon it? On what part could he turn his eyes that would not publish to him his own shame?

To sum up the result of the foregoing observations; what may be open to doubt, is, in what degree, on this or that occasion, this or

that individual may have been actuated by a deliberate intention to sacrifice the ends of justice: how much of the effect may have been produced by the direct and acknowledged operation of the sinister interest, how much by the unperceived influence of a prejudice produced by the unperceived operation of that interest, how much by honest blindness and negligence. What does not admit of doubt, is, that, supposing such to have been the views and wishes, they could not by any other arrangements have been more fully accomplished than they have been by these existing ones.

Section VII.—*Recapitulation.*

That the conclusions resulting, though but in the way of corollaries from the above survey, may be placed in a distinct point of view; a few propositions, by way of recapitulation, may in this place be not without their use.

1. That,—in so far as it has departed from the practice of the courts of natural procedure,—the practice of the courts of technical procedure, the practice of all the courts in the kingdom (the above excepted), is completely and radically unconducive and repugnant to the professed and supposed ends of their institution, the ends of justice.

2. That, in the mind of the judges, (howsoever it might have been in the mind of the legislator, so far as the legislator has interfered in the ordering of it), it never has, unless comparatively speaking of late years, been directed to those ends.

3. That the ends to which it has been directed have been the procurement of the maximum of profit, combined with the maximum of ease, immediately to the judges, and intermediately to the several other classes of lawyers.

4. That, to the purpose of the collection of this profit, lawyers, all classes taken together, with the judges at their head, constitute a virtual partnership.

5. That, of this departure from the ends of justice, the consequence is perpetual injustice: injustice in every one of its shapes, and in every one of them to a prodigious amount: failure of justice and misdecision to the prejudice of the plaintiff's side; misdecision to the prejudice of the defendant's side; vexation, expense, and delay, all factitious, and manufactured in prodigious quantities, on both sides.

6. That the judges of modern times,—not having had any concern in the forming of the system, but taking it as they found it, and being bound to pursue it throughout, except in so far as any alteration may come to have been made in it by competent authority,—reap the whole benefit of its depravity, without incurring either reproach or danger: and that, though constantly occupied in the working of injustice in all its shapes, they are not in that respect chargeable with criminality in any shape, or with any the slightest misdemeanour; the mischief they are continually occupied in doing, being done not contrary to law, but according to law.

7. That, in this perpetual fabrication of mischief and distribution of injustice, there is no-

thing in any way inconsistent with that perfect purity and uncorruption which has so long been regarded as a characteristic, and perhaps, in the degree in which it is possessed, the peculiar virtue, of an English (say also British) judge: the measure of profit regularly received by those judges according to law, being probably greater than, under the most corrupt administration of justice in any other country, was ever received by judges of the like rank in the way of bribes, and contrary to law.

8. That, being not only authorized, but bound, to pursue the course marked out by the established system as it is, it would in the instance of any individual judge (in so far as he keeps to that course) be a question equally useless, invidious, and indeterminable, how far, in his own conception of the matter, he pursues the ends of justice,—how far (if in any degree) he pursues the established ends of judicature, as above delineated.

9. That, howsoever it may be to be regretted that, in the midst of such a heap of abuse, to which, in one way or other, conscious or unconscious, they were continually adding,—neither the whole order of judges, nor one member of that order, ever exhibited symptoms of any serious desire, by their own authority, or by application to the superior source of power, to apply any considerable and efficient remedy; yet (in so much as no such obligation has ever been imposed upon them by any official oath, or otherwise by any positive law) the question whether, on the score of such forbearance, any blame, even of the mere moral cast, can justly

attach to them, (for legal blame is altogether out of the question), would be another question alike useless and invidious.

10. That, in so much as, by any such interference, every person in that high station would have more or less to suffer, and no person, in the way of ordinary interest, anything to gain; the wonder that no such interference has ever hitherto taken place would be a wonder, the expectation that such interference should ever generally take place would be an expectation, repugnant to universal experience and common sense.

11. That, though in the legislative body there be power abundantly competent to a complete system of reform, in this as in every other line of abuse; yet, inasmuch as, on the part of any individual person within, any more than without, that body, there exists neither obligation, nor adequate inducement in any other shape, either to propose any such system, or any the smallest portion of it, or ever to look into the actually existing system in any such point of view; neither matter of blame, nor matter of wonder, on this score, is to be found in the instance of any individual member of that supreme body, any more than on the part of any member of the legally exalted though subordinate body above mentioned.

12. That, by no institution which should have for its professed object the propagation of vice, could vice (in three of its most pernicious shapes, mendacity, insincerity, and injustice) be more assiduously or successfully propagated, than it is by and for the profit of the principal courts of justice. And of what vices? Not

those of which (as in case of drunkenness) pleasure is the sure and present, pain but the future and contingent, fruit; but those of which pain present and future, pure and unmixed evil, is the result.

13. That the practice of the courts of natural procedure is not subject in any respect to such imputation: that, in and by those courts, should vice in any shape be manifested or propagated, it never can be manifested or propagated—should injustice be ever committed, it never can be committed—without exposing the delinquent to contingent punishment, as well as to certain and immediate shame. Delinquency, at the worst, is comparatively rare: and if punishment in case of delinquency be not there so certain as it might be, the fault lies in the practice of those superior courts, in and by which alone such punishment could be inflicted.

14. That, in the character of schools of absurdity, the practice of the regular courts, and the discourses by which, under the name of reasons, it is explained and defended, exercise no less pernicious an influence over the public understanding, than, in the character of schools of vice, they do over the public morals.

15. That the practice of the courts of natural procedure is as free from absurdity as it is from vice.

16. That, against the mal-practices committed by individuals under the system, no tolerably efficacious remedy can be applied by the punishment of those individuals: that the root of the evil lies in the system itself: that the mischief done by violation of the rules, bears no proportion to the mischief done by the observance or under the

sanction of the rules; and that, under the system, no mal-practices ever were, or ever can be, committed, which it has not been the tendency at least, if not the object, of the system, to engender and to nurse: that any misbehaviour of the pupils is the fault immediately perhaps of the pupils, but originally of the school; and that it results only from their having followed too closely and incautiously the sort of instruction they had received.

Hence the injustice of imputing any especial or peculiar personal blame to this or that individual functionary, on the score of his having, on this or that occasion, pursued the dictates of that sinister interest which the system itself, in the state in which he found it, planted in his breast.

The fault lies not in the individual, not in any peculiar taint of improbity seated in the bosom of the individual, but in the system itself, the system into which he enters, and under which he acts. Amend the system, you amend the individual. Render it his interest to pursue the ends of justice, the ends of justice will be pursued; the ends of judicature will be brought to a coincidence with the ends of justice.

Hence, also, it may be inferred, that the more powerful the sinister interest planted in every bosom without exception by the corruption of the system, the more substantial is the merit, the more brilliant (in proportion as that merit is understood) will be the glory, of the few, should any arise, (more than few there cannot be), in whom the force of that sinister interest should have found a superior and opposite force strong enough to overpower it.

In vain would any individual of any of the classes in question exclaim, You have thrown obloquy on the profession; you have, in as far as depended on you, covered it with infamy, and that infamy falls upon me, however honest my character, however irreproachable my conduct.

My answer is, I have done no more than to state the strength of the temptation under which you act; to state (what is matter of history, written upon the face of the system) how weak, if any, the resistance which that temptation has experienced from those who have gone before you.

The task I have been labouring in, according to the measure of my strength, is no other than the sort of task which has been performed, and with so much applause from the public, by so many public committees and commissions under the authority of the state; bringing to view the opposition that has taken place between the interest of the public in respect of the branch of administration in question, on the one hand, and the interest of the functionary, on the other; and the system of conduct to which, to the prejudice of that branch of the public service, that opposition of interest has given rise.

Of the infamy, not a particle can fall upon yourself but from your own choice. Confess the viciousness of the system, or defend it. Confessing its viciousness, the greater its viciousness, the greater your merit and your glory. Defend it, if to you it appears defensible; remembering always that by defending it you make it your own; and that, after your defence, in whatsoever eyes the system will appear vicious, after all, and indefensible, the vicious-

ness of the system will be the ignominy of the advocate.

Hence, also, the absurdity and mischievousness of any opinion which could call upon the author, upon any one who shall undertake the task he has undertaken, to spare the system in consideration of the station of the persons acting under it: to suppress truths of the first importance, in consideration of any displeasure, of which, in such exalted breasts, the doctrine may naturally be expected to be productive.

Hence also supposing the existence of the sinister interest established, the incongruity and absurdity of paying any regard to opinion, mere general declaration of opinion (as contradistinguished from argument), delivered by any person acting and speaking under the impulse of a sinister interest of such mighty force. Separated from argument, the value of such opinion will not be simply nothing, but negative; operating on the side opposite to that in favour of which it is delivered. The more strenuously an existing arrangement is in this way defended, the stronger the presumption afforded of its being beneficial to the administrators of this corrupt system, which is as much as to say, pernicious to the community at large: the more strenuously any new arrangement, proposed in the character of a remedy to the abuses of that corrupt system, is opposed, the stronger the presumption thereby afforded of its utility.

There is yet another circumstance, by which the value of any opinions of this description (if they had any) would be diminished, not to say, done away. In the quarter from which such

opinions are supposed to come, there exists, of necessity, the most thorough knowledge of all the matters of fact, out of which just ground of defence in the one case, of opposition and censure in the other case, are capable of being made. All the materials of defence that the subject furnishes, all these materials of defence (if any such exist) are constantly at your elbow: the handling them, turning them about, and, at a moment's warning, making application of them to any given purpose at command, is the constant occupation of your whole life. With so mighty an advantage in respect of the materials for making an appropriate and proper defence, if the nature of the case admits of any,—do you, notwithstanding, betake yourself to generals, and confine yourself to generals?—to a sort of argument equally at the command of the best cause and the worst? Confining yourselves to such arguments, you give judgment against yourselves.

CHAPTER IV.

PARTICULAR EXEMPLIFICATIONS OF THE VICES INTRODUCED BY THE FEE-GATHERING PRINCIPLE INTO TECHNICAL JUDICATURE.

IN the ensuing chapters, the business will be, to bring to view the principal devices constituting so many leading features of the technical or fee-gathering system of procedure, in the character of effects produced by the operation of the sinister interest on the authors. But, before we proceed to the enumeration and delineation of these several features considered in a general way, as produced by the operation of that corruptive principle, it will serve for illustration as well as for proof, if a view be given of the operation of the principle in particular instances; a particular portion of delay, vexation, and expense, produced on a particular occasion, on the part of the suitor, through the medium of a particular rule or course of practice, produced by a particular sum of money, operating, in the character of a principle of corruption, on the bosom of the judge in whose decision and habits of procedure the practice took its rise.

In many of these instances (to say no more), as the practice itself, so the mischief of it, stole

on at an imperceptible rate; being, therefore, not the work of any one judge or judges to the exclusion of the rest, the effect produced by the operation of the sinister interest is rather the preservation of the practice, than the generation of it. If so it be (and surely it will not be otherwise) that, of those by whom the benefit of the abuse has been reaped, no one can ever have failed to recognize the mischievousness of it, the repugnancy of it to the ends of justice; on the other hand, neither is there any one who can have recognized in himself the author of it: the benefit is enjoyed by all; of opprobrium, scarce a particle has ever yet been reflected by it upon any one.

I. Sham writs of error—King's Bench an open delay-shop.*

Exemplification the first.

Justice delayed by sham *writs of error:* a sort of instrument whereby a party (almost always a defendant) against whom a judgment has been obtained in a court below, appeals to a superior court, alleging the erroneousness of such judgment.

Number of causes so delayed by appeals called writs of error, made to two courts (viz. to the King's Bench from the Common Pleas, and to the Exchequer Chamber from the King's Bench) in three years ending 1797, - - -	1,809

* The reader will remember that this was written previously to Mr. Peel's recent law reforms. By one of these, a partial, and but a partial, remedy, was applied to the abuse here in question; which, however, will equally serve the purpose of history, and of illustration.—*Editor.*

Whereof to the King's Bench, - -	550
- - - to the Exchequer Chamber, -	1,259
Whereof argued in the Exchequer, - -	12
- - - - - - in the King's Bench, - -	7
Not argued, (the party, at the time of his asserting the existence of error, being conscious of the falsity of such assertion, and never intending to take the opinion of the court, knowing that it could not but be against him; in virtue of which consciousness, the writ of error comes under the denomination of a sham writ),	
In the King's Bench, - - -	543
In the Exchequer, - - -	1,247
Number of such sham writs per year, on an average of the three years,	
In the King's Bench, - - -	181
In the Exchequer, - - -	415
Length of delay, and consequent advantages (including interest of money) gained by defendant on such sham writ of error, -	"nearly 12 months"*
Year's profit of the Lord Chief Justice of the King's Bench, by fees upon writs of error (viz. either the 550, whereof all but 7 sham, or the whole 1,809, whereof all but 19 sham †, -	£1,434 ‡

The official *custos morum* of the nation, concurring with six hundred men in a year, in the defrauding of so many creditors, by uttering so many false pretences, by which he gets so much a-piece: while, for a fiftieth part of the money, obtained each by a single false pretence, wretches are hanged or transported by this same guardian of the public morals, by scores and hundreds.

* 27th Rep. of Committee of Finance, pp. 5, 12.

† Ib. pp. 160, 161.

‡ The officer who alone is entitled to receive these fees, is the clerk of the errors: in that same year, the total of the fees received by him was 1,771*l.* But this officer is appointed by the chief justice; and the above sum of 1,434*l.* was the sum squeezed by the judge out of the clerk, to whom, for doing the business, no more than 150*l.* for the year was left neat. (Ib. pp. 160, 161).

Writs of error, 1,809 in three years, whereof only 29 argued. What is certain is, that, in the 1,790 in which there was no argument, the non-existence of the alleged error was no less perfectly known to the licensed liar by whom the existence of it was asserted, than to his injured adversary. What is not certain (speaking always upon the face of this account) is, that, even of the 19 that were argued, there was so much as one that was in the other case.

Be it not supposed, that, from the difference between the number sued out and the number argued, any inference can be drawn one way or the other concerning the probity and wisdom of judges,—the proportion between cases of right decision and cases of misdecision,—and the proportion between the number of the instances in which the losing party goes away satisfied, and those in which he goes away dissatisfied, with the conduct of the judge. The 1,790 were almost all, if not all of them, so many cases in which there was no real question between the parties: cases, in which the justice of the demand was no more a secret to him that resisted it, than to him that made it. The delay-shop, the injustice-shop stood open; he went in and bought the goods, because, after paying the price, there was a net profit upon the purchase.

As little be it supposed that the 1,434*l.* forming the Chief Justice's share of the price of the delay on the writ of error account, was the whole of his profit upon the aggregate of the suits, the whole of the profit produced to him by this point of practice. Of these 600 suits in a year, each yielding a writ of error for delay,—but for the delay thus purchaseable, perhaps not one would have come into existence. In each of

these instances, the year's delay yielded by the writ of error was preceded by a quantity (perhaps, upon an average, about an equal quantity) of delay, manufactured in the course and by means of the suit to which the judgment thus appealed from professed to put an end. If the suit by appeal had no question in it, it was because the original suit had no question in it. Whether they would or would not have been defended, and so kept up, had it not been for the assurance of the twelvemonth's delay after judgment; these 600 original suits were so many *malâ fide* suits, *malâ fide* on the part of the defendant, generated by the technical system: so many suits that would not have had existence, had the ends of judicature, and the practice in conformity to these ends, been in a state of conformity instead of repugnance to the ends of justice.

Of all these 1,809 or these 3,618 suits (if 3,618, costing probably not so little as 20*l.* a-piece), not one that under the natural system of procedure (in the hands of a court of conscience, for instance, or of a justice of peace) would not, at the cost of a few shillings, or, if thought better, without any cost, have received its termination in a few minutes; instead of the half year or year for the single suit without the appeal, or the one and a half year or two years for the double suit, original suit and suit of appeal together.

Can it for a moment be supposed that anything but *will* is wanting for the extirpation of the abuse? The remedy, is it not almost too obvious to be named without an apology?

For a general rule,—the judgment being in favour of the plaintiff,—notwithstanding the appeal, let the judgment take its effect, just as

if there were no appeal; security being found by the plaintiff for eventual restitution, in case of reversal or modification, according to the decision of the court above.

Cases may be found, in which, the decision of the court below being executed, and that decision erroneous, the damage might be irreparable. Damage to person,—a female delivered into the arms of a wrong husband: a minor, especially of the female sex, delivered into the power of a wrong guardian; Virginia made a prey to Appius. Damage to property,—a grove, the pride of a venerable mansion, a screen to the domain from blighting winds, levelled out of spite; any article endowed with a *pretium affectionis* destroyed by malice, or embezzled by concupiscence. Against these possibilities, precautions would need to be taken. But, even though no such precautions were practicable, (and nothing could be more easily practicable); giving execution, in the first instance, to the decision of the court below, would still afford a better chance for ultimate justice, than would exist in the contrary case. Under the tardy pace of technical procedure everywhere, what tolerably effectual provision is there against accidents thus deplorable? Be the judge who he may, can there be more safety in ascribing corruption or culpable negligence to him, than ordinary probity and diligence? For if he be not either corrupt, or incapable to a degree calling aloud for dismissal (not to speak of punishment), give him but the necessary power, he will take effectual care that, in case of the reversal or modification of his decision, no irreparable damage shall take place.

Thus upon general principles: laying the scene anywhere. Lay it in England; apply it

to the courts in question, in the characters of court below and court above; nothing can be more evidently impossible than the sincerity of any such fears. By the fortuitous concourse of technical atoms, the King's Bench happens to stand above the Common Pleas; but, on this occasion or on any other, who ever supposed that a grain more or a grain less of confidence was due to the one court than to the other? Of the whole assemblage of our judges, is there a single one that is not, in his turn, with no other check than that of a not unjustly obsequious jury, sole arbiter of life and death?

Were but the will present, where power is never wanting, there is no end to the expedients that might be proposed; the worst of them an improvement upon the state of things delineated above.

Good my Lord, accept the money, spare us but the injustice and the immorality: to the plaintiff, the loss and hazard by the delay; to the defendant, the expense of lying. Select any one of the annual six hundred injured plaintiffs, confiscate his property to the amount of the indispensable 1,434*l.*, pardoning the other five hundred and ninety-nine. Establish a lottery, the blank lots of which shall fall upon the sums due under the respective judgments, until the sum, for the purchase of which six hundred injustices are so well bestowed, be completed. Take up the list, begin with the most opulent, or (as is more conformable to precedent, and more congenial to prison fees) the most distressed. Nay, my Lord, there would be no end were a man to undertake to exhaust the list of commutations, the least beneficial of which would be an improvement; and such an improvement that the stamp of Utopianism, which upon all

of them is but too visible, threatens to render the acceptance of it next to hopeless.

Eight years ago * was a proposition made; but not a grain of the pound of flesh could ever yet be bated. Eight years ago the committee of finance laid their project. Being no less Utopian than the above, it underwent the fate of so many other of their projects. But as to this one, it will meet us in another place. †

By giving to such and such a judge such and such sums of money, a man who owes another so much money and knows it to be justly due, may purchase, with so much of his creditors' money, the delay of almost a year: including the interest of the debt for that time, besides other advantages. Yet this on their part is not bribery. Why? Because they are not punishable for it. Suppose (for argument's sake) they were punishable for it,—in what respect and degree would the mischief of that act of theirs, which then would be an offence, be augmented by such punishment?

When lord Bacon was punished for taking bribes, his excuse was, that though he made justice pay more than he ought to have done, he never for money shewed favour to injustice. That for which so much money is regularly taken by these his successors, is in every instance for favour shewn to injustice: for money, known to be the plaintiff's, put by them into the pocket of the defendant. Six hundred is the number of families in a year whose money they thus dispose of: at five to a family, three thousand persons whose property they thus sell to wrong-doers at a fixed price.

* (Written in 1806.) † Vide infrà, chap. 28.

All this I speak of with the utmost freedom and tranquillity. Why? Because, all this being legal, nothing of it being criminal, I am not punishable for speaking of it. Were I to see any one of them take a bribe, a punishable bribe; were I to see every one of them with his right hand closing upon the corruptive metal, should I thus speak of it? I know better things: not they, but I, should be punished for it. The man whom the law of their creation punishes, is not the man who has stolen the sheep, but the man who has dared to look over the hedge.

II. Sham motions—Chancery an open delay-shop.

Exemplification the second.

Delay sold in Chancery, on the following terms:—

1. Number of days allowed to the defendant by regulation, (without motion), for putting in his answer, -	8
2. More on first motion of course, - - -	28
3. More on second motion of course, - -	21
4. More on third motion of course, - - -	14

This if the defendant reside within 20 miles of London. If it be a country cause, that is, if the defendant reside beyond 20 miles' distance from London, the rate is as follows:

1. Allowance by regulation, -	Till the next term.
2. More on first motion of course, -	42 days
3. More on second motion of course, -	21
4. More on third motion of course, -	14 *

If the bill be filed in the long vacation, or within seven days of the expiration of the term (Trinity) preceding it, the defendant is allowed till the term following to put in his answer; being a delay of upwards of two months, besides the additional 63 or 77 days obtainable by three successive applications, as above.

* Vide Harrison's Chancery Practice, vol. i. p. 165.

It commonly happens that by the defendant's first answer a need is produced of further questions, under the name of *amendments* to the bill. To this demand it may happen to present itself any number of times: for it is only in this way that that security for correctness and completeness, which is afforded by the faculty of grounding questions upon answers, can be obtained at the end of a certain number of months; that security which, in an examination *vivâ voce*, as before a jury, may be obtained in so many minutes. The allowance of time on an amended bill is precisely the same as that on the original bill, except that a third application is not allowed. By every such set of amendments, therefore, a title is given to the defendant to purchase a further quantity of delay, to the amount following:

1. Allowance by regulation, - - 8 days
2. More on first motion of course, if it be a town cause, - - - - - 28
- - - if a country cause, 42
3. More on second motion of course, - 21 *

The delay thus sold is altogether independent of all just cause of delay. Paying the price, it is as much at the command of him who has no just demand whatever for a moment's delay, as of him who has ever so just a demand for a delay of ever so great a length. It is on this account that it is said, as with the strictest propriety it may be said, to be *sold*.

The case, and the only case, in which it is not sold, is where a special case is made for extra-delay, on some special ground. The supposed facts constitutive of the supposed

* It has been decided, that, after two insufficient answers, the defendant is not allowed six weeks' time to put in a third. Gregor *v.* Lord Arundel, 6 Vesey junior, p. 144.

ground are then brought before the court by motion not of course; supported by evidence (though in the incongruous shape of affidavit evidence), with liberty on the other side to oppose, with or without counter-evidence in the same shape. The judgment of the court is in that case exercised, and, whatsoever may be the fees received, the term *sale*, if here applied, would be incongruous.

Price of the quantity sold at each motion of course:

1. Counsel, for making the motion, -	10s. 6d.
2. Solicitor, for drawing instructions for the motion, - - - -	2s. 6d.
3. Solicitor, for attendance on counsel and court, - - - -	6s. 8d.
4. Entering appearance of the defendant, -	* 5s. 4d.
5. Clerk in court, for his attendance, -	6s. 8d.
6. Solicitor, for his attendance on the clerk,	6s. 8d.
7. Order, entry, copy, and service, -	9s. 0d.

III. Sham notices called warrants—Chancery offices delay-shops.

Exemplification the third.

Delay not sold, but regularly made, by the subordinate judges in chancery called masters, for the purpose of extracting correspondent fees.

In the Court of Chancery, the masters are so many subordinate judges, eleven in number, by whom, each of them sitting singly in his closet, judicial decisions in great variety, and to any degree of pecuniary importance, are pronounced in the first instance. The master is attended by the solicitors (attornies) on both sides: each attendance is preceded by a sort of

* This is when there is only one defendant. In chancery, persons are made defendants by scores; and, frequently, when no claim is intended to be preferred against them. For every additional defendant, an additional 2s. 10d. is aggregated to the 5s. 4d. already included in the calculation.

summons or notice, addressed by the master, at the instance of the solicitor on one side, to the solicitor on the other side. This instrument is called a *warrant:* and for each warrant the master receives a shilling, a fee settled at a time when that sum was worth perhaps some number of times what it is now. By a custom which is never departed from, but of which the exact time of commencement is now inscrutable, no real attendance ever takes place till after the third warrant. By an habitual connivance on the part of these subordinate dispensers of equity, for the purpose of trebling the emolument lawfully receivable by them, the quantity of delay is thus trebled to the suitors: to the proportionable distress of the suitors on one or both sides, according as the persuasion of the justice of a man's cause is entertained on one side only, or on both.

For the more effectual attainment of the same ends, the quantity of time bestowed by the master at any one attendance is never more than an hour, but may be to any amount less. On these several occasions, what actually passes is no more to be known than what passes in the divan at Constantinople: but, by whatever cause the custom of three warrants for an attendance was produced, by the same cause, of course, the rate at which business is done, when the partnership are ashamed or afraid to put it off any longer, is regulated. As often as the suit affords a party who by dishonesty or insolvency is engaged to seek delay, here is an individual whose interest it is, that, on each attendance, the quantity of business done shall be as small as possible; and, whether the suit affords any such party or no, it affords two professional lawyers, whose interest it is, as well

as that of the judge, that this maximum of delay shall be produced. Here then exists a corrupt interest, constantly acting upon a set of persons who are known to pay habitual obedience to it, and who, amongst them, without the smallest danger of punishment, or so much as shame, have it completely in their power to put themselves in possession of the corrupt profit which that interest invites them to receive.

Go any day you please into Westminster Hall, you may hear pompous eulogiums on the importance and essentiality of publicity in judicature. But the occasions in which publicity has place, are, what? Those in which it cannot be prevented. Those in which secrecy has place of publicity, are, what? Those in which it can be prevented: and to this latter description belong some of the most important among civil cases. Whatever abuse cannot be fastened upon justice, the absence of it is trumpeted forth with great ceremony. *Regula generalis*, touching mischief:—What you can do, do and profit by; what you cannot do, take credit for not doing.

In a master's office reigns perpetual darkness, and we see the consequence. Punishable corruption, probably none: unpunishable, naturally as much as possible. The thicker the darkness, the less the demand for anything in the shape of a reasonable soul, in the human flesh subsisting. In such a state of things, the natural course is, that, of that business, that judicature, which is said to be done by the master, a great deal should be in reality performed by the clerk *.

* Accident once led me to an examination, said to be taken by an alderman of our great metropolis; the clerk found

Lawyer.—What, sir! Do you dare to insinuate anything to the prejudice of the learning, the assiduity, the sound judgment, of gentlemen of such high respectability as——

Non-lawyer.—Indeed, sir, I do not dare do any such thing. To be sure I have been in use to hear something "to this or the like purpose or effect," so long as I have been in use to hear anything about Westminster Hall, or the Inns of Court, which may now be somewhat above sixty years; but, perhaps, if applied to any particular person, nothing of all this would be found to be true: and, if there were any person in particular of whom I thought it true, do you think you would catch me saying so? Indeed, sir, you would not. My business is with *genera* and *species:* to individuals, I make my bow.

What makes the practice the more valuable, in the character of an example, is the smallness of the fee.

Is it credible that a man in such high office, receiving so many thousands a year, bearing so long a gown upon his shoulders, and so venerable a mass of artificial hair upon his head, indued consequently with so rich a stock of learning and virtue,—that a man so gifted should ever, in any single instance, be content to do so much mischief for a few shillings? Is it in the nature of a man, so to degrade himself?

Whether in the nature of a man, is a problem I leave to philosophers. What is certain is, that it is in the nature of an English judge. A man, any man that ever breathed in such high office, do so much mischief for a few shillings? And

thought and words, the alderman yielded auspices. Yet the alderman had been a lawyer in his day, and this was in a large and crowded place. What had it been in a closet?

that in the very teeth of common sense and common honesty, and without the shadow of an excuse? *A* man? Why, they all do it, and for a single shilling: it is every day's practice: and the Chancellor and the Master of the Rolls, their superiors, know of their doing it, see them doing it, see them every day. So far from stopping it, did ever chancellor, dead or living, ever let fall so much as the slightest token of disapprobation at the process going forward perpetually under his nose? How should he? What sense is there in expecting he should? Would you have the husbandman turn up his nose at the rottenness of the manure that is giving fertility to his fields? The present shilling of the master is the future shilling of the chancellor. As often as a master dies, the chancellor puts into the office whom he pleases. The 10,000*l.* or 15,000*l.* a-year of the chancellor, with its *et cæteras*, and their *et cæteras*,—are not shillings the stuff it is composed of?

To this most highly and best rewarded of all lawyers, the value of every office to which he has the nomination is in the direct ratio of the emolument it brings, and in the inverse ratio of the qualifications it requires. The less capacity it requires, the more open it leaves his choice among his friends. The more emolument it brings, the more worthy it is of their acceptance.

Not that the situation of these learned subordinates has been altogether matter of neglect to their still more highly learned, and withal noble and honourable, principals. *

In the district called the Rolls there is a cha-

* So long ago as in 1734 (18th March), there was an assembly of chancery officers, sitting, under the appellation of a jury, to enquire into the reasonableness of their own

pel, and in that chapel a catechism, in which, to the question—"*Who is thy neighbour?*" the answer is, *the Master who sits next to me.*

Court of Chancery, 15th August 1805. Sitting, Lord Eldon. Purcell *v.* Macnamara. Morning Chronicle, Aug. 16.

Application for an order to the master, authorizing him to sit *de die in diem*, till the accounts between the parties were adjusted.

"Lord Alvanley had been of opinion that the master was authorized, and that it was his duty, without any order, to exercise his discretion in every case of the kind. Were his lordship of that opinion, he should think any order unnecessary, and therefore improper. When, however, he looked at the practice of the court for the last twenty-five years, and considered that hundreds of orders of the kind had been made within that period, he could not persuade himself that all of them had been granted for no

fees *. On this subject, one of the findings of this jury was, that, though the recompense received by the masters was not, on the whole, an adequate one, yet, adequate compensation being made, those "fees on warrants should be taken away:" and that, this done, "rules should be laid down for preventing the like consequential expenses being continued on the suitors, after such new regulation."

In the year 1740, there existed a set of commissioners, appointed "for taking a survey of the offices of the courts of justice, throughout England and Wales, and enquiring into the fees" †. In the report made by these commissioners, dated 8th November 1740, the passage containing the opinion of the jury, as above, is transcribed.

Several times, at the instance of the official lawyers, have augmentations been made to the salary of these subordinate judges. At no time has the mouth of any lawyer been opened, to stop these judges from the receipt of fees on false pretences.

* 27th Fin. Rep. p. 20.

† 27th Fin. Rep. p. 58.

earthly purpose, but must suppose, without such order, that the right of the master to do what was here required, did not exist. His lordship therefore granted the order to the master, subject to the master's exercising his own judgment, having obtained the power to act, whether the circumstances of the case rendered it necessary for him to do so every day or not."

The practice of the court, then, is so contrived, (if the account thus given of it be correct), purposely so contrived, that the master shall not have it in his power to make that distribution of his time, which, in the judgment of the only judge, who, with the power, has the facts before him, is conformable to the demands of justice. By the sham warrants, with their fees, a regular system of delay is organized. But, from this regular delay, by the motion for the *de die in diem* with its fees, an exemption is always ready to be sold. And what is it that at this price is purchased? Not any obligation on the subordinate judge, but a license only, and *pro hâc vice* only, to do justice.

Here, then, we see a perpetual writ of injunction issued by the superior judge of the high court to his eleven subordinates, prohibiting them from doing justice. A prohibition on justice: and to what end? That, as often as a party's impatience for justice is too strong for control, an attempt may be made to purchase it at the expense of an incidental suit, carried on by affidavit evidence: a suit which, if needful, shall, for that once, render it so far possible to do justice.* Injustice established as a rule

* Supposing this report and another to be correct, two things are certain relatively to a conscience which may be taken for a sample of other consciences.

of practice, to produce motion causes with their fees, and such causes actually produced to the number of hundreds (how many hundreds is not said), in the course of five-and-twenty years.*

One is, that, in the perpetual prohibition thus put upon justice, saving bought exceptions, there is nothing by which the sensibility of that delicate organ is affected by any such sensation as that of pain.

Another is, that either the practice of the sham warrants (a practice so well known to every other learned person who knows anything about the court and its practice) had been fortunate enough to escape his lordship's notice; or that, in the practice of making delay on false pretences for the sake of fees, there is nothing capable of affording any such unpleasant sensation to the same learned conscience.

Whence does this appear? From an authority no less exalted and irresistible than his lordship's own certificate. "I quit the office I hold," (says his lordship's speech in so many words),* "I quit the office I hold, without one painful reflection: and I enjoy the grateful feeling, that there is no suitor who can say I have not executed it conscientiously." Most assuredly no suitor, who has read the trial of Mr justice Johnson for words said of the noble and learned lord's noble and learned friend and colleague, will say so if he is wise.

There are four modes of defending innocence, when attacked by the press. One is by silence; another by answer; a third by prosecution admitting proof of delinquency; a fourth by a mode of prosecution that shall preclude it. The latter is the mode chosen by English judges: and then they grow bold and say—'Accuse me if you dare.'

* Description of the mode of proceedings before a master in chancery; from the "Apology for the Conduct of Mrs Teresa Constantia Phillips," anno 1761. vol. iii. p. 173—178.

'By means of these subterfuges and evasions, she was above two years before she was able to get a report; for when a warrant was taken out, and the parties were to attend at five, nobody appeared till after six, and then it was either a message from the counsel or the solicitor, to beg the master would be so good as to excuse the *counsel*, who had a cause in chancery, or some other *no-business* that day, and could not possibly attend.

* Morning Chronicle, Feb. 5th, 1806.

Such being the pattern set at the metropolis, it may be imagined whether imitation is in danger of being slack in the shade of a distant province.

'If the counsel was ready, the solicitor was ill, or *had a cause elsewhere.*

'At other times, Mr W. would promise to take a warrant out for the next attendance, as it came in his turn; and, if he kept his word, (which seldom happened, for he generally chose to forget it), he would take it out three or four days later than he agreed to do.' [*A* warrant—Here was every exertion made that could be made to make delay: if, at this time, the practice of taking out three warrants constantly for three different days to procure one attendance had been established, would not some notice have been taken of it?]

'In fine, thus was she played off and amused by these gentlemen: it was looked upon as a great point gained *if one warrant in six was spoken to; and then it was only to go the same matter over and over again, with all the sophistry their imaginations could furnish.*

'Very frequently the *modification* of a word has been the business of a whole attendance; for the counsel's watch was laid upon the table by him, and he took great care never to exceed a *second* beyond the hour.

'Though this is a most terrible grievance to a suitor, *can it be imagined a master will be so infatuated as to discountenance a practice whereon the chief profits of his place depend?* No, surely.

'Then what remedy is there left for the party distressed by these *iniquitous delays?* Why, they must move the court by their counsel, that the master may expedite his report, and the parties attend *de die in diem;* and a motion of this kind is seldom or ever made *but you run the risk of gaining the master's displeasure before whom your question stands;* and no doubt that would be looked upon *as a dangerous proceeding;* therefore, *this is an evil without remedy.*

'But at last, in 1744, she obtained a report in her favour, after being obliged to put in *six or seven different answers;* for, if by any chance there was the word *then* instead of *than,* they blotted it out to oblige her to put in *another, and then another,* till, finding no possibility of cavil, even at a *word,*

On passing accounts before the court of grand sessions upon the Chester division of the Welch circuits, "*each* side is to file its interrogatories with the registrar, and to take out *three* warrants, for the other side to be present at settling them,"

they were obliged to give it up, after two years and some months close attendance, and that *monstrous expense.*

'However, that this summary way of proceeding may not give our readers too high an opinion of the law, they will be pleased to observe, before she went to Jamaica, this had been above two years referred to the master: therefore, from first to last, exclusive of the time she was abroad, this answer was five years attending; not that she lays the blame upon the master to whom it was referred, for when they at any time attended, and he, good old gentleman, could keep himself awake, he endeavoured all in his power to understand them.

'The master, she believes, was an honest man; but not one of those judges who, 'if he could see light through a hedge which he was not able to pass, would jump over it.' [An expression of lord chancellor Talbot's in this cause.]

'Mr. M——n's counsel and solicitor in this case were his neighbours; and, before any warrant was to be attended, they generally smoked a pipe together, and the stories they told him were so very different from what she used to tell him before their faces the next day, it perplexed the good old gentleman to such a degree, that he used to fall asleep for relief; and when he awaked, made an excuse for what he called shutting his eyes to save them; and Mr. O——, (who continued all the time he was reposing still talking), would say—"Well, master, I believe you will be of opinion that this line we have been arguing, viz. 'And this deponent at that time lodged at the house of Capt. Burton, &c.' should stand thus:—'And this deponent on or about that time was a lodger at the house of one Capt. Burton,' &c."

'Pray, reader, observe how material was this exception.

'"I say, master, I believe you will be of opinion this ought to be altered and more explained, and therefore is insufficient; but, as it is six o'clock, we must defer our other objections till the next warrant."

'The poor old gentleman generally consented; for it is

(six notices, to produce the effect of one), "else on the third warrant the registrar proceeds *ex parte*."* August 1789 is stated as the time at which this practice was perhaps instituted, more probably recognized.

Yet, in that same court,† the "course of equity proceedings is *even more dilatory and prolix than in the high court of chancery:*" the little Welch equity court being a sort of dormouse, that "must generally sleep ten or eleven months of the year;" the great high court a sort of sloth, which, though at its own pace, keeps on crawling almost the whole year round. Five or six times as much delay as in the grand warehouse of delay; and yet not enough for the appetite of learned travellers, without the extra portion attached to the sham warrants.

From the same school, take another specimen of the art of making business.

P. 114. "Where there is a replication, there must be a publication [of the evidence], though

not to be imagined an apothecary would be against a *repetitum.*'

Lawyer—Memoirs of a courtezan?—a pretty source to draw from!

Give me a better, and I draw from it. Is it my fault, that the transactions of a cell, where a great part of the property of the kingdom is perpetually telling over a gridiron, should be as perpetually involved in darkness? In such a state of things, have not the faintest lights their value? Of the matters of fact there stated as true, must not some the most material have been in their own nature matters of notoriety? With her adversary she was at bitter enmity: but, as to the state of the law, and the conduct of those by whom it was administered, she had no motive for representing it as being any otherwise than she found it.

* Jurisd. &c. of Great Ses sions, p. 124. Anno 1795.

† Preface to the same work, p. xxviii.

no witness be examined:" *i. e.* though there is nothing to publish. To what end thus attack impossibility, and vanquish it? Answer: That the plaintiff may move (*i. e.* fee counsel to move) that that which cannot be done may be done. Take the passage at length: "If defendant neglects to take it out and execute it," [a commission for the examination of witnesses], "plaintiff may *next circuit*," (*i. e.* next half year), "move for publication, though no witness be examined: *for*, where is a replication, there must be a publication, though no witness be examined." Here, too, we see a sample of equity logic, from the school of Gilbert and Blackstone. Take any arrangement that comes uppermost, the more irrational the better,—if you want a *reason* for it, write it over again, with a *for* before it. The use of such logic is, to enable such morality to pass without notice.

IV. Sham notices called *distringases*—Exchequer a delay-shop.

Exemplification the fourth.

A corporation, according to lord Coke (who was not ill acquainted with them), has no conscience. What is better, it has commonly a long purse. Problem, how to get the money out of it? Solution: By both these qualifications, it is so much the better disposed to the purchase of that delay, of which the court of Exchequer, as well as the other shops, has an assortment so perfectly at its service.

Is it your misfortune to have a demand upon a corporation? You must let off upon them three writs, or three pair of writs, one after another. By the help of these three writs, at

the end of about seven or eight months the suit is just begun, the corporation having made what is called an *appearance*, that is, employed an attorney to act for them, but nothing as yet done. These three writs are worth beyond comparison more than the three warrants; but then there is an end to the writs, which there never is to the warrants.

Sum demanded, say 2,000*l.* The writ is a command to the sheriff to levy so much money at the defendant's expense, in the event of his not employing an attorney, as he ought. In your first writ you take care that the sum thus levied, or ordered to be levied, shall be a sum plainly inferior to the interest of the money in dispute, for the time which the defendant gains by taking no notice: a customary sum is 40*s.*, and perhaps there is no other. Defendant not appearing, you are almost angry, and to shew you are in earnest, you fee counsel to move for a larger sum, taking care not to be too hard upon him, say 20*l.* The same cause preserving inviolate on the part of the corporation the same principle of passive disobedience, you are now quite angry; and to shew you are not to be trifled with any longer, you move a second time, get your third distringas, with your 50*l.* worth of *issues*, for that is the phrase.

In Mr Fowler's account of the practice of the Court of Exchequer* (equity side), are to be found three original and highly instructive cases, from which the above instruction was composed. Corporations squeezed, 1. corpo-

* I. 198.

ration of Bridgewater, 2. East-India Company, and 3. a free grammar school.

Average quantity of delay sold, between half a year and a year; after which the cause was to begin. Profit to the partnership, not discoverable. Care taken by the court in each case that the amount of the eventual mulct on the second order should not exceed 20*l.*, lest obedience to the second order should take away the pretence for the third. In two out of the three cases, a brace of writs were let off at a time.

Thus in the Exchequer, equity side. But, at common law, the art of dealing with corporations is not less completely understood. The same care to avoid precipitation; and the same tender caution not to bear too hard upon the corporation (though it has no conscience) a first and second time.*

A judge, who, with a wish to do justice, possessed power suitable, can it be necessary to ask what in such a case he would do? He would send for an acting member of the corporation, the directing head, the writing hand, or any other, (what difficulty soever they might find in settling the matter among themselves, there would be no more difficulty on the part of the judge in dealing with them, than with any one of them in his individual capacity); and what was not done in the Exchequer, among so many learned hands, in six months, could be done in half as many minutes.

V. Sham representations—Scotland—Court

* Sellon's Crompton, I. 217. II. 76, 77.

of Session a delay-shop—Lord Ordinary the shop-keeper.

Exemplification the fifth.

In Scotland, as every body knows, no fewer than fifteen judges are occupied in obstructing one another's decision, and frittering away one another's responsibility, all sitting in one court.

As with most other functionaries, so with judges, in the calculation of common sense, the chance of right decision is (because responsibility is) in the *inverse* ratio of the number; in French calculation in the *direct* ratio: a thick quarto volume of calculations is built upon that ground. In France, sale of offices (and amongst others of judicial offices) was an object of revenue. Before she gave kings to England,—drawn by necessity, Scotland clung to France. French law *shews* through Scotch law in a thousand places.

Under this system of obstruction, lest suits should get through too fast, a sort of a turnpike was contrived, with one of their lordships, in quality of turnpike man, to stop the cause and take toll of the suitors, with the title of Lord Ordinary.

In no one sort of cause is he bound to give any decision; in some he is not allowed: in no cause is the suitor bound by his decision, should he have been pleased to give one: in some sort of causes, the suit, after regularly going up, as regularly comes down again, before anything can be done in it.

> The king of France with forty thousand men
> Went up the hill, and then came down again.

This privilege of not judging, does he fre-

quently avail himself of it? This would be worth knowing. If this modesty is general, the result is curious. Here is a court composed of fifteen judges, each of them, by his own acknowledgment, unfit to be a judge.

What! not take so much as a chance for giving satisfaction to the parties? Impose upon them purposely the most vexatious lot that necessity can prescribe?

Supposing you to have got a decision of his lordship (called an *interlocutor*) in your favour, think you that a guess can be formed when the cause will terminate? Not it indeed. After receiving a fortnight's delay gratis,* your adversary gives in a *representation*, and then the cause stops. Some time or other comes a second interlocutor, adhering to the first: stop again: and so on without end.

On each such representation, fee to his lordship's clerk, 3*s.*; to the other members of the partnership, other fees: amount of each, and number in the whole, unascertainable.

Seeing, in the instance of masters' warrants, what the power of one shilling was in England, an estimate may be formed of what (even were this all) the power of three may have been in Scotland.

Lawyers, of all men, are least given to the telling of tales out of school: the quantity of abuse that transpires is as nothing in comparison of that which is kept close. Here and there, by a momentary fit of pique or probity, an incident comes to light.

* Bell, VI. 75.

In the picture above given, is the character of Scotch justice injured? Hear from her own worshippers. First, let us hear from Mr Russel how the matter stood in 1768.*

1. "It is a common device of defenders who want delay, to suffer decreets to pass in absence against them, and then to offer a representation to the lord ordinary, praying to be heard in their defence. By this shift, the determination of causes is greatly postponed, and much unnecessary trouble is given to the lord ordinary, in reading *representations*, which contain nothing material to the cause."

2. "The party who is dissatisfied with an interlocutor must offer a *representation* to the lord ordinary, praying an alteration of the judgment, within ten sederunt days [amounting to a fortnight†] of the signing of the interlocutor; otherwise the interlocutor shall become final, unless &c."

3 "Representation against decreets entirely in absence, may be permitted at any time, before extracting the decreet."‡

4. "The lord ordinary, after reading the representation, will either refuse the desire thereof, or ordain the same to be answered by the other party; either of which shall keep the matter open until a new interlocutor is pronounced."§ [Failing both, it may thence be inferred, the cause would be at an end. A catastrophe of this sort, does it ever happen? If seldom, the unfrequency of it is a proof of the constancy of his

* Page 50.
† Bell, VI. 75.
‡ Russel, p. 64.
§ Ib. p. 65.

lordship's vigilance. How should there be any failure of that virtue? The cause gone, with it go the *representations* and the fees].

5. "Every new interlocutor creates a fresh delay, as it is competent to the party who thinks himself injured to offer a new representation, within ten days [a fortnight] of the last interlocutor; and there being no limitation as to the number of representations, the occasions of delay are infinite, when parties are litigious."*

There being no limitation to the number of representations, there is no limitation to the number of 3*s*. fees: and there being no limitation to the number of his lordship's fees, there is no limitation to the extent of his lordship's patience. Where is the virtue that may not be taught by money? By money, English judges are taught mendacity: by money, Scotch judges are taught patience.

6. "If the lord ordinary, after repeated representations, shall continue to adhere to his former interlocutor, the party who complains must either acquiesce, or apply to the lords in the Inner House by petition."

This in 1768. One and thirty years after, let us observe how the matter stood in 1799.†

7. "It is to be regretted," says Mr Lawrie, "that there is no general rule of court, limiting representations in point of number; as a *party* who conceives himself hurt by the ordinary's judgment, frequently brings an intolerable load of expense on his opponent, and trouble on all concerned." The party? Is he the author

* Russel, p. 66. † Lawrie, p. 91.

of the mischief? What is the judge about all this while?

8. "Sometimes," says he again, "in order to accelerate the final decision, and save trouble and expense to the parties, the lord ordinary declares in his interlocutor [inexorable justice!] that he will receive no more representations; in which case, if the party be dissatisfied with the judgment, he ought to apply for redress to the Inner-house. In practice, however, such declaration is too often disregarded [amiable weakness!], more representations being given in notwithstanding the prohibition, by which means the salutary ends which the judge has in view are often entirely disappointed." Thus it is, that, under the fee-gathering system, the virtue of judges is continually set at nought by the wickedness of suitors.

Observe, that, to prevent the mischief altogether, all that his lordship has to do is to abstain from violating his own solemn engagements; that to this purpose no positive act whatever is necessary; for that, if his perfidy slumbers but for a moment, the cause with its fees are at an end. All that he has to do is, to abstain from travelling any further in that track of corruption, into which perhaps in no other country, certainly not in England, has any judge the effrontery so much as to make a footstep.

Of the statement thus given by the institutionalist, one is at a loss to know what to think. Is it serious? Is it irony? Is he a party to the hypocrisy, or a dupe to it?

The fee which is treble to that by which the

probity of English masters in chancery has been so long subdued, is far (I have already observed) from being the whole of the force by which that of the Scotch judges has been kept in the state we see. As to making out a complete account of it, I have already acknowledged the impracticability of it. The greater the number of shillings, the more irresistible the temptation, the better the excuse: let us pick up a few more.

9. "If the representation be ordered to be answered at the bar, it is the business of the other party to enrol the cause in the ordinary's first hand-roll*....To his lordship's clerk, for every enrolment in the hand-roll, fee 3*s.*†

10. "But, if the order be simply to answer the representation, which is the most usual deliverance, the other party must give in a written answer, within the time limited by the interlocutor, if any time be specified."‡ At giving in this "answer," or "any other paper in a cause, appointed by the lord ordinary," fee to his lordship's clerk, 3*s.*"§

Let us now hear Mr Bell, official lecturer on conveyancing, in his System of Deeds, vol. vi, exhibiting instruments of procedure.

"When a judgment is pronounced by the lord ordinary, the cause must then proceed as before, by representation and petition; but where memorials or informations are appointed to be given in, it will most probably happen, that the one party is more anxious than the

* Lawrie, p. 90.
† Ib. p. 383.
‡ Ib. p. 91.
§ Ib. p. 383.

other to bring the cause to a conclusion:" (*i. e.* the plaintiff to receive his money, than the defendant to part with it) "and of course to *force in* the memorial, or information. This is to be done only by preparing the memorial, on the part of the client, and by enrolling the cause, and praying the lord ordinary to appoint the opposite party to lodge their memorial. The lord ordinary will, of course, renew the order against next calling; but in all probability, several such enrolments [value of each, 3*s.*] will take place before the order be made peremptory, or under a fine. In short, this is a situation in which it is almost impossible to force forward the cause: the only remedy you have, is by constant *enrolment*, [application of 3*s.* fees in that shape], and by strong *representations* [application of similar fees in that other shape] to the lord ordinary of the necessity of dispatch, to obtain an order that will *force in* the paper called for:" (and with it a last 3*s.* fee).

The judge takes payment for making delay: and the more delay he makes the oftener he is paid: and to this traffic there are no limits. Is it to be wondered at that Scotch suits are longer still than English ones?

Compare this case with the preceding one: between them the partnership have a dilemma, and such a one, that on one or other horn they are sure to catch you. Is it delay you want to buy? There it is for you and welcome, at a fixed price: is it dispatch you want? there is delay for you instead of it. The higher you pay for your dispatch, the more delay you have for your money: and so it goes on, till shame or fear

cries out to them, The measure is full: it is time to be in earnest.

A pretty task is that allotted to the suitor! to ply the judge with fees till his lordship is tired of receiving them!

Two courts, through which almost every cause (at least every cause worth retaining) is doomed to travel: one in which his single lordship would not get on if he could: the other in which their whole lordships could not get on if they would.

It is not enough for them to be themselves delayers: they must moreover be the cause of delay in other men.

Scotland is *fortunate* enough to be provided with a system of local courts, competent to the task of rendering prompt and unexpensive justice to every man at his own home; *unfortunate* enough to see, in the two so closely intertwined branches of this supreme court, the power and the will to nip in the bud that incipient advantage. Of their joint activity, no inconsiderable portion is employed in paralysing the salutary action of the inferior courts.

One merit which, in comparison of English, is peculiar to Scotch lawyers,—they do not plaster over the foulness of their system with eulogistic daubings. They acknowledge, at least there are some among them that acknowledge, their need of amendment. Such is their humility, they are willing to draw it from the fountain that flows on the other side of the Tweed: and their southern brethren, such is their liberality, are ready with their ink to blanch the northern ebony.

When abuse is the plant, the pruning-knife, not the pick-axe, is the instrument employed by jurisprudential husbandry.

When you see the lawyer bustling, and a twig or two cut off, be sure that the patience of the non-lawyer is exhausted, or threatens soon to be.

Once in half a century or so, the legislator awakes from his trance, and then something is to be done. At other times, his dealing with the man of law is that of the young spendthrift heir with his steward or his wine merchant. "The fellow is a rogue, and cheats me, but rather than be at the pains of overhauling his account, I'll e'en set my name to it as usual, and there is an end of it."

The real nature of the *representation* trade, was it a secret to the traders? Without staying for the answer of common sense, let us look to history. In a particular case specified, so long ago as in 1756, representations were forbidden.* In this case, they were taken away altogether. In other cases, Mr Russel, who ever and anon is a reformer, suggested that the number of them be limited. Limit the number of representations. When you have done that, reduce the number of masters' warrants from three to two: or the number of common bail or of pledges of prosecution from two to one.† Discard poor Mr Doe, and leave his friend Mr Roe to pine in solitude. Such are the reforms of lawyers!

* Russel, 66. 17 Jan. 1756.

† Common bail, or sham bail; fictitious persons, whom an English judge, on receiving a fee, gives to a creditor for his security.

Ask an English judge how many representations he thinks ought to be allowed? or (what to him is the same question) how many his law allows? He will answer you, when a Scotch judge has informed you, how many common bail, or how many pledges of prosecution he looks upon as necessary.

What is above is but a sample. Let it not be imagined that the above manifestations of the influence of the principle of corruption are all that could be found; let it not be imagined that they are the hundredth part; let it not be imagined that they are even the grossest manifestations. Why then employed to the exclusion of others? Partly by accident; for the labour of a complete survey would have been too great; partly as being more intelligible.

Ransack the whole system of procedure—travel through it from beginning to end—you will find it throughout of the same complexion, owing its birth to the same causes.

Maximum of profit to the partnership, the main and constant end; maximum of ease, the collateral end. Minimum of expense, delay, and vexation to the suitor, the pretended, maximum the real, object, pursued in the character of an intermediate object, conducive to the main end. Misdecision and failure of justice knowingly produced, not for their own sake, nor therefore constantly, but whenever they presented themselves as conducive to the above intermediate end, and thence onwards to the ultimate. The ends of justice, the true and legitimate ends of judicature, pursued so far, and so far only, as seems necessary to keep the people, in the character of suitors, in a state of

patience, and keep the talons of depredation covered by the cloak of justice.

Such being the interest,—such the wishes and endeavours generated by these interests, what were the means employed by them? It remains that an answer be given to that question, by a brief indication of the principal *devices* employed by the fee-gathering system, for the attainment of these ends.

CHAPTER V.

LIST OF THE DEVICES EMPLOYED UNDER THE FEE-GATHERING SYSTEM, FOR PROMOTING THE ENDS OF ESTABLISHED JUDICATURE, AT THE EXPENSE OF THE ENDS OF JUSTICE.

Thus much as to the sinister interest operating on judges, under the existing system of procedure; and the ends pursued in consequence, the actual ends of judicature, not coinciding with, but opposite to, the ends of justice.

In the pursuit of these ends, a variety of devices have been employed. It may be of use to bring to view a list, or at least a sample, of these devices; the rather, since at the head of the list it will be necessary to place an instance of exclusion; a sweeping operation in which evidence, and of the best and most necessary sort, is comprehended; evidence, which in most cases constitutes the most instructive part of the whole mass.

There will be a convenience in seeing the list of these engines of iniquity in one view. For

enabling the reader to enter into the conception of them, a variety of expressions have been employed. Where one fails, another may answer the purpose. Not having been noticed, at least sufficiently noticed, they have never as yet been named.

1. Exclusion of the parties from the presence of the judge—parties not heard—decision given without hearing the parties—audience refused to suitors, either throughout the cause, or till the end of it.

2. Tribunals out of reach—the county courts swallowed up by the metropolitan courts.

3. Sittings interrupted, interrupted by long and fixed intervals: terms — circuits — days fixed for each step in a cause.

4. Operations without thought — decisions pronounced, judgments, rules, orders, delivered, by subordinate officers, without the privity of the judge. Judicature upon mechanical principles—principle of mechanical judicature.

5. Decision without evidence, or on evidence delivered in under a *mendacity-licence*—under a general licence given by the judge for the admission of false evidence.

6. Pleading, and more especially special pleading.

7. Principle of nullification — decision on grounds foreign to the merits—decision by quirks and quibbles.

8. Principle of fiction, in all its various branches—the habit of giving from the bench lies for reasons—of telling lies to entrap and fleece the parties—of encouraging parties to tell lies—of compelling parties to tell lies—of punish-

ing parties for not telling lies—of encouraging jurors, and even compelling them by torture, to commit perjury.

9. Principle of jargon, jargonization, or technical language—perversion of language to the purpose of securing ignorance and misconception of the law, on the part of the people—setting and keeping up a cant or flash language, to serve the ends of judicature.

10. Double fountain principle.

11. Eulogization, puffing of jurisprudential law.

12. Multiplication of offices.

On the subject of the several articles comprized in this list, several observations, applicable to them in common, present themselves as having a claim to notice.

1. There is not one of them that has any place in any of the courts above distinguished by the name of courts of natural procedure.

2. There is not one of them that has not place, in the several courts above distinguished by the name of courts of technical procedure.

3. They consequently form so many characteristic differences, by which, on the one hand the courts of natural procedure, on the other hand the courts of technical procedure, may be distinguished from each other.

4. In proportion as the institution of them respectively is found to be repugnant to the several ends of justice, one, more, or all of them together, (which, in the case of every one of these devices, will be found to be actually the case), they will serve to bring to view and demonstrate the existence of so many virtues in the natural,

so many vices in the technical system; characterizing the natural system by their absence, the technical system by their presence:—so many *vices*, and (as being the result and product of great labour, carried on by generation after generation, from age to age, and under the impulse of a sinister interest created by the fee-gathering system) so many *abuses*.

5. They will form so many topics for the exercise of the ingenuity and eloquence of the advocates of the technical system; for the professional advocate, the official judge, the official lecturer or general institutionalist, the unofficial compiler or particular institutionalist. Under each head, a perpetual invitation is given to all these learned persons. In any court of natural procedure has it any place? Of the courts of technical procedure, is there any one in which it has not a place? Is it not more or less conducive to the mischief opposite at least to some one of the ends of justice,—delay or expense, for example, or both? Can you make it appear that, to any other of the ends of justice, it is in any preponderant degree, or so much as in any degree, conducive? Here is so much delay from it; here is so much expense from it; here is so much vexation from it:—now, where is the use of it?

In this plain speech—not too plain for the plainest man to put or to comprehend—they will feel the spear of Ithuriel: touch them with it, one after another, the unclean spirit will stand confessed.

Of these, there are few which have not place in common, in every civilized country in which

the technical system is established; that is, in every civilized country on the face of the globe.

Of the whole list of them, however, no inconsiderable part will be found peculiar, either *in toto* or in degree, to that modification of it which is established in England: some articles peculiar *in toto;* many more peculiar in respect of the degree in which they have place in this country, as compared with others.

Devices peculiar *in toto,* are,—1. the distinction between law courts and equity courts; 2. the habit of eulogizing jurisprudential law at the expense of statutory, sham law at the expense of real.

Under the head of devices peculiar in degree, will be found, perhaps more, at any rate the following: viz.

1. Tribunals out of reach.
2. Sittings at long and fixed intervals.
3. Principle and practice of nullification.
4. Jargon, under its several modifications.
5. Fiction, or mendacious reasons.
6. The use made of the double fountain principle.
7. Motion business; including the business of incidental motions, original motions, and motions of course.

CHAPTER VI.

FIRST DEVICE—EXCLUSION OF THE PARTIES FROM THE PRESENCE OF THE JUDGE.

SECTION I.—*Mischiefs of the exclusion.*

IN the exclusion put upon the parties may be seen the master-device, the *sine quâ non* of the whole system. To this, as to the centre, may all the others be referred: their office being, in each instance, to give either birth, continuance, or effect to it.

By exclusion of the parties from the presence of the judge, must here be understood exclusion of their allegations, in the character of testimony, applicable to the purpose of grounding a decision, giving termination to the suit. An express exclusion put upon their persons would have been too flagrantly odious, and more than was necessary to the purpose. It was done by so ordering matters that a party should have nothing at all to gain by attendance, while he had as much as possible to suffer and to lose. Nothing at all to gain; when he could neither gain credit for any testimony of his own, nor extract any testimony from the lips of his antagonist, nor so much as comprehend, through the jargon in which it had for this purpose been enveloped, what had been done, or was

intended to be done. Much to suffer; partly from the natural causes of vexation, expence, and delay, the unavoidable concomitants of judicial attendance: but a great deal more by the arrangements that had been established for the purpose of wearing out his patience, rendering the burden of attendance intolerable, and thus forcing him into the arms of the partners and dependants of the judge, the professional substitutes and assistants.*

It is in virtue of this commanding feature, that a glance, however rapid, over the whole expanse of the technical system, became so indispensable a part of the present work. Exclusion of parties is exclusion of witnesses: of the persons in whose instance an acquaintance more or less intimate with the mass of facts pertaining to the cause, or at least with some of them, is matter of course; and that acquaintance frequently most intimate, not unfrequently peculiar, the cause affording no other witnesses.

Under the technical system the ends of judicature being throughout in opposition to the ends of justice; to bring to view the several ways in which the appearance of the parties in the presence of one another and of the judge, or

* Add to which, that the practice of committing to writing whatsoever was said by either of the parties,—this practice when once established, (which it was not, nor well could be, but by degrees) superseded, as of course, the demand and occasion for oral intercourse. In one instance, perhaps, out of twenty, the demand for writing would present itself: under favour of the pretence afforded by this one instance, the purchase of written paper was forced upon the parties in the nineteen other instances in which it was useless or unnecessary.

(where that cannot be) at any rate of the judge, is subservient to the ends of justice, is to shew in other words the several ways in which it is adverse to the ends of judicature. So many services which it is in the nature of this meeting to render to justice, so many considerations by which the authors of the technical system were called upon to oppose an inexorable bar to it at any price: as also, on the other hand, so many considerations by which the legislator, in proportion as justice is the object of his regard, will feel himself called upon to rid the country of a system by which the dictates of justice are thus trodden under foot.

In the most common and natural state of things, both suitors will (at least in the outset of the cause) find themselves together in the presence of the judge. What other arrangement so natural? Whom should the judge hear, if not the parties? And if either, why not the other, and (were it only that time may not be wasted) at the same time? In this case the meeting is tripartite: parties to it, the two suitors, (the plaintiff, the defendant) and the judge: tripartite, taking the judge into the account; bipartite and reciprocal, as between the suitors.*

Cases, however, are not wanting, in which, either in a physical or in a prudential sense, the reciprocity is impracticable: then comes a meeting bipartite, a hearing *ex parte*.

When the party is not present, his presence may either remain altogether unsupplied, or supplied (in so far as it is capable thus to be

* For the sake of simplicity, the case which affords divers parties on one side, or on each side, is here passed over.

supplied) by an agent or substitute, private,* or professional,† or both.

In the character of a party, the suitor (if he be present) appears necessarily and of course: in the character of a witness, he may appear or not, as it may happen: according as it happens or not that a fact or facts, having an influence on the fate of the suit, had or had not fallen under his cognizance.

Saving always the case of impracticability, physical or prudential,—justice presents a constant demand for the presence of each suitor, on two opposite accounts: on his own account, that, of the facts, arguments, and demands, which the cause is susceptible of, and he capable of adducing, such part may be brought forward as tend in favour of his side of it; on the account of his adversary, that the adversary may on his part be in possession of his share of the same advantages.

In the character of a witness, the suitor may present himself either as an immediate, or as a non-immediate witness. If as a non-immediate witness, it will then be merely as giving indication of some other source of evidence, *real*, oral, or written: some *being*, whether belonging to the class of persons or of things, from whom, or from which, evidence fit to serve in the character of *immediate*, or say *ultimately-employable*, evidence, may (it is supposed) be extracted.

In any case, the supposed ulterior source of evidence thus referred to may either be *determi-*

* Husband, father, guardian, private friend.

† Attorney, or advocate, or both, or (as in America) both in one.

nate, known to the suitor as qualified to serve in that character, or hypothetical and *indeterminate*. From what, of his own knowledge, he knows of the nature of the case, taking into account the circumstance of place and time, he supposes (with a degree of persuasion more or less intense) that, from a person or a thing of such or such a description, evidence pertinent to the cause in hand may be to be obtained.

Presenting himself or presented in the character of a witness; the facts which a party will be most ready and most sure to bring to light will be such facts as (in his view of the matter) promise to be of service to his side of the cause. In respect of these, his evidence is self-serving, and will naturally be spontaneous. Facts seen to be of the opposite tendency, if they come out at all, will scarcely come out but on demand made by the adverse party or the judge: in a word, but by *interrogatories:* in respect of these his evidence will be self-disserving.*

* Attendance of parties is one thing, exclusion of professional assistants another thing. Care should be taken not to confound the two arrangements, or to regard the one as a necessary consequence of the other.

In the greater, the far greater, number of suits, (understand individual suits, not sorts of suits), professional assistance will be needless; and, if needless, of course mischievous. But some there will always be, in which the exclusion of professional assistance might be the exclusion of justice. Various are the deficiencies, the natural deficiencies, any of which may be sufficient to prevent the suitor from doing justice to his own cause. Minority, superannuation, mental infirmity in any shape: regard being always had to the quantity and quality of mental qualification, the demand for which is presented by the nature of the case. If gratuitous assistance, the fruit of natural relationship or of any other source of sympathy, be forthcoming, and that

I. *Facienda* by the plaintiff. Functions, for the performance of which the presence of the plaintiff is or may be requisite.

1. To state the nature of his *demand*: *i. e.* what the nature is of the *service* which, at the charge of the defendant, (in virtue of the authority supposed to be given to him by the law), he demands at the hands of the judge: *ex. gr. in criminali*, infliction of *punishment* on the defendant; *in non criminali*, (and, in so far as *satisfaction* is concerned, *in criminali*), transference of the matter of wealth in any shape, (an individual thing, immoveable or moveable, a sum of money liquidated or to be liquidated), from the possession of the defendant into that of the plaintiff, &c. &c.

2. To state on what *title* such demand is grounded, viz. in point of law: *ex. gr. delinquency, contract, succession*, &c. &c. referring to the tenor of the *law*, where there exists a law, *i. e.* to the words of the statute, where there exists a statute: in other words, where the

competent to the task, so much the better: if not, the assistance of strangers must be obtained, upon the only terms on which the assistance of a stranger can be made sure of: or, the lamb being opposed to the wolf, and without a shepherd, the consequence is obvious.

The zeal of the judge, the unfeed judge (it may be said), ought to be such as to render the assistance of the hireling needless. It ought to be, true: but will it? Choose and manage your judges as you will, can you be sure of its being so, and in every instance? If not, saying that it ought to be is not a reason, not an argument applying to the question, but a departure from it.

What if the judge be not merely negligent, but (by the influence of sinister interest) positively and actively partial? Such things have been, and therefore ought never to remain unprovided against, as if they were impossible.

legislator has rendered it possible for the subject to be apprized of, and to observe, the law, for the non-observance of which he is doomed to suffer.

3. To state what the *facts* are, which, to his knowledge in the character of an immediate witness, or to his belief in the character of a non-immediate witness, have taken place: they being such as, in virtue of such law, have given to him such his *title* to such *service:* events or other facts *investitive*, or say *collative*,—having the effect of *investing* him with, or *conferring* upon him, such his title to such service.*

4. To state the *grounds* of his persuasion respecting the existence of such collative or investitive facts: whether they be his own perceptions, or the supposed perceptions of any and what other persons, or whether they are composed of other information, in the shape of real or written evidence: and, in his own instance, to make known, if necessary, whether the facts so perceived by him were the very facts themselves that are in question, (as in case of *direct* evidence), or other facts regarded as *evidentiary* of them: as in case of *circumstantial* evidence.

5. To state, (as well for the benefit of the defendant as for his own benefit, and whether called upon or not), all such persons as he expects to find qualified to speak, in the character of witnesses, to any such relevant facts, as above: stating, in regard to each such person,

* See Dumont, "Traités de Legislation," and "Introduction," &c. ut supra.

what facts,—and on what grounds such his expectation rests.

6. To propose, (whether by name or by description, as the case may be), such persons, if any, through the medium of whose testimony, ultimately-employable or not, (and on what ground), he looks for immediately relevant and ultimately-employable evidence, as probably obtainable by *investigatory* enquiries and examinations.

7. To state, (as well for his own benefit as for that of the defendant), all such relevant articles of *real* or *written* evidence as lie within his own custody, power, knowledge, or supposal; together with the *places* in which they are respectively lodged, or supposed to be lodged, the *time* within which, and the *means* by which, they may respectively be made forthcoming for the purpose of evidence: and, in case of apprehended difficulty, what the nature of the difficulty is, and what means (if any) seem best adapted to the removal of it.

8. To authenticate, (whether for his own benefit or that of the defendant, and thence whether in the way of spontaneous allegation or confessorial recognition), in the character of sources of written evidence, or else to disavow, all *instruments* and other *scripts*, purporting or alleged to be of his writing, inditing, or adoption, whether by signature or otherwise.

9. To deliver (either on the spot, or, in case of necessity and for special cause, at a subsequent time, in writing, and with the benefit of recollection) answers to all such relevant and not improper questions as shall be propounded

to him by or on the part of the defendant (subject to the disallowance of the judge), or by the judge himself.

10. To declare, if needful and required, his means of justiciability, for the purpose of eventual satisfaction, or even punishment, for any undue expense and vexation imposed by such his demand on the defendant, and any other person or persons,—especially in the event of the demands being deemed groundless, or being left unsupported; more especially if the institution or pursuit of it be accompanied with *mala fides* (consciousness of wrong), or temerity.*

11. Unless where, previously to the institution of the suit, demand (demand extra-judicially made to the defendant) was physically or prudentially impracticable, — to declare whether such demand were made by him, and where, and when, and how; and if not, why not? to the end that, if the vexation attached to the institution of the suit were causeless, especially if malicious, due satisfaction for it may be made by him.†

* In this case, the security given for the assurance of such justiciability, of what nature shall it be? a topic to be considered. For example, shall it be self-furnished, or extraneous? real, or merely corporal? eventual only, or depositious, *i. e.* by deposit made in the first instance?

† Under the natural system, the importanee of this use will in general be very inconsiderable: Why? Because, under that system, the vexation attendant on litigation is so inconsiderable.

Under the technical system, the importance of it would, for the opposite reason, be great: great in proportion to the vexation attached to the particular species of suit employed.

In the most vexatious of all suits (at least all English

12. To afford (whether by means of interrogatories properly adapted to the purpose, or otherwise) the means of establishing or disproving his own sincerity, that is, his persuasion of the demand: to the end that, in case of insincerity, he may, on the score of undue vexation, be the more highly responsible.

13. To receive warning that, for the truth and sincerity of his several declarations and alleged persuasions, as above, as well in respect of completeness as of correctness, he is about to be responsible, *i. e.* justiciable: to wit, upon exactly the same footing as an extraneous witness, deposing in like manner in a suit to which he was not a party.*

14. For his own benefit, to receive communication of the several allegations on the same occasion made by the defendant on his (the defendant's) own behalf; and, by counter-interrogation on the spot, and eventually by counter-evidence and apposite observations, to do what lies in his power towards securing the plenitude

suits), an equity suit,—in the instrument called a *bill*, by which it is commenced, a statement of the existence of such previous demand is at least frequent, if not constant: not that, whether such demand was ever made or no, is a fact concerning which the draughtsman ever deems it worth his while to enquire. To the party, it is perfectly useless, the judge never taking any the slightest cognizance of it: the only use it is of, is to the partnership, by swelling the quantity of profit-yielding surplusage. The charge is inserted under the *mendacity-licence*, of which in its place.

In a suit at common law, nothing is ever said about it.

* The care taken, in so many instances, under the technical system, to exempt parties, on various occasions, from this obligation, constitutes the device spoken of below under the appellation of the *mendacity-licence*. See the chapter so intituled.

as well as correctness, or exposing the incompleteness or incorrectness, of such the defendant's testimony and declarations.

15. At the requisition of the defendant or the judge,—to settle a *channel* and *mode* of correspondence with him, during and for the purpose of the suit; in such manner as to obviate thereafter all difficulties and uncertainties in respect of his having or not having, on this or that occasion, received notice; (viz. of anything which he may be called upon to do or receive, either for his own benefit, or that of the defendant, or any one else.)

II. *Facienda* by the defendant.

1. To declare whether he admits, or contests, the justice of the plaintiff's demand:—and this whether the demand be of a criminative, or a non-criminative nature.

2. If he contests it,—whether on the ground of *law*, or on the ground of *fact*, or on both.

3. If on the ground of fact;—to declare whether he means to advance, in the character of *divestitive* (or say *ablative*) facts, any *counter* facts; and if yes, to advance them accordingly, proceeding, in regard to such *counter facts*, in the course stated in the case of the plaintiff, as per articles 4, 5, 6, 7 and 8.

4. To undergo examination on the part of the plaintiff: as in the case of the plaintiff, by article 9.

5. If (by his own confession or otherwise) the justice of the plaintiff's demand has been established, (or provisionally, in the event of its being established)—and if the nature of the obligation in that event imposed on him requires

it,—to declare whether he is able to fulfil it (for example to endure the punishment, render the satisfaction, pay the money due, deliver up the thing due, &c.) upon the spot, or at what other time or times, place or places, &c.

6. If not upon the spot; then to pray the respite he desires, stating the grounds of such his prayer; and, if requisite, to indicate and declare his justiciability (or say *responsibility*) as in the plaintiff's case, article 10; to the end that the judge may determine, whether any and what indulgence may and shall be granted to him, consistently with the plaintiff's rights and exigencies: that, on a comparative consideration of the exigencies of both parties, the judge may determine whether any and what abatement may be made from the plaintiff's right, to save the defendant from suffering in excess.

7. *Inter alia*, (in case of need), with a view to pecuniary punishment or satisfaction, as above; to give an account of all debts due, or about to be, or likely to be, due to him, and of all other expected pecuniary resources, and all other means (if any) by which his eventual justiciability in point of fact may be secured and carried into effect.

8. To be warned of his responsibility for the truth and sincerity, the completeness and correctness, of his declarations of all kinds; as per article 13 in the plaintiff's case.

9. For his own benefit; to receive communication of the plaintiff's self-serving, and (if any) self-disserving, testimony, as above: to the end that, by counter-interrogation, and (if the facts admit of it) by counter-evidence, he may do

what lies in his power towards securing the completeness and correctness, or exposing the incompleteness or incorrectness, of the plaintiff's testimony and declarations.

10. To settle a channel and mode of correspondence with him, during and for the purpose of the suit; as per article 15, plaintiff's case.

III. *Facienda* by both parties in concert.

In particular cases; the demand for such a mass of evidence as shall, on one or both sides, be to a certain degree complex, being established by their mutual declarations, as above,—to take an *anticipative survey* of it: for any or all of the following purposes, viz.*

1. To discard any such articles as, were it not for such concert, might in reality or appearance be necessary to the parties having in contemplation to produce them respectively, but, by virtue of such concert and mutual explanation, may be rendered unnecessary.

2. When this or that article of evidence is so circumstanced, that the production of it threatens to be attended with delay, expense, and vexation, to any considerable amount; to take measures in concert, for reducing to its minimum that mass of collateral inconvenience.

3. Where the quantum of the inconvenience appears to be to such a degree considerable as to outweigh either the value of the evidence in the character of a security against misdecision, or even the mischief of misdecision, though on the exclusion of the evidence it were seen to be a certain consequence; an exclusion may accordingly be put upon that article of evidence: an

* See infrà, Book IX. EXCLUSION. Part II. PROPER. Chap. 7. *Remedies succedaneous to exclusion.*

exclusion, to wit, either definitive or provisional, as the case may require.*

4. Where, by the influence of any cause or causes of complication, any ulterior meeting or meetings have been made requisite; to concur with the judge in the fixation of such time or times as shall be productive of least delay, expense, and vexation: regard being had to the convenience of both parties, as also of the suitors in other causes depending before the same judge.

To the uses attached to the functions which by this means the parties are in the most advantageous mode enabled and obliged to perform, (enabled, each for his own benefit, or obliged, each for that of his adversary), may here be added an advantage, which consists, not in anything that either of them does, but in the situation in which each of them finds himself. I speak of that which places him in the presence of the judge, and commonly (except where special circumstances afford special reasons to the contrary) in the presence of a more or less numerous and miscellaneous auditory: bringing thereby to bear against each party, in case of malpractice or insincerity on his part, that sense of shame which is so powerful a preservative against any the slightest deviation from the line of rectitude, and of which, in the solitude of the closet, the force is as nothing in comparison of that which it derives from society, especially from society so composed.

The use here in question is over and above that which consists in the party's being person-

* See Book IX. Part II.

ally responsible for every breach of sincerity or probity committed on his side of the cause. Such responsibility might be made, and is made,* to attach upon him, without his ever finding himself in the presence either of the adverse party, or of the judge.

The check here in question is that which is applied to a man by the consciousness that, in the event of a present detection or well-grounded suspicion of any impropriety of speech or conduct on his part, the stain thereby made on his reputation will be witnessed by a number of persons more or less considerable, in which his adversary and the judge will at any rate be included;—the adversary, whose triumphant eye, and the judge, whose reproving eye, his own humiliated and suffering eye will have to encounter on the spot.†

* Viz. in English regular procedure, in the case of the instrument called an *answer* to a *bill in equity*.

† So successfully has the industry of the technical system exerted itself, that not only this corroborative to personal responsibility has been cleared away, but the very foundation of it, the responsibility itself: and this so effectually, that neither shall the party himself be responsible for the falsehood or dishonest trick by which he profits, nor yet the person or persons, the professional assistant or assistants, to whom, in the character of instruments or assistants, he is indebted for it. The licence thus granted to insincerity and malpractice requires, it is true, the removal of the check here in question,—requires the exclusion of the parties from the presence of each other and the judge,—requires the withdrawing out of the joint presence of his adversary and the judge, the party on whose behalf the dictates of sincerity or probity are to be transgressed; but, to render the licence complete, and completely effectual, ulterior devices (of which presently) were necessary, and have accordingly been employed. It was necessary that for every such transgression a safe author or accomplice should be provided:

Of all the above modes of turning to account the presence of the parties, there is not one that is not the obvious result of the plainest common sense: not one that is not, wherever the nature of the case admits of it, subservient to all the ends of justice: not one of them the use of which in that character is not felt in the courts of natural procedure, according to the nature of the causes of which those sanctuaries of justice are respectively permitted to take cognizance. But, by so many points as this arrangement is subservient to the ends of justice, by so many is it adverse to the established ends of judicature: accordingly, the opposite arrangement, the exclusion of the parties, constitutes the basis of every system of technical procedure, wheresoever established, and howsoever modified. All the other devices presuppose this, and serve but to improve the advantage gained by it.

In whatever court this basis of all justice has been restored, or suffered to remain, the best evidence, so far as it applies, takes place; and, besides furnishing such lights as frequently are not be had from any other quarter, saves the

and that matters should be so managed, that, whatsoever be the transgression, and whatsoever the advantage reaped or sought from it, no inconvenience, either on the score of punishment or on the score of satisfaction, should fall anywhere. To this purpose the exemption here in question was indeed necessary, but was not sufficient. It was necessary that, besides improbity in other shapes, a full and unrestrained liberty of lying should be secured to the party, for himself, and any number of assistants at his nomination, they being members of the partnership: and this accordingly is what has been done. See Chap. 15. *Mendacity-licence.*

vexation, expense, and delay, attached to the production of inferior evidence: and the cause receives the very speediest, as well as least expensive, and in every way least vexatious, conclusion, which the nature of it admits.

Even when ulterior evidence is ultimately necessary, by the preliminary meeting much vexation and expense is saved in the exhibition of it.

Under the technical system, for want of the necessary preliminary explanations, each party finds himself, generally speaking, under the obligation of having in readiness, by a particular day and hour, every article of evidence (how vast soever may be the expense) which it is supposed can by any possibility be found necessary, or so much as rendered serviceable.

Under the arrangement proposed, not only in respect of this or that individual article of evidence, is the delay, vexation, and expense, saved, that would have been produced by the exhibition of it, but (without any the smallest prejudice to the *direct* ends of justice) needless evidence, with the delay, vexation, and expense, attached to the exhibition of it, is shovelled out in whole masses: as for example:

1. Whenever the burthen of delay, vexation, and expense, attached to the collection of the evidence, constitutes an object worth regarding; if any *point of law* is in question, the collection may on both sides be postponed till after the determination of the point of law: for, suppose the point of law given (for example) against the plaintiff, all evidence, as well on his side as on the other side, will be altogether useless.

2. In like manner, where, on the defendant's side, the burthen threatens to swell to a certain amount, the collection may on that side be postponed till after the plaintiff's evidence has been collected and provisionally pronounced upon: for, if the plaintiff fails in making out his case, it is needless to put the defendant to the trouble of making out his.*

Neither party (it may seem at first sight) ought to be present without the other: no *ex parte* appearance previous to their simultaneous appearance. Supposing this to be the case, the simultaneous appearance will be the first step in the cause, after the delivery of the summonses by which it is brought about.

But in some cases it may not be right that the defendant should be subjected to the vexation of attendance, until the *primâ facie* justice of the demand has been so far established as it can be by the examination of the plaintiff. In these cases, it is for the advantage of the defendant that the plaintiff should be heard without him, and before him, and consequently out of his presence.

Again, in some cases it may be necessary, for security, to apprehend the person of the defendant without warning; and, by that means, at some casual and unforeseeable time and place. In all such cases, the ends of justice require, as

* True it is, that, when the question is concerning *quantity* or *degree*,—for example, *how much* money is due to the plaintiff (it being out of dispute that something is due), and not whether *anything* or *nothing*,—it will frequently, if not generally, happen, that, under the head of evidence exhibited, no saving will be to be made. But, where the question is whether anything be due or nothing, there it is that the door is open for such saving in all cases.

peremptorily as the ends of judicature have forbidden, that, without loss of time, and (if possible) antecedently to his being inclosed within the walls of any prison (ordinary or extraordinary), he be conducted into the presence of the judge.* In these cases it is only

* In Sergeant Wilson's reports † we have a case, in which a widow, being illegally imprisoned, lay eight months in jail, from no other cause (as declared by the lord chief justice) than that no judge knew anything about the matter. In the nature of things, cases where the like consequence is produced by the like cause, must be happening in every day's practice; but, mere accident excepted, what is it that can ever bring them to light? For, of those who could remedy it, who is there that either knows or cares about it?

On this occasion, the observation made by the chief justice is worth remarking. "It was in some measure Mrs Barker's (the widow's) own fault, that she was detained in prison so long as eight months; for that, if she or her attorney had applied to the court of King's Bench, or to any judge of that court, at his chambers, she might have been discharged out of custody within a day or two after she was arrested, *upon laying her case properly before the court, or a judge.*"

At the expense of a suit, in which the judge would have had his fees, the widow might have obtained earlier, what, at the like expense, she did obtain at last, an enlargement from an illegal imprisonment: to which imprisonment she never would have been exposed, had it not been a rule with learned judges wilfully to neglect (for the evident purpose of making such suits) a duty imposed upon all judges by the most obvious principles of justice and common sense,—a duty from which no judge of the class of unlearned judges ever is exempted,—viz. the duty of not punishing or plaguing men, without suffering themselves to know anything about the why or wherefore. See Chap. 12, *Decision without thought.*

The cause was tried by De Grey, lord chief justice: his sympathy was excited by it: In whose favour? That of the widow by whom the eight months imprisonment had been suffered? No: but that of the attorney by whose malpractice it had been caused: he was an object of compassion. Why? Because no such offence as that of conspiracy had been proved upon him.

† 3. Wilson, 368. Barker *v.* Braham and Norwood.

by an accident, and that a rare one, that the plaintiff can be there exactly at that same time. Here, then, it is for the advantage of the defendant to be heard out of the presence of the plaintiff.

Again: On the part of the plaintiff, the obligation of personal appearance is attended with a degree of vexation, which, when without preponderant vexation it can be saved, ought to be saved: besides that the fulfilment of the obligation will in some cases be physically, in others prudentially, impracticable. Here then comes in the consideration, in what cases,—antecedently to the issuing of the summons commanding, or the warrant for compelling by physical means, the attendance of the defendant,—a succedaneous security shall be accepted at the hands of the plaintiff, in lieu of that which would have been afforded by his preliminary attendance at the judgment seat, and examination by the judge.

Here again comes in the question, in what cases examination in writing ought to be employed, in aid, or *provisionally* in lieu, of examination *vivâ voce* (reciprocal or *ex parte*) by and before the judge. I say provisionally, and never definitively and exclusively (as in the case of the answers extracted from defendants in equity practice), under the assurance of never being subjected to the other more efficient mode.

So again, in what cases the reciprocal examination incidental to the meeting of the parties in the presence of the same judge shall give place to a reciprocal *ex parte* examination; viz. of the plaintiff before one judge, of the defen-

dant before another, whose seat may be at the antipodes.

Obvious enough these several considerations, to those whose views are directed to the ends of justice. To men of law, they will be apt (many of them) to appear new, as not being conducive to the ends of judicature. They are here glanced at, as being necessary to fit up the natural system for performing, not what is performed, but what is pretended or supposed to be, without being, performed, by the technical.

SECTION II.—*Uses of the exclusion to Judge and Co.*

Use 1. Making *business*, i. e. profit, by forcing the suitor into the hands of professional lawyers, assistants, substitutes; linked with the judge himself in a virtual partnership, in the mode already explained.

2. Making business, by the exclusion of the testimony of the parties in that most trustworthy, most correct and complete, as well as promptest and cheapest, shape; giving occasion to the production of it in shapes more expensive and more profitable: to the partnership, more profitable; to the parties more expensive. *

3. Making business, by giving birth to erroneous decisions, grounded on incorrect or incomplete masses of evidence; which decisions give birth to ulterior suits, seeking relief in ulterior and better-grounded decision.

* Viz. in all the courts, *affidavits*, and in the equity courts, *answers* (*answers to bills*), and depositions received (not in the presence of the p ties) by a judge *ad hoc*, who has no part in the decision.

4. Making business, by exempting, on each occasion, the party in the wrong, from that sensation of shame, which, at the moment of detection, (especially if in the presence of a miscellaneous mass of by-standers, as well as of the judge), attaches itself upon self-conscious and detected falsehood or injustice. Opening the door to whatever falsehoods and frauds present themselves as promising to serve the purpose of the cause, or of the moment; and thereby to demands and defences, and thence to suits, which, but for the assurance of being able to employ to advantage such falsehoods and frauds, would not have had existence.

5. Making ease (without prejudice to profit), by exempting himself from the plague and indignity of having to do with low people, with the mob, the rabble, the populace; *i. e.* the great majority of the people; wretches, who, being ignorant of things in general, and of jurisprudential science in particular, are, in proportion to their ignorance, apt to be troublesome.

6. Giving to the partnership (or at any rate to the judge, and his younger brother the advocate) the profit of inhumanity, of inhumanity to any extent, clear of the opprobrium that otherwise would attach upon it.

Were the debtor and creditor both in court, in the presence of each other and the judge, shame would every now and then prevent him from extorting, in the shape of fees, the pittance which, if not left to the debtor in the name of humanity, should have been delivered to the perhaps equally distressed, perhaps still more grievously distressed, creditor, in the name of justice.

7. Giving to the partnership, or at any rate to the judge and to the advocate, the profit of inhumanity, clear of any pain of sympathy that might otherwise be excited by the spectacle of distress, in the bosom of him for whose benefit it has been produced.

Often does the unlearned judge, the country magistrate, give up his trifling retribution: Why? Because the distress, of which the exaction of it would be productive, is before his eyes.

Who ever heard of fees given up by the learned and ermined magistracy?

Of the profits drawn by them, in such copious draughts, from the extremity of distress, a great part, perhaps the greater, is never set down to their account. It is sunk in the pocket of some officer: and the profit to the judge is from the sale, or what is equivalent to the sale, of the office *.

Even of that part which finds its way directly into his coffers, care has been taken that the individual contributors, with their respective distresses, shall be as completely unknown to him, as if the scene of them were at the antipodes.

"What the eye does not see, the heart does not rue." Nowhere has the truth and value of this proverb been more fully understood, and more completely profited by, than in the great hall at Westminster. Hence, the miseries and iniquities of which the English system of imprisonment for debt is composed,—a mass of abomination not to be matched in any other clime, a source of profit as religiously protected as it has been elaborately organized,—has ever found as much sympathy in the stones of which the pave-

* Vide supra, p. 13.

ment is composed, as in the bosoms of those who walk upon it. Misery in abundance; but the heart never rues it, care having been taken, and that so effectually, that the eye shall never see it.

In the division made of the labour among the members of the partnership, all this opprobrium, and whatsoever may be supposed to be realized of this pain of sympathy, lies on the shoulders of the attorney. His inferior share of the aggregate profit, comes to him loaded with this incommodious drawback. The superior share of the authors of the system, the judge and the advocate, drops into their learned laps, free from all incumbrance.

8. Giving the necessary support, or increased effect, to the several ulterior devices (of which in their order): and, in particular, to the practice of decision without evidence and without thought, to the principle of nullification, to the use of written pleadings, with the benefit of the mendacity-licence, to the chicaneries about notice, to motion business, to the entanglement of jurisdiction as between law and equity courts, and to the opinion trade.*

* In any judicatory, suppose for (argument's sake) any such rule established, as that, of any two parties, the judge shall be at liberty to hear which he pleases: refusing peremptorily to hear the other, in any mode or upon any terms. In this may be seen a rule of which no person (as is supposed) would hesitate to pronounce,—not solely that it is in itself contrary to justice,—but that it is impossible that, in any system of judicature of which any such rule stood part, justice should really have been the end in view.

Accordingly, in no one judicatory under the technical system, has any such rule been acted under or established. Of its non-establishment one cause probably may have been, that in all probability the people of the country could not

have endured it: another cause probably was, that,—if a hearing must be given,—with the advantage of a power to make those to whom it is given pay for it, more money may be to be got by allowing the privilege to two or more parties, than if it were confined to one.

But, as there have been senses in which, and occasions on which, the half has been said to be more than the whole; so are there in which the double may be seen to be less than the whole.

To refuse a hearing to either of two contending parties, to the advantage of the other, is that sort of practice, against which neither non-lawyers in general, nor even judges themselves, would be backward in bestowing the most vehement and unqualified censure. Why? Because no such thing is ever done.

But, to refuse a hearing to *both* parties; to refuse to hear either of them, so much as by a hired proxy (which after all, if the principal be not present, is not a hearing of the principal); to refuse to hear either of them, even in that improper sense and in that inadequate way, till after the greater part of that evil has taken place, which, by a timely hearing of the parties themselves, would have been prevented; this is what not only lawyers of all sorts, and especially such of them as are judges, are ready at all times to defend by all means whatsoever that are in their power, but even non-lawyers (such is the effect of custom and prejudice) to acquiesce in.

In Mexico, a rule was established, giving power to a certain person or set of persons in authority, on condition of pronouncing some word or other translated by us into the word *sacrifice*, to murder any and as many persons as he pleased. In some newly discovered islands of the South Sea, the like rule has place, and is acted upon to this day.

In this country this rule is looked upon as an improper one: nor, supposing a motion made for the establishment of any such rule, would so much as a single voice (it is supposed) be found to second it. Why? Answer: For three very good reasons. 1. Because it is established in a foreign country: 2. Because, in that foreign country, the manners and opinions are in a savage state: 3. Because it is not established in our own.

But, supposing this said rule actually established, and still in force, and a motion now made tending to the abolition of it; would such a motion pass *nemine contradicente*? So far from it, that, if at all, it would not pass but at the end of

a considerable number of years: during which, every session, would have been emptied upon it the whole quiver full of those fallacies which, having for their common property that of being irrelevant with relation to every proposition which they are employed to combat, would apply with equal force and propriety to a proposition for divesting a king of the prerogative of murdering an unlimited number of his subjects at his pleasure, and to a proposition for divesting a king's nominees, under the name of judges, of the privilege of destroying every year, by a slow death, an unlimited number of those same subjects; having first brought them to ruin, under and by virtue of a violation of that primary principle of justice, which prescribes as the first step proper to be taken by a judge, the giving to the parties on both sides (with or without their respective agents) a real hearing in his presence.

CHAPTER VII.

SECOND DEVICE—TRIBUNALS OUT OF REACH: OR, SWALLOWING UP THE INFERIOR COURTS.

IF justice be necessary in one place, it is little less so in any other: if justice be necessary to one set of men, it is little less so to another.

So obvious is this truth, that, upon the first settlement of every country, judges, with competent authority, distributed all over the country in courts under some denomination or other, as little distant from each other, and thence as numerous, as the state of the country in respect of wealth and population will admit, are, under the natural system, an obvious and general arrangement. To disturb it, requires, as under the fee-gathering system, power, perverted by the impulse of sinister interest to private purposes.

In every country in which the technical system has established itself,— in every country, to an extent commensurate with the power possessed under that system by the superior courts, established (as they naturally would be) at the fountain-head of power, as close as possible to the ear of the sovereign ;—to strip the local, distant, and consequently inferior and weaker courts, of as much of their jurisdic-

tion as was possible, has of course been the constant aim of the superior, the metropolitan, courts.

But in no country have the enterprizes of this most cruel species of robbery been so successful as in England.

Not to speak of bye-courts established for particular purposes; not only before, but for ages after, the Norman conquest, every county, every hundred, had its court, sitting for general purposes.

If in any place justice be necessary in respect of any one sort of cause, in that same place justice cannot be much otherwise than necessary in respect of every other sort of cause. If, then, of a court sitting in any district (a hundred for example), the whole time be not taken up by causes of a particular description, nature and utility combine in giving to (or rather in not taking from) that same court, the power of administering justice in causes of every other description. To so simple an arrangement, limitations may be made by power, actuated by sinister interest or caprice, but cannot, unless for some very cogent and not at all obvious reason, be warranted by utility and justice. Between jurisdiction and jurisdiction, geographical lines of demarcation are prescribed by utility, rising to the degree of necessity. Metaphysical lines of demarcation (except in here and there a particular case, indicated by special circumstances) are the result of a compromise between rapacity and rapacity, fighting in the dark.

Under the natural system of zoological economy, spider devours spider, for want of flies.

Under the technical system of procedure, judge, give him time and power, swallows up judge. If the hundred court—if even the county court, once so efficient and so exalted in power and dignity, with its earl and its bishop, its temporal judge and its spiritual judge, can still be said to have existence, it is scarce otherwise than in name: it is as the shell of the fly, which, after having been sucked by the spider, is sometimes seen flittering in the web.

In a general point of view, the cause of this voracity is as obvious as the fact is notorious. As to the details of the operation, and how it happened that the success of the enterprise was so much more complete in England than any where else; the investigation would be curious, but here there is not sufficient space for it: and if not history, (for history requires honesty), *materials* at least for history are not wanting in the books.

Of the mischiefs resulting from this distinction, little need be said.

On the one hand, anarchy, failure of justice, the equivalent of constant misdecision to the prejudice of the plaintiff's side;—on the other hand, factitious delay, expense and vexation, and in general with an increased chance of misdecision to the prejudice of either side.

From extinction of local courts, comes enlargement of the geographical field of jurisdiction of their devourers, the metropolitan courts. Thence increased length of journeys and of demurrage; obvious and irremediable causes of increased delay, vexation, and expense.

In each several instance, the burthen sustained, is it sustained by both parties?—then

comes the collateral inconvenience. Does the plaintiff (that is, the injured individual who but for the abuse would have been plaintiff) sink under it?—then comes the failure of justice. Is it the defendant who sinks under the burthen?—then comes misdecision to the prejudice of the defendant's side: a mischief on that side, correspondent, and not inferior to, the mischief of failure of justice on the plaintiff's side.

If the mischiefs of this devastation are obvious and incontestable, the advantages aimed at and reaped by the authors are no less so.

1. Making increase of business. Of the whole number of causes that would have gone to the local and little district courts, it was but a part indeed, and that a small part, that could find its way to their metropolitan devourers; the remainder would evaporate in the shape of failure of justice. But no grain of profit was too minute to be stooped for; nor any mischief too great a price to be paid for that minimum of profit. Witness the shillings, the splendid shillings, the price of delay under English equity: * witness other delays without number, with their respective purchase-monies.

2. Making pretences and means for the exclusion gradually put upon the parties in all cases.

The more remote the province, the more intolerable the vexation of journeys and demurrage to and from the head seat of judicature: especially in a state of society which afforded neither roads, nor carriages, nor inns, nor lodging-

* See Chap. 4. of this book.

houses, nor security against robbers. But, the more intolerable the burthen of attendance, the more anxious the solicitude to obtain permission for the employing of professional substitutes: who, when once admitted for the relief of distant suitors, soon found means to render it as impracticable to suitors to do their business in Westminster Hall without the help of lawyers, as it is to stockholders to make transfers at the Bank without the help of brokers.

Besides; it would be a hardship to send to a man at the Land's End to come and be heard at Westminster; therefore, so it would to send to a man in Palace-yard, or to put a question to him in court, if he is there already. This logic impresses conviction on learned minds. To come and be heard is the greatest of all hardships to a man: understand, if it is about business of his own; for if it is a business in which he has no interest, he being but a witness, there is no hardship, or at least none worth thinking about.

Without this advantage, the other would in comparison have been little worth: the system of procedure pursued would have been the natural system: and, under that system, business is scarce worth having.

3. Saving technical judicature from the odium of comparison, by the extinction of natural judicature.

This advantage came in gradually, as the technical system, with its ever-increasing mass of delay, vexation, and expense, took place of the natural, in the superior courts. In the local courts, the mode of procedure would of course con-

tinue, if not purely natural, at any rate, in comparison, undilatory, unvexatious, unexpensive.*

The motives being so strong, and power being adequate, means could not be deficient: the mode was the only object that presented itself to reflection or choice. In the choice there was no difficulty. Make the recourse of the suitor (that is, of the plaintiff) to the local courts, vain and useless, productive of nothing but vexation and expense,—he will either sink under the injury, without seeking for justice anywhere, or he will seek for it in the great courts. *Removal*, in all its shapes, proffered itself, and was accepted, for this disastrous service.

Make the burthen of attendance in the great courts intolerable, the suitors on both sides will fly for relief into the arms of their natural enemies, the professional members of the law-partnership, raised up, to bring in custom, by the head and most active partner, the judge.

John Poor and Thomas Rich live both in Cornwall. Rich is able to bear the charge of journey and demurrage to London; Poor not. From the Cornish courts, a defendant has the power of removing the cause to the London courts. What chance has Poor for justice against

* Meantime, however, the exigencies of society had given birth to new courts, in the practice of which the natural mode of proceeding was revived; in particular, the courts filled by Justices of the Peace, acting out of general sessions at their own houses. Courts pursuing the ends of justice, presented an odious and formidable object of comparison and standard of reference to courts pursuing the ends of judicature. The precedent was alarming; they could not be too anxiously kept under, and discountenanced.

Rich ?—None whatever. Rich removes the cause from London, and Poor gets his labour for his pains.

In this way, nineteen injuries, perhaps, out of twenty, are shut out from remedy. Who cares? Judge and Co. get their profit out of the twentieth.

The indigent of all classes are thus reduced to a sort of slavery under the opulent: nineteen persons put out of the protection of the law, that two may be squeezed by and for the benefit of the lawyers.

Removal is either absolute, or not without leave: leave, viz. of the court *ad quam*, the court into which the removal is proposed to be made.

Obligation of applying for leave, is in appearrance a security against oppression, in reality an aggravation of it; a cause tried, to know whether another cause should be commenced; the yoke doubled on pretence of lightening it.

Under the fee-gathering system, sham securities* of this sort are as easy to find, as it is difficult to find real ones. The prime security is the appearance of the parties at the outset *coram judice*: and, to bereave the suitor of that security, nothing that power and industry could do has been left unemployed.

In general, and after allowance made for a

* In the case of an offence prosecutable by information,—motion for leave to file an information; motion for a mandamus; motion for a prohibition; motion, in some cases, for a *certiorari* (a writ to remove a cause from an inferior to the superior court), though in others, perhaps in most, the removal by *certiorari*, is *ad libitum*. No new trial without motion: though in many cases it might be grantable to great advantage by the judge, viz. immediately on hearing the verdict, and without farther argument.

few narrow exceptions,* there can be no sufficient reason for taking any sort of cause out of the jurisdiction of the local court, in any other way than by appeal.

If there were any such reason, what should it be? Value of the matter in dispute? too great to be entrusted to such inferior, and comparatively untrustworthy, hands? But the remedy, and the sufficient remedy, lies in appeal, not in refusal of cognizance. When the party, who knows the circumstances of the cause, and against whom the decision is, sees no reason to be dissatisfied with it,—is it for the legislator, or the superior judge, who knows nothing about the individual cause, is it for these strangers, to be dissatisfied with it?

From whence is it concluded that the judge is unfit to be trusted with a sum above the mark? he whose fitness for judging of all sums up to the mark is assumed.

By delay (it is true) injustice equal to any producible by misdecision, equal and even superior, (since, to the mischief of antecedent delay, vexation, and expense, may come to be

* Example of exceptions proposable, with their grounds and reasons:

1. Supposed unfitness of the ordinary judge: as in some ecclesiastical causes.

2. Residence of parties and witnesses naturally confined to a few particular districts, as in some maritime causes.

3. Extraordinary judge extraordinarily well qualified by appropriate skill and experience, and the causes, in respect of their value, such as may in general bear the extra expense, &c. of the journeys and demurrage resulting from the exclusion put upon the greater part of the local courts. Examples: 1. The exclusive jurisdiction of the Admiralty courts; 2. and of the courts having the cognizance of the validity of wills: defensible upon that, if upon any, ground.

superadded the mischief of ultimate misdecision), —injustice, especially to the prejudice of the plaintiff's side, may come to be produced; and, to this mischief, an appeal, which supposes decision, applies no remedy. But, though it lies not within the reach of that same remedy, neither is injustice by delay, any more than injustice by decision, without its remedies; nor are those remedies less efficient in this than in that other case.

CHAPTER VIII.

THIRD DEVICE—BANDYING THE CAUSE FROM COURT TO COURT.

Appeals and removals have no place but by the act, or with the concurrence, of a party in the cause. The sort of transfer here in question requires no such concurrence, nor any spontaneous act on the part of anybody. At a particular stage of the cause, it takes place, as it were, of itself, and without any fresh expenditure of human will or reason: it takes place, as, in a piece of clock-work, sound succeeds sound, by a pre-established harmony among the parts of the machine.

Of this species of transmission, the possible modifications are plainly infinite. In Scotch judicature, the actual ones observable in a single court want not much of being so. Throughout the demesne of the technical system, other exemplifications, in unhappy abundance, may be found.

The principal of them will be found comprizable under the following description:—One court to decide, another court to collect the

evidence on which the decision is to be grounded. For illustration, the following may suffice :—

1. Practice of the English superior common law courts, on indictments for offences not felonious. The cause bandied to and fro between the court of King's Bench and the court of Nisi Prius.

2. So in informations, *in criminali*.

3. *In civili*, uniform practice of the King's Bench, Common Pleas, and common law side of the Exchequer ;—the cause bandied between these courts respectively, and the courts of Nisi Prius and assize: projected from the metropolis by a centrifugal, and drawn back again by a centripetal force. Fragments of causes, projected now and then under the name of *issues* from the Court of Chancery and the equity side of the Exchequer to a common law court, and then re-absorbed, are to the others what comets are to planets.

4. Ordinary practice of the equity courts. The collection of the evidence turned over (or rather turned down) in London, and within twenty miles, to a clerk in the Examiner's office, and beyond that distance to one or two attornies on each side, commissioned in each cause for that one cause.

5. Practice of the ecclesiastical courts: transmission and retro-susception, as in the equity courts.

6. Practice of the Admiralty courts: much the same.

7. In Scotch judicature, the practice of the Court of Session, on this ground, forms a system of itself. The cause a very shuttlecock: between the outer house and the inner house, vibrations

and vibratiuncles, more than Hartley ever imagined. While this game is playing, the property of the suitors told over a gridiron in each house. "A plague on both your houses!" would be the cry of the agonizing suitor, if this fragment of a line in the part of Mercutio could be pronounced with safety on the Edinburgh theatre.

8. The vibrations which in many instances a cause is made to perform between the court and the office of the subordinate judge called the master, form another class, which must not pass altogether without notice. They have place both in law and equity, but more constantly and abundantly in the equity courts.

Made business is here almost undistinguishably entangled with necessary business: the reasons and pretences are far too multifarious to receive discussion here. Not that, in either class of courts, the vibrations are either so complex or so gratuitous as between the two contiguous Scotch delay-shops.

For illustration's sake, take the following examples of the contrary practice.

1. Indictments for offences not felonious, on the circuits, viz. before learned judges, in the character of judges of assize. Instead of a complete vibration, a semi-vibration: the cause received into the King's Bench, without having been sent from thence.

2. Indictments for the same offences at the quarter sessions; viz. before justices of the peace, judges themselves unlearned, but acting per force in technical trammels, "*tanquam in vinculis sermocinantes.*"

3. Causes brought on by petition to the Lord Chancellor, in matters of bankruptcy.

4. Attachment causes, in all the Westminster Hall courts: unless in the extremely rare event of a transmission of the defendant to the master, to be examined upon interrogatories.

5. Motion causes, and applications of various sorts, principal and incidental, in all those great courts. (See the chapter so intituled.)

Note, that, in Nos. 3, 4, and 5, there is no transmission of the cause for collection of evidence; and that for a very simple reason: no evidence is received but in a ready-manufactured state, viz. the state of affidavit evidence: a state in which (it has been seen) there is but one objection to it, viz. that it is unfit for use.

The case of indictments for felonious offences is a case too complex to receive discussion here. In this case, antecedently to the trial, the cause has gone through two courts; viz. 1. that of the justice or justices of the peace, before whom the preliminary examination has been performed; 2. that of the grand jury, before whom the evidence has been heard on one side only, viz. the plaintiff's. By the operations of the grand jury, the trial before the petty jury is also preceded, in the case of an indictment for an offence not felonious: but, as the cause comes before the grand jury in the first instance, without ever having been in any superior court, no complete vibration takes place here.

From the extent given to the bandying system in one direction, and the limits set to it in another; from this incongruity, coupled with the gigantic length of arm given to the metropolitan courts, and the licence given to the prosecutor to choose his court,—results an addition of no mean importance to the mischievousness

of the system to the people on the one hand, and the advantage made of it by its creators and preservers on the other. At the sessions, there is no bandying : sentence is pronounced, pronounced on the spot, by the president of a bench of judges, who, at the same time with the jury, have been hearing the evidence. At the assizes, as we have seen, the bandying system reigns. One judge, along with the jury, hears the evidence ; the court of King's Bench, composed of four judges, of which that judge may or may not be one, as it happens, (the chances are exactly two to one against it), pronounces the decision, the sentence, which professes to ground itself on that evidence.

At the sessions, the expense in fees is much the same the whole kingdom over : everywhere comparatively moderate, having been settled by or under the controul of those who derive no personal emolument from it. At the assizes, and at the metropolis, the expense of fees is of course, for the opposite reason, much greater. But the expense and vexation attached to journeys and demurrage, instead of being a fixed, is a fluent quantity ; of which the extremes are to each other as ten, the number of miles representing the distance from Kingston to London, to three hundred and one, the number of miles representing the distance from Carlisle to the same manufactory of technical justice.

The magnitude of the punishment, consequently, is in the joint ratio of the animosity of the prosecutor, and the distance of the abode of the defendant from the great shop, in which the sweets of revenge are dealt out in lots proportioned to the price which the customer is con-

tent to pay for them. Whatever be the county, town revenge is always to be had in much larger quantity than any which any such country shop can afford: but, to a man who has a taste for the sweets of revenge, a Surrey man, in the character of a defendant, brought up to town, will afford poor sport, in comparison of a Cornish man, or a man of Cumberland.

Not but that this excess in punishment has its remedy: but this remedy is, as usual, an aggravation of the disease. The Cornish man, if his own fireside happens to be more pleasant to him than the King's Bench, enjoys the faculty of causing a motion to be made, praying the court to dispense with his personal attendance: that motion (like all other motions which are not of course) supported by affidavits and arguments on one side, opposed by weapons of the like nature on the other. For the chance, such as it is, of an exemption from this vexation, (which is a work of supererogation, over and above the punishment), a cause is then to be gone through: a cause of the same sort as that which comprehends the whole career of litigation in many other cases.

As to the King's Bench; what in that sanctuary befalls the hapless sinner, dispensation being either not applied for or refused; with what solemnity, after hearing his sins poured over his head for the second or third time, by affidavits upon affidavits, enforced by comments upon comments,—with what solemnity he is committed one day without sentence, that he may be brought up another day to receive sentence; in what pathetic strains (the day of

doom at length arrived) the wickedness of the age hears itself deplored by the senior and most reverend of the three reverend and puisne ministers of technical justice; these are topics not exactly assorted to this place. The reiterations and protractions given by the deliberations of the cat to the sufferings of the offending mouse, may, to any one to whom it has happened to witness any such dispensation of domestic justice, furnish a general idea of it.

Mischiefs, *in specie*, as above. Of misdecision, an increased factitious probability: of delay, vexation, and expense, a certainty.

First, as to misdecision. Of the evidence, all that most instructive part,—the species of circumstantial evidence composed of deportment,—the gesture, the countenance, of the witness, under the ordeal of adverse examination,—in a word, the very spirit of the evidence,—is lost: the *caput mortuum* alone preserved.

The evidence is the very vitals of the cause. He who is not fit to decide upon the evidence, is not fit to collect it, or preside at the collection of it. For this function, when the mass of evidence is to a certain degree complicated and conflicting, no degree of skill, of experience, of sagacity, can be too great.

When the rule of action is in the shape not of sham but of real law, the ability necessary to right decision on the question of law, is as nothing in comparison of that for which a demand is sometimes presented by the function of collecting the evidence.

On the part of the judge whose province it is to frame a decision upon the evidence, the most

consummate ability may be rendered useless by a want of ability on the part of him by or under whom it is collected.

In proportion as the deciding judge is studious to guide himself by the evidence, his decision is commanded by that other functionary (if there be another) by whom it is collected.

Under natural procedure, the parties present in court, the first thing done is to hear the evidence. If the cause affords no evidence but that of the parties, or none but what they have brought with them, then the whole of the evidence is heard at that one time, and the cause is already ripe for decision. To what end send it for decision to any other court? Certainly to no good end.

Exists there any other court fitter for pronouncing the decision? then was that other court fitter likewise for hearing the evidence on which the decision is to be grounded.

Does the cause afford more evidence than at that first meeting can be heard? Part, at any rate, of the evidence has been heard. When part of the evidence has been heard in one court, if the remainder can be heard in that same court, to what end send the cause into any other court? The evidence already heard, is it to be heard over again? Delay, expense, and vexation, are the consequences, all of them without use. Is it to be sunk and excluded? The consequence is misdecision, or at the best a great and useless danger of it.

By necessity, this transference, this inconvenient arrangement, like any other, may be justified.

Of the evidence necessary to the pronouncing a right decision, it may happen that a part consists of the testimony of a witness whose testimony cannot* be heard by the court in which the suit is instituted, but may be collected elsewhere: viz. either *vivâ voce* in some other court, and so minuted, or in a ready-written state, by epistolary examination, as the case may be.

Here is a just and necessary cause for bandying the suit *pro tanto* from court to court. Here the transmission and retrosusception is proper, because necessary. By necessity it is justified: but it is by necessity alone that it is justified.

Under the technical system this transference is made, always without necessity, always by choice, viz. by a blind and pre-established choice. By choice, yet without reflection: so it might be said, and truly, were it not for the sinister advantages which the authors, as may be seen already, reaped from it.

Of the cases in which it actually has place, is the extent commensurate to, and limited by, that of the necessity? Quite the contrary. The cases in which it has place are, all of them, cases in which, being without necessity, it is without excuse. The cases in which it has not place, are all those cases in which necessity and justice call for it.

Use to Judge and Co.

1. Making business; constant, standing business, with its equally constant profits. The more courts, with their respective sub-offices,—

* Cannot—*i. e.* the hearing of it would be physically or prudentially impracticable.

the more operations, the more fees. In what court, in what office, is anything done without a fee?

2. Making occasional incidental business: applications to the deciding judge, on the ground of alleged misbehaviour by or before or under the testimony-collecting judge.

3. Affording ease; ease to the deciding judge. Of the irksomeness of the operation of collecting *vivâ voce* evidence, mention has been made already. For lightening or shifting off the burden, different courses have been pursued.

In some instances, whatever has been the number of deciding judges sitting on the same question at the same time, all but one have slipped their shoulders from under the load, leaving it to rest upon that one. Such has been the expedient employed by the three great common law courts in English practice, King's Bench, Common Pleas, and Exchequer. Such also has been the general practice under Rome-bred law on the continent of Europe. In other instances, the deciding judge or judges have exonerated themselves of it altogether: turning it over, or rather turning it down, to some underling or set of underlings, not recognized as executing the function, or possessing the character, of judges.

4. Making complication: helping to manufacture rubbish to serve as materials for sham science: thereby nursing uncognoscibility on the part of the law, that is, uncertainty in regard to decisions, with other beneficial consequences, for which see titles *Nullification* and *Jargonization*.

CHAPTER IX.

FOURTH DEVICE—BLIND FIXATION OF TIMES FOR THE OPERATIONS OF PROCEDURE.

THE parties once met in the presence of the judge, in nine instances out of ten the cause would receive its decision upon the spot; and, execution excepted (or not excepted), nothing would remain to do in it at any other time.

Yet, circumstances there are, and in no inconsiderable abundance, by any one of which a demand may be created for a quantity of time to which no just limits can be set by general rules.

In any of these cases, whatever at the conclusion of that first meeting remains to be done, the properest time for doing it will be settled of course: settled by the judge, on the joint consideration of the quantity of business which thus remains to be done; the point of time at which it can be done; the convenience of the parties on both sides in that cause; and the convenience of the court, that is, of other parties, who, in other causes, have their several and equal claims upon the disposable portion of the judges' time.

Thus necessary is it, on the occasion of each

cause, that, in respect of fixation of times, the conduct of the judge should be governed by considerations peculiar to that individual cause.

In the way of general regulation, (with here and there an exception too inconsiderable and too obvious to be worth particularizing) fixation of days, of times and intervals, is plainly repugnant to the ends of justice. Fix what day you will, the chances against its being the proper day will be as infinity to one. On each individual occasion, the interval thus blindly allotted will either be too long, involving factitious and needless delay, or not long enough, insomuch that in the course of it either the business cannot be done at all, or cannot be properly done.

1. Under the technical system, neither party being present, exigencies and convenience of all sorts being in all shapes alike uncared for and unknown, discriminative fixation is impossible: the one device forms thus a reason for the other device: the one abuse forms a cover for the other abuse.

The fixation is not so inflexible, as not to have admitted diversities of time corresponding to diversities in place.

Jurisprudence, English jurisprudence, has a geography of its own. In England there are two places, *town* and *country*. Town is the spot in which the four courts are situated: reckoning from that place as from the *terminus à quo*, all places in the country are at the same distance. As the term is *one day*, so the country is *one place*. But, forasmuch as there are two places, town and country, so there are two sorts of causes, town causes and country

causes. Accordingly, when for a given operation a certain number of days are allowed in a town cause, for the same operation an additional number of days are allowed in a country cause: one and the same additional number in every country cause.

If, as hath been said, the branches of true science are connected, those of sham science are so too. Jurisprudential geography and jurisprudential chronology throw light upon each other.

Regularity and good order are the images presented, and doubtless meant to be presented, by these fixations.

Whatever is according to rule, or reducible to rule, is *regular*. But, the quantity of the pillage being given, whatever be the degree of regularity, the party plundered is not much the better for it: still less, if the object and effect of the regularity have been to give birth or increase to the quantity of the pillage.

Every order is *good* order, in the eyes of him who profits by it.

Motives for setting aside proceedings on the ground of irregularity, form no inconsiderable part of the business of the courts. The irregularity is sometimes improbity, sometimes honest departure from *regularity*, as above delineated.*

Uses to Judge and Co.

Use 1. Making business.

In each case, whatever be the length of time thus blindly fixed, it will almost always be

* See Chap. 14. *Nullification.*

either too long or too short: longer than necessary, or too short to admit that to be done (or at least properly done) which is required to be done.

If too long, then come the advantages from delay: of which under the next head. If too short, then comes an application for more time. No application but by motion; and no motion without fees: fees to the advocate for making it, or being supposed to have made it; fees to the attorney for preparing it; fees to judicial officers for preparing and registering the result.

The application is either opposable or unopposable. If unopposable, then the application is a sham application, and the fees for making it so much money obtained on false pretences:* moreover, so much more delay, sold thus by the partnership to every dishonest suitor who will pay the price for it. If opposable, and opposed, then comes so much more business: a cause within a cause: a motion cause within a regular cause.

Opposed or no; if opposable, the application must have its evidence to support it, and warrant the judge in complying with it. This evidence is not received but in the shape of affidavit evidence, bringing with it its fees: fees to the attorney, for manufacturing; fees to judicial officers, for receiving and registering it.†

* See Chap. 11. *Motion Business.*

† The principal cause, if tried, will or will not be tried upon evidence in a fit shape: but the shape in which the evidence for or against these applications is presented,

Use 2. Affording ease to the judge. Fixation with eyes open, would have consumed time and trouble. To regard the ends of justice; to consult the convenience of the suitors; to attend to the allegations and discussions *pro* and *con* in relation to that convenience,—are irksome operations, beneath the dignity of the court. By blind fixation, time, trouble, and dignity, are all saved.

Use 3. Affording materials for the system of mechanical judicature, or decision without thought; for which see Chap. 12.

Use 4. Making more and more rubbish, with the help of factitious and groundless diversification: thence uncognoscibility, uncertainty, and so forth, as before.

With blind fixations, the ingenuity or the blindness of the man of law has contrived to combine equally blind diversities. Though, from diversity in respect of length of distance, no diversity in respect of length of time allowed, is deduced; yet, from diversity as between court and court, all four in the same hall, correspondent diversities in respect of allowance of time have not been grudged.

As to the mischiefs to the suitor; in a general

is never any other than an unfit shape. The principal cause, if tried, would (suppose) have been tried upon good evidence; but it is prevented from being tried: prevented by the result of an application supported and opposed by bad evidence: by mendacity undetected, undetected because presented in that fallacious shape. Trial put off, upon affidavit (suppose) of the temporary absence of a material witness. The alleged material witness has no existence: in the mean time, a really existing material and necessary witness, on the other side, dies, or goes out of reach.

view they have been stated already, under the preceding heads: in detail, they may so easily be read through the medium of the benefits derived to the law partnership from the same source, that a separate delineation may, it is supposed, be spared.

CHAPTER X.

FIFTH DEVICE—SITTINGS AT LONG INTERVALS.

Connected with blind fixation of times for judicial business, but separable from it, and therefore not identical with it, is the device which consists in the establishment of long and unabridgable intervals between these times.

As to the general nature of this device, it is too simple for explanation. The mischiefs of it (viz. to the suitors) are those of delay. Of the uses derived from it, and in the contemplation of which the creation and preservation cannot but have originated, some explanation may be of use.

But, before we come to speak of the uses, a short glance at the principal applications made of it, will place it in the clearer point of view.

Of these applications, the principal are presented to view by the words *term* and *circuit*.

Terms in the year, four; each containing three weeks and a day, upon an average: nine-

teen days, deducting Sundays.* Of the thirteen months (lunar months) in the year, not so many as four in which anything is done under the name of justice. Under the name of *vacation* time, all the rest of the year is a blank: all the rest of the year so much holiday time given to injustice.

Such was the original arrangement, in effect as well as name: such it is still in name, and in effect as far as possible. If, through this and that outlet, as the business increased, this or that portion forced itself out of its bounds, and spread itself over the vacation, it has been because it could not be kept in; because the complete confinement of it was not possible. Nor need the extravasation be matter of regret; on the one hand, the extra labour called for in the vacation is not unrewarded; on the other hand, of the profitable mischief produced by the compression, by far the greater part (as will be seen) has been successfully preserved unimpaired.

Judges keep holiday! almost four-fifths of the year in holidays!

* Term.	First day.	Last day.	No. of days.
Hilary - -	Jan. 23. - -	Feb. 12. - -	20
Easter - -	Variable.† -	Variable - -	27‡
Trinity - -	Variable.§ -	Variable - -	20
Michaelmas	Nov. 6. - -	Nov. 28. - -	22
			89
	Deduct Sundays - -		12
	Remain - - - -		77

† Seventeen days after Easter Sunday.

‡ Easter term sometimes, instead of the twenty-seven, contains but twenty-six.

§ Eighteen days after the conclusion of Easter.

If there were a time of the year, a proper time, for justice to sleep, when would it be? When injustice does.

When is the time for the shepherd to keep holiday? When the wolf does. When is the time for the mother and the nurse to keep holiday? When the infant can live without sustenance. When is the time for the physician and the surgeon to keep holiday? When there are neither diseases nor accidents.

The ancient Romans, being pagans, and (as such) superstitious, had their *dies fasti*, and their *dies nefasti:* days in which justice was to be done, and days in which it was not to be done: days in which it was lawful, and days in which it was not lawful, to do justice.

The primitive christians, a whimsical set of people, when they came into power took it into their heads, evidently out of a spirit of opposition, to "administer justice upon all days alike." In the eyes of Blackstone,* neither of these courses coinciding with existing practice, both it seems were wrong: the *dies fasti* and *nefasti* made an *extreme;* and justice upon all days alike, a sort of confusion of all order, made "a contrary extreme."

"Profanation," the wickedest of all wicked things, broke out in different shapes: administering justice upon all days alike, was one of them. Among other sins of the primitive christians, "holy church," when it came into power, took this profanation in hand to correct it. Taking into consideration five holy seasons,

* Comm. vol. iii, p. 276. b. iii, chap. 18.

advent, christmas, lent, easter, and pentecost, it beheld in them so many reasons for four intervening vacations: so many reasons for being months together without so much as pretending to administer justice. Of the necessity of the three short vacations, considering that holy mother church was at that time a papist, Blackstone seems to have entertained a sort of half-disclosed suspicion: but, as to the long vacation, a season so comfortable to lawyers, with that he seems to have been completely satisfied. Here, to the general spiritual reasons, he adds a temporal one; a reason, which, if good in those days of popery, is certainly not less good in these days of reformation: this is the demand presented for denial of justice, by the "hay-time and harvest."

Accordingly, certainly in the eyes of holy mother church, and, as it should seem, in those of Blackstone,—should it have happened to a man to have his carts and his horses unjustly taken from him, and thereupon to apply to a judge to have them back again,—the application would have been an unreasonable one, contrary to the interests of agriculture. What is the matter with the man? What use can he have for his horses or his carts? Does not he know that it is harvest time?—Such would be the speech of Mother Church's and Mother Blackstone's judges.

Such is the cogency of this reason, that, in the city of London courts, whose jurisdiction ends before fields begin, long vacations are kept up no less religiously than in Westminster Hall. Not to speak of the profanation, care was taken

not to call off the harvest-men from their labours in Cheapside.*

* The course taken by Blackstone is altogether in his style, and, when rightly explained, instructive.

Seeing, because even he could not avoid seeing the iniquity of this denial of justice; his object was, as usual, to prevent his readers from seeing it. Direct argument was not to be found: direct averments, such as an argument would have required to support it, would have been too grossly false. Insinuation was to supply their place.

The insinuation about the harvest is understood already.

The insinuation deduced from the practice of the legislature, for which practice the unassigned reasons must by presumption have been good ones, will be more closely seen through under another head.

The insinuation about the extremes, requires a word or two more to clear it up. The established practice, established by lawyers for the use of lawyers, was too palpably repugnant to the ends of justice to be defended by anything in the shape of reason: imagination presented this medium of proof, a mean between two extremes. Required to find the two extremes. One of them (we have seen) was the course prescribed by the domestic, the natural, system of procedure; the course dictated by common sense and common honesty, in all ages and all countries; the course adopted (he confesses) by the primitive christians; the course adopted over and over again by the British parliament in these latter days. This course we are to look upon as an extreme course. Why? Because it was dictated by passion, by the spirit of opposition: opposition to pagan institutions.

The other extreme was still wanting; these pagan institutions furnish it: the system of *dies fasti* and *nefasti*; *fasti*, the term-days, *nefasti*, the vacation-days. What! had the Romans, then, a long vacation, an uninterrupted mass of *dies nefasti*, longer than our long vacation, and as much longer as the 120 days of our long vacation are longer than one? So far from it, the *dies nefasti* were, originally at least, but a few holidays, sprinkled (as the expression itself imports) in an otherwise unbroken ground of term-time. The really *extreme* course then, where is it to be found?—In the very course, for which, to mask its repugnance to justice,

One use of prohibitions is to form a ground for dispensations: her holiness was not inexorable; dispensations were granted, the profanation vanished.*

Anno 1275, at the commencement of the reign of Edward I,† a discovery was again made that "it is great charity to do right unto all men at all times when need shall be:" whereupon, at the special request of the king to the bishops, provision was made, that, in a few particular causes, at a few particular extra times, justice, even without any such special dispensations, might be done.

Since then, the time for doing justice having been found once more to have run out into "an extreme;" parliament has since, under the direction of its learned counsellors, been occupied, not only in "regulating terms, but in abridging them:" particularly the two boundaries of the long vacation, trinity term and michaelmas, lest that "holy season" for injustice, now happily so much longer than all the seasons for justice put together, should not be long enough.

he can find nothing better to say than that it is a mean between two extremes—two such extremes as these.

For the long vacation, besides its general uses, which are so evident, he has found moreover a special use; to prevent common recoveries from being suffered, so long as it lasts. Recoveries are of use, by defeating the will of the legislature; long vacations are of use, by defeating recoveries. If the long vacation covered the whole year, would not its use have been so much the greater? So it be but established, how was it possible for anything not to be of use, in the account of Blackstone?

* III. Comm. 277. † 3 E. 1. c. 52.

All this while, the truth is, that, in the eyes of the most competent judges, three months in the year for administering justice was an excessive allowance; four days were quite sufficient: and, by an exertion of legal pneumatics, each term, consisting of thirty days, more or less, was condensed into one day; and so real is this condensation, that it is decided and argued upon, and forms a source of business.

Terms, with their vacations, present but an inadequate idea of the quantity of delay really manufactured. An idea nearer the mark is that which is indicated by circuits. Not that either is complete without the other; for, to the quantity manufactured by one of these engines of iniquity, must be added the quantity manufactured by the other.

Excepting that class of causes, from the trial of which, as above, all fit evidence is excluded; with a few other exceptions, of too narrow an extent in the whole to be worth particularising, the business done in term, is so much made business: business manufactured by the principle of fixed days, as above, or some other device or devices; * business for which in the natural system there is no place, and the transaction of which is repugnant, instead of being subservient, to the ends of justice. In a general point of view, term business may be set down to the account of sham business. The real business, the business by which anything is done towards the ends of justice, is what is done at the *trial;* and, in causes non-criminal (not to speak of the inferior criminal ones), the trial,

* Viz. Pleadings in writing; nullification principle.

under the operation of the bandying principle, as above explained, is performed at the courts of Nisi Prius, and the circuit courts: Nisi Prius courts in town causes, circuit courts in country causes.

Counties in all England (Wales not included), 40; deducting Middlesex, as not comprised in the circuits, 39. Counties to which the judges in their circuits go twice in the year, 35; counties to which they go but once in the year, the remaining 4. Average number of days in the year, on which the circuit courts sit in each place, at both seasons put together,—gross number, 6; employable number, (allowance being made for journeys, and for days of entry, on which in general nothing can be done) at the utmost, 5. Out of the 365,—number of days during which justice, or something that goes by the name of justice, is administered, those 5; number of days in which nothing under the name of justice is so much as pretended to be administered in these courts, anywhere but in the metropolis, the remaining 360. Term-times for real business, two in the year, lasting 2½ days each; vacations between those term-times, two, of 180 days each: four counties excepted, in which the vacation, instead of the 180 days, lasts about 360 out of the 365; the four northernmost counties being as well able to live without justice for a whole year, as their next neighbours for half a year: as some animals are able to live longer without air than others.

Blackstone, besides the care and cheapness, bids us admire the system for the "expedition" which characterises it. Expeditious indeed, if, out of the 365 days, 360 be but thrown out of the account,—the 360 in which nothing can be done!

expeditious, indeed, on these terms, as if Procrustes himself had planned it!

In the time of Henry II, who, out of his grace and favour, gratified his people with a circuit once in every seven years, Glanville, his grand justiciary, or whoever held the pen of Glanville, trumpets it forth in the only passage of his book in which any symptoms of sensibility are to be found. Instead of once in seven years, had it been once in seven times seven years, the Glanville or the Blackstone of the day would have admired it, either for the expedition, or for something still better, which they would have found in it.

Meantime, whatever delay is created by the 360 or 362½ vacation days, is amply made up for in the remaining 5; excess of delay finds, in excess of precipitation, a counterpart, and, in the eye of the law, a remedy. The space being marked out, it is for the causes to squeeze themselves into it, as they can, like negroes on the long passage.*

When the natural course of things is departed from, and that to such a degree that there are more *no-justice days* than *justice days;* in such a

* On the Norfolk circuit, each perambulation affords about sixty causes; on the western, more than thrice as many. The 2½ or a little more, allowed at each place on the western circuit, serve as well for the west country causes, as the 2½ or something less, serve for a third part of the number in the east. If days are not elastic, causes are, which comes to the same thing.

In lord Melville's case, it was a moot point whether the cause should be tried by the House of Lords or before a jury. In the House of Lords, it occupied 14 days; tried at Nisi Prius, it would have occupied twenty-four hours, if human attention could have kept itself upon the stretch so long, without bursting; tried upon the western circuit, it would have occupied such part of three or four days, as it could get in a scramble with thirty or forty other causes.

state of things, in regard to justice days, what is of much more importance than the number of them in the year, is the degree of *equality* with which they are *distributed*.

Suppose, for example, in the whole year, 52 justice days, and no more: place them regularly one in each week, and on the same day in each week, here are in each week indeed 6 no-justice days, but in no week any more. Place them on the contrary, in an order as widely different from the foregoing one as possible; place them all 52 together, the whole year is thus divided into two masses, and but two: one composed of 52 justice-days, the other of 313 no-justice days: a *term* of 52 days, followed by a *vacation* of 313.

With this proportion in both cases; under the system of the greatest equality, suppose the causes to be all of them of a simple cast, and to such a degree simple as that none of them shall be capable of being protracted beyond the first sitting. In this case, though the provision made in this respect for the fulfilment of the ends of justice would fall considerably short of that made by the natural system of all justice-days; still, in comparison of the system of greatest inequality, the denial of justice would be comparatively inconsiderable. On the one hand, the inconvenience resulting to the suitors from the subtraction of the six days out of the seven would be comparatively inconsiderable; on the other hand, the benefit to the law-partnership would be absolutely nothing, or next to nothing. Suppose the cause complex enough to require an adjournment, then the inconvenience to the suitor, and what (as will be seen) would keep pace with it, the benefit to the man of law,

will begin to be sensible. Suppose, with or without a fresh adjournment, another week, the inconvenience on one side, the advantage on the other, would rise in value: and so on without end.

Viewed in this point of view, the abominations of the circuit system will show themselves in the truest and clearest light: in the four northern counties, the inequality of the distribution, and consequently the wickedness of the system, at the highest possible pitch; in the thirty-five other counties, the inequality and the wickedness half way to that pitch.

The profits here placed to the account of the length of the intervals between the time fixed for one part of the business and the time fixed for another part of the business in the same cause, are over and above those which are reaped from the mere fixation of the times, as under the last head.

Use 1. Making business by making delay. Delay is a part of the stock in trade: terms and circuits, with the vacations between them, are the machinery by which it is made. On each occasion, the greater the quantity of the delay, the better it is worth a man's while to pay the price that has been set upon it.

Use 2. Making business by extra fees: fees taken by the judge, or (what comes to the same thing) his official instruments and sponges, for business done in vacation, over and above what is taken for the same business when done in term time.*

* It was by the system of terms and vacations that the delay was manufactured, by the sale of which, in lots of a year's length, the chief justice of the King's Bench, in lord Kenyon's time, used to make his 1,700*l.* a year: 1,700*l.* a year and

An instrument of extortion is thus made out of the delay: and the longer the delay, the stronger the instrument.

The judge neglects, wilfully neglects, his own duty: this neglect of his own he converts into a source of profit. First he commits the wrong, then he takes advantage of it: himself he rewards for it, him who is injured by it he punishes for it.

Use 3. Making business by delay: viz. the delay manufactured by the nullification machine. Of this engine of iniquity, (one of the most capital ones in the whole factory), a draught will be given in another chapter. According to the application made of it, sometimes ultimate misdecision, sometimes mere delay, is the product. When it is delay only, it is for the sake of the delay with the casual benefits attached to it,—of the delay and nothing else,—that the suitor applies to have the engine set to work. The delay is the commodity which he obtains by the application: the costs of the application, (by which party soever ultimately paid), are the price of it. Were it not for the delay, he would get nothing by the application; the costs

more, by this one article. In a court of conscience, or in the study of a justice of the peace, not a farthing was ever made by it.

On the circuit, a paper which, with or without reason, is pronounced necessary, is, by inadvertence or accident, omitted to be produced. Defendant, having no merits, insists upon the production of it: on the next day, it accordingly is produced. But, on the circuit, the next day is that day six months, or that day twelve months: in a court of conscience, or in the study of a justice of the peace, the next day would have been the morrow. In either of these seats of real justice, the objection would not have been made, nothing but trouble would have been to be got by making it.

of it would be so much pure loss to him: he would never make it. What use would there be in making a flaw, if it were cured as soon as made?

Thus then stands the relation between the system of terms and vacations, and the principle of nullification. Without the principle of nullification, the system of terms and vacations would, in a variety of ways, have been rendered serviceable to the ends of judicature; but, without the system of terms and vacations, that engine of torture, the principle of nullification, so far as concerns its dilatory use (which is its principal use) would have been worth nothing, and society would never have been afflicted by it.

Use 4. In case of pecuniary demands,—securing to the defendant (when a wrong-doer), in the shape of interest saved or gained, (interest on the amount of principal due), an inducement to become a purchaser of the delay so manufactured and set to sale.

Use 5. Making business, by giving effect and use in like manner to one division of the *chicaneries in regard to notice*. See the chapter on that head.

Use 6. Affording ease to the judge, and to the partnership in general: ease in the shape of holidays.

So much the less time in which business can be done, so much (for a moment it might be supposed) so much the less business: thus obtained, ease (it may be thought) is obtained at the expense of profit. No such thing. The quantity of natural business,—the demand for the services of the judge by the administration

of justice, is little influenced by the time allowed for doing it in. If, in this or that particular instance, an example should be found of business (natural business) lost by delay, the sum total of the business so lost would be found to bear no proportion to the amount of what is gained in the shape of *made* business.

Of the denial of justice for so great a part of the year, coupled with the non-denial of it during the remainder,—of the compound made (as above noted) of excessive delay with excessive precipitation,—the general effect (bating a few casual exceptions) is, not that less is done by reason of the temporary denials of justice, but that what is done is more badly done.

That for which time is continually insufficient is, rendering of justice: that for which time is never insufficient is, receipt of fees.

CHAPTER XI.

SIXTH DEVICE—MOTION BUSINESS.

THE principal agent in motion business is the advocate. Except the principal hearing (called in jury causes the trial), almost all business in which the advocate (as such) has, or is pretended to have had, occasion to address himself in open court to the judge, is referable to this head: it consists in making a motion, or opposing it.

In the aggregate mass of motions, two main branches may be distinguished: motions not of course, and motions of course. The use of the distinction will appear presently.

The mass of business composed of motions not of course, calls upon us to distinguish it into two branches: 1. Incidental motions; being so many applications made to the judge, in the course of a suit already instituted in some other form. 2. Original or originative motions; giving birth each of them to an individual suit, belonging to that class of suits which on this account may be termed motion-suits or causes.

All motions not of course have two common properties or characteristic differences, by which they are distinguished from motions of course: 1. Each of them has for its ground and support a mass of evidence: 2. That mass, the whole of

it, is of a sort which not only is, but, by all those by whom on a disputed case it is thus employed, is perfectly known, and, upon occasion, openly acknowledged, to be of an inferior and untrustworthy complexion: so untrustworthy, that, when better is to be had without preponderant delay, vexation, and expense, (and it is seldom indeed in which it is not to be had even with less delay, vexation, and expense), it is altogether unfit to be, on any disputed occasion, ever received in any court of justice.

Motion causes, in so far as they extend, are a sort of improvement upon ordinary causes: they are tried in a bad mode, but in a mode somewhat less dilatory: perjury abounds and triumphs; but one way or other the business terminates. As men are dealt with in those courts, he who is soonest out of them is best served. All the rules of evidence are either discarded or reversed. No unwilling witness is compellable; every willing witness is received. Every party is admitted to swear for himself, no party is compelled to swear against himself. Testimony, which would not be received on any other occasion, the testimony of a convicted perjurer, is received on this occasion without difficulty. Every man that chooses to be heard is heard, on condition that his testimony be concerted with an attorney, and that he be not cross-examined.

Incidental motions arise most of them out of factitious business, the business made at the offices. With the help of so many devices, all directed to this end,—exclusion of the parties, mechanical judicature, jargon, fiction, mendacity-licence, nullification; blunders are made,

or pretended to have been made, that application may be made for setting them to rights: these applications are called motions; the incidental motions.

Under any natural system, accidents may arise, producing need of new arrangements, and of application for that purpose to the judge: unexpected absence, sickness, lunacy, death, and so forth. On an occasion of this sort, what truth and justice require, is, some person from whose testimony (when present and examined) the judge can deduce sufficient ground for being satisfied about the matter of fact. Instead of that, he sees a lawyer, who, knowing nothing about the matter, stands with a paper in his hand, containing a vamped-up story, which, whether in his own eyes it be true or false, he calls upon the judge to take for true.

Motions of course, are motions that are of no use. Without any one exception, this character belongs to every individual operation of the class thus denominated. Of no use, none whatever: understand always with reference to the interest of the suitor, to the ends of justice. To the ends of judicature, to the partnership in divers of its branches, yes, of no small use.

A motion of course, is an application supposed to be made to the judge, but which, made or not made, never is refused: never creates on the part of the judge any demand for the exercise of reason; never, in fact, comes under his cognizance.

Motions of course, are again distinguishable into two other classes: 1. Motions made; 2. Motions not made.

This distinction is of comparatively recent growth. Originally, all motions used to be made: all are still supposed to be made.

Every motion of course, that has been made, is signed by the advocate, in attestation of his having made it: in attestation of his having received the fee charged by the attorney to the client.

Every motion that has not been made, but is charged to the client as having been made, is also signed by the advocate: viz. in attestation of his having made it, as well as of his having received his fee for it.

Made or not made, they are all alike useless: mere pretences, false pretences for extracting money out of the pocket of the distressed suitor, to put it into the pockets of the barrister, the attorney, the judge's protegé, and eventually the judge. Pretence of speaking, is false in many of them; pretence of thinking, is false in all of them.

In conclusion, we have a division of the whole stock of motions: applications that ought not to be made in that manner, and applications that ought not to be made at all: the division is exhaustive.

CHAPTER XII.

SEVENTH DEVICE—DECISION WITHOUT THOUGHT; OR MECHANICAL JUDICATURE.

In this device may be seen the very acme of perfection, under the fee-gathering, the technical, and (as it might be called, could the object be completely attained) the *mechanical* system: in this may be seen the goal to which all exertions tend, though it cannot on every occasion be reached:—to get in the money, without the trouble of a thought. Here may be seen men without feeling, operating upon others as if *they* had none.

Besides the exclusion of parties, which is necessary for everything, the principle of fixed days was necessary, indispensably necessary, to the accomplishment of this device: which in truth is little more than the principle of fixed days carried to perfection, and applied to this particular purpose.

Something which, on a particular day, according to a rule declared or not declared, ought to have been done,—done by the defendant's attorney,—is not done: from this omission, without anything more, the judge, by his deci-

sion, deals with the defendant as if he were proved to be in the wrong. Not that he thinks him in the wrong, for he thinks nothing about the matter: but, from this omission on the part of one member of the partnership, the other takes occasion, without knowing anything about the cause, to act as if he had tried it; and to punish the client for the fault, real or pretended, of his lawyers. Like default on the part of the plaintiff's attorney, judgment for the defendant: judgment against the attorney's client, the plaintiff.

What is thus done by the power of the judge, by whomsoever it be really done, is at least said to be done (you would naturally suppose) by, as well as by the authority of, the judge. No such thing: to such perfection is the system carried in this line, so notoriously as well as effectually is the judge exonerated from the trouble of judging, that judgment in this case is not so much as said to be signed by him: the member of the partnership, the person by whom it is said to be signed, is an attorney; the attorney of the party in whose favour it operates. So completely are the relations of persons and of things confounded: so open, not in deed only, but in word, is the contempt of justice.*

* To prove, for the amusement of readers, that a case may exist, in which, without inconvenience, a man may be a judge in his own cause, Blackstone introduces an imaginary pope adjudging himself to be burnt, and burnt accordingly. Why go to all that distance, and for a single precedent? Why not say—there exists a country in which every attorney is judge in his own cause: and this country is precisely

It is well for the party if the worst that happens to him in such a case be the loss of his cause.

By blameless ignorance, by culpable ignorance, by negligence, or by treachery, something which (it is said) should have been done on a particular day by an attorney, is omitted to be done: by an attorney employed by the party, or perhaps by the party himself, who has failed to employ an attorney, because it was out of his power to find money to pay one. The something at any rate which should be done, fails to be done. What is the consequence? By a pre-established order of things, the work of the Goddess Law, not of the mortal judge,—the defaulter, (that is, not the person by whose fault, but the person to whose misfortune, the failure has taken place), is pronounced a rebel or a contemner of justice, and dealt with accordingly: he is taken up and consigned to prison on the authority of a writ of attachment, as for contempt, or a commission of rebellion: a paper signed by somebody, no matter by whom: by an adverse attorney, by an automaton, or by a judge.

Regularity is thus maintained: and, on the strength of that endowment, the system is (for praise and honour) compared to a piece of clock-work. The parallel need not stop there: for, under a set of rules so organized, it is just

that in which "everything is as it should be"? In Italy, the judge, though a saint, did not become so till he was burnt: in the English Utopia, every attorney, without any expense of fuel, is as much a saint as *he* was.

as impossible to a judge of flesh and blood, as it is to a judge of leather and prunella, with bowels of brass and iron, to do anything better than receive fees.

Under the authority of a judge, acting under the natural system, what room is there for such regularities, for such irregularities, or any of their consequences? The parties being before him at the outset of the cause, (an appearance which need not, and perhaps would not, cost either of them a farthing), he would state to them what was to be done by each of them on the next occasion, and what, in case of failure, would be the consequence. In a case of extremity, he would have recourse to the measure of extremity, he would send a warrant: but the warrant would neither make nor find, nor pretend to find, a rebel or contemner. If the cause required another day to finish it, would the day appointed by him be appointed by cross and pile, without thought or preference as between convenience or ruin of the interests of any of the parties? On the contrary, not one would there be, to whose convenience due attention would not be paid of course.

Though, in the order of things which we have been examining, the decision is altogether without thought, it cannot in strictness be said to be altogether without evidence.

By an inference made once for all, the party whose attorney makes default, is concluded to be in the wrong. Here is a something, which, if it must be called *evidence*, belongs to the head of circumstantial evidence: and so satisfactory is this evidence, that, by the operations grounded on it, it is pronounced *conclusive*.

Of the inference so quietly drawn, what is the force to a rational mind, consideration had of the circumstances of the case? From the fact thus accepted in the character of an evidentiary fact, and that conclusively so, is there any sufficient reason for regarding the principal fact (viz. that of the party's being in the wrong) as being so much as in a preponderant degree probable? No such thing: whatsoever, under the natural system, under a system pure from factitious expense, might be the degree of the probability; the force of the inference, under the system in which it is made conclusive, in which the probability is put on a level with certainty, is below par, much below par: the chances are many to one on the other side. Without setting down anything for the chance of treachery, ignorance, or negligence, on the part of the attorney, or (what is so frequent a subject of judicial complaint) fraud on the part of his brother on the other side, or even uncertainty in the rules themselves, which had uncertainty for their object; of the whole number of individuals exposed to the misfortune of becoming defendants, how few are there who are able to defray the expense of continuing themselves on that unhappy list, in comparison of those who are unable! If the unable are not to the able as more than one to ten, then say, on this score alone, without looking to any other, the chances are as ten to one against the truth of the proposition, thus acted upon as if it stood on the ground of certainty.

If, in imitation of the law still existing in some places in regard to flour-mills, a barber secured by privilege in the possession of the

whole custom of his district were to set up an engine, by which, instead of corn ground, beards were to be shaved, the patients standing in rows to apply their faces to the circumference of a wheel, the advantage to the professional man would be obvious and indisputable: business to any amount might be done within a given time; and, should any mischance take place, such as the drawing of blood, or the levelling of protuberances not intended to be levelled, the responsibility, instead of falling upon the professional man, would be divided between the patient and the wheel.

The privilege was too valuable to be imparted to barbers: judges reserved it to themselves. Causes accordingly are decided, though not exactly by steam (steam-engines have not been long enough in use), yet (what comes to the same thing) by mechanism, without the aid of any such expensive instrument as human reason. As to the advantages of the improvement, they have been already indicated. Men are as well judged, as by the shaving-wheel they would be shaved: and the uses derived by the partners, with the judge at their head, from the circle of offices, are alike conspicuous as those that might be derived by the barber from the wheel.

In the system of mechanical judicature, the supposition of the existence of *notice*, apposite and adequate *notice*, is necessarily involved. In many cases, and, of course, in as many as possible, the supposition belongs (as will be seen) to the category of *fiction;* it is false; the study having been to make it so. But, as appearances must to a certain degree be preserved, and pu-

nishment, or other hardship, avowedly inflicted without notice (that is, without possibility of defence), would not be consistent with the preservation of appearances; it is not the less true, that (on whatsoever principles performed, rational or mechanical) judicature *supposes* notice.

Under the system of fixed times,—in so far as the fixation extends, and is not disturbed by incidental application,—the fixation, being *supposed* to be foreknown, is thereby supposed to convey the requisite information; to operate as notice. To this class of cases extends what may be called *general* or pre-established notice.

On the other hand, in the cases to which the system of fixation has not been supposed to extend, and in those to which, as just mentioned, it has experienced disturbance, to those cases applies the demand for *special* or *incidental* notice.

Such is the connection between the device of mechanical judicature, and the device (that is, as will be seen, one out of two parts of the device) composed of *chicaneries about notice*. To render the mechanical system more productive, one object has been, so to order matters, that the implied supposition of the existence of adequate notice shall in this and that instance, and of course to as great an extent as possible, fail of being verified. By the impossibility of timely notice, or by some other means, that which a man is to be punished for not having done, is rendered impossible; and, therefore, he is punished for not having done it.

For an exemplification of this policy, the practice of *outlawry*, in actions called civil actions, is

of itself a host of cases. But, as to this, see the chapter in which the *chicaneries about notice* are particularly brought to view.

Uses to Judge and Co.

To the uses already summed up, under the head of the two devices forming the foundation of this device, there will not be much to add.

Use 1. Making business; viz. by the foundation laid for defaults, mischances, and frauds, thence for more and more business.

Use 2. Making business; viz. by giving encouragement and existence to *malâ fide* demands and defences, under the assurance of inability on the part of the adversary (for want of adequate opulence) to avoid making the default.

Use 3. Affording ease; viz. by enabling the judge to act, and receive fees, without expense of thought, without expense of time, trouble, avocation for pleasure, or hindrance of ulterior and more profitable business.

Use 4. Affording ease; viz. by exempting the judge from all responsibility, and apprehension of responsibility. A judge, when he has thus converted himself into a machine, shares this advantage with other machines.

Use 5. Affording ease; viz. by giving to the judge the profit of inhumanity, clear from the opprobrium.

Use 6. — and from that pain of sympathy, which, by the view of the party thus injured and distressed, while suffering under the distress, might by possibility, in some cases, have been excited.

The most striking peculiarity of this device, as compared with most of the others, is the shel-

ter which it affords to the judge against responsibility.

When the fate of the several parties interested is seen to have the judge for its author, to have a decision pronounced by the judge on the ground of appropriate evidence for its cause; a certain share of responsibility attaches of course upon the judge. Should the parties, or any of them, labour in consequence, under any evil imposed upon them in contravention of the ends of justice, the odium at least (if nothing more) is carried naturally, and of course, to the account of the judge. Should any profit be thrown into his hands by the operation of the same cause, such profit will be apt to be also carried by the public mind to the account of the judge; and the expectation of the profit on the one part, will be in danger of being looked to, as the cause of the suffering on the other.

That so inconvenient a check should be removed, was of essential importance to the ends of judicature. The principle of *decision without thought*, presented itself for this purpose. Whatever is done, whatever cruelty, whatever extortion is practised, takes place without any thought, and, therefore, without any need of thought, on the part of the judge,—takes place, in virtue of certain pre-established rules. These rules,—having been established so long ago, nobody knows when, nor by whom, nor why, nor wherefore,—are of course presumed to be the fruits of the most consummate wisdom; and whatever misery is seen to flow from them, is placed to the account of necessity, and the nature of things, the imperfection of human institutions, and so

forth. Who have been the sufferers, or to what amount, the judge neither knows nor cares. The judge who knows what it is he does, is exposed to the imputation of partiality. Let things be so arranged, that, on as many occasions as possible, he shall act, and be known to act, without knowing what he does, and that men in general shall understand as much, and be satisfied with it; malice itself cannot find any pretence for disturbing him with any such charge. The judge secures the praise of probity, inflexible probity: and by what? By that very arrangement, by which, for the purposes of extortion, justice has been rendered impossible.

The judge is thus, almost from first to last, the passive, the unconscious, and consequently the innocent and irresponsible, instrument of all the mischief that is done by his authority, and for his benefit. Whatever distress, extortion, and injury comes to be manufactured for his use, means have been found for saving him from every thing that could have been unpleasant to his feelings; from the tears of the afflicted, from the cries of the oppressed, from the reproaches of the injured. Whatever mischief is done, either he never hears of it, or, if he does, it is through the medium of friends and partners, engaged by a common interest, in reality to make it as heavy, in appearance to make it as light, as possible.

In the simplicity of ancient times, saving his ears from being stunned with noise *(ne amplius clamorem audiamus)* was the only motive to which it was thought needful for the monarch to as-

cribe his alleged disposition to do justice. Under the technical system, his substitute, the judge, has contrived to withdraw himself out of the reach even of this motive.

CHAPTER XIII.

EIGHTH DEVICE — CHICANERIES ABOUT NOTICE.

WHENSOEVER, for the purposes of justice, an obligation to any effect is imposed upon a man, knowledge of the existence of such obligation is necessary to the fulfilment of it; or at any rate to the affording the requisite security for its being fulfilled. What in some cases may happen, is, that, without knowledge of the obligation, a man may be led by other causes to do that which it is the object of the obligation to engage him to do: but, in so far as the obligation is either necessary or conducive to his performing that act which, being performed, is the fulfilment of it,—so far the knowledge of the existence of the obligation is necessary to the fulfilment of it.

On the part of the individual, fraud and injustice operating on the subject of *notice*, must assume one or other of two forms.

One consists in wilful omission to give notice, viz. in the not furnishing the person by whom the performance (or the opportunity of performance) of the act in question is necessary to justice, with information of the existence of the

fact, the contemplation of which is to present to him the motive for such performance.

The other consists in the not acknowledging the receipt of notice: to wit, by him by whom it has actually been received.

Under the fee-gathering system, fraud in these shapes, as in all other shapes, being in some way or other beneficial to the partnership; among the objects of that system has accordingly been that of giving encouragement to fraud in both these shapes.

One device has consisted in the enabling a fraudulent party (for the joint benefit of himself and the partnership) to impose upon his adversary, without effective notice given, this or that burthensome obligation: the imposition of which, on the supposition of the *receipt* of effective notice, may be just or not just, but, at any rate, on the supposition of the *non-receipt* of such notice, is not just.

The opposite device has consisted in the enabling the fraudulent party, by whom effective notice has been received, to escape from this or that burthensome obligation, the imposition of which is necessary to the giving effect to the correspondent right on the part of his adversary: to escape, viz. on the supposition that the effective notice so received had failed of being received: failed, viz. either because it never had been received at all, or because it had not been received at such time, and in such manner, as to enable it to answer the purpose for which it ought to have been given.

On these two devices taken together has been engrafted a third, consisting in the needless diversification of the modes and forms of notice:

the written instruments required to be employed, and the steps or operations required to be performed in relation to such instruments.

This diversification has had two main sources: 1. The diversity of courts,—the fertile source of confusion and injustice on so many other grounds besides this: 2. The diversity of occasions on which the demand for notice may have been presented by incidents arising in the same court: viz. whether in causes of the same sort, or in causes of different sorts carried on in the same court.

The demand for the notice is produced by the obligation grafted on it,—by the obligation, to the justice of which the existence of such receipt is a necessary condition. This obligation will in every case be bottomed upon two inseparably connected grounds: 1. The existence of the law, or rule of law, by which the quality of giving birth to the obligation in question has been conferred on a fact or facts of the description in question; 2. The existence of such fact or facts.

As to the law,—as on this occasion, so in all others,—to *prevent* it from having been present to the minds of those who are subjected to its operation, on the supposition of its *having* been, on the occasion in question, present to their minds, is among the fundamental policies and constant endeavours of the fee-gathering or technical system, in every part of its course.

The keeping of the requisite *facts* also out of the reach of the minds of those who are to be thus operated upon, is a more special and diversified application of the same industrious policy. Examples will meet us as we advance.

After what has been said, or even without anything of what has been said, two propositions, it is supposed, may pass without any dispute: 1. That, whenever appropriate notice is necessary to justice, it ought to be effectively given: 2. That, whenever it has been effectively given, and thence effectively received, it ought to be deemed and taken to have been received: *i. e. that* ought to be done, the doing of which, in the case in question, is, upon the supposition of such actual receipt of notice, conformable to justice.

Hence,—to any one whose desire it really were that in all cases, as far as possible, justice should be done,—a main question would naturally at the outset present itself: What in general is the most effective, and upon the whole the most eligible, mode, for the conveyance of effective notice?

In the endeavour to find an answer to this question, the first observation that presents itself, is, that to this purpose not merely the efficiency of the notice ought to be attended to, but likewise the other consideration so inseparably connected with many questions relative to the subject of procedure,—the consideration of the circumstances of delay, vexation, and expense. Thence comes the question in its amended state: What is the most eligible mode to be taken for conveying effective notice, regard being had to the collateral considerations of delay, vexation, and expense?

To find an answer to this question, the first object to be looked to is the *occasion:* understanding, in this instance, the occasion as constituted by the *stage* of the suit: by the stage

in which it is proposed that the notice in question, be it what it may, shall be given and received.

The person by whom it is proposed that the notice be received, will, in each case, be either willing, or not willing, to receive it.

In so far as he is willing; the proposed giver of the notice being also by the supposition willing to give it; there can exist no difficulty. In the ordinary and amicable intercourse of life, those who wish to hold intercourse with one another, and are at the same time free to do so, never experience any other difficulty than those which are opposed by the circumstances of time and place.

Unfortunately as between parties litigant, the case in general is unhappily the reverse: by whatever motive one party is prompted to give the notice, by some correspondent motive the other party is prompted to avoid, if possible, the receiving it; or rather, the being *deemed* to have received it. If the notice has been received, such and such proceedings, tending to impose a burthen in some shape upon such receiver, are lawful, and productive of such their intended effect; if not, not: but his endeavour is of course to avoid being subjected to that burthen: therefore his wish and endeavour is, that, —whether the notice was or was not received by him,—the supposition entertained, or at least acted upon, by the judge, may be in the negative.

Under the natural system of procedure, in so far as it governs, whether in the private circle of a family, or in a public sphere; in so far as this primitive mode has been preserved or

restored by law; the most eligible course is not only to the last degree obvious, but (in so far as legal powers have happened to extend) is exemplified in every day's practice; though, as to the execution of what is determined to be endeavoured at, difficulties will of course be apt to present themselves, and in as great abundance and force as one of the parties can contrive to give to them; yet, as to the determining of what shall be endeavoured at, difficulty has scarcely any place.

Where, for this or for any other purpose, two parties are really and mutually wishing to hold intercourse with each other; they embrace of course the most effective, and (regard being had to delay, vexation, and expense) the most convenient, modes, which the state of society in the place and at the times in question happens to afford: special messengers on foot, special messengers on horseback, letter-post, mail coaches, telegraphs, and so forth.

The problem and the difficulty, the only difficulty, is, how to render that party willing who of himself is not so; or, where that is impracticable, to supply the place of willingness on his part by other means. Under the natural system, the solution of this problem will depend upon the stage of the cause.

When the judge is honest, and not ashamed or afraid to face the parties, the business of notice is attended with little difficulty.

At the outset of the cause (suppose) a meeting is produced; after this, all difficulty is at an end. A mode of intercourse is settled for each, and by mutual consent. Declare (says the

judge) on pain of losing your cause, at what place delivered, and how directed, it may be taken for granted that a letter has reached your hands. So delivered and directed, by accident should it happen to any letters to have miscarried, the inconvenience, whatever it be, shall ultimately rest, no part upon your adversary, the whole of it upon you. This arrangement lasts so long as the cause lasts; the cause lasts, as to this purpose, till to this purpose I have declared it to be at an end.

As to the mode of procuring the initial meeting, in general a simple summons will suffice. But if there be any apprehension of latitancy, and that apprehension declared upon oath (or what is equivalent), and registered, so as to render the plaintiff responsible in case of vexation; the security afforded by personal arrestation need not be grudged. In this or any other shape, the danger of wilful and needless vexation cannot be great, where the author, in case of its being deemed so, is sure to smart for it.

Arrest, when it is (what it ought to be, and might so easily be) neither more or less than a visit to the judge, is at the worst but a forced visit. Every forced visit is unpleasant; but by what human means shall a man be exempted from the occasional vexation of making and receiving unpleasant visits?

Arrest, as under technical procedure it is, and, so long as that system of abominations remains unextirpated, will be, is indeed a most barbarous oppression, a most enormous grievance. The visit is, not to the judge, but to a

jail; that, in that seat of misery, indigence may be stript of its last rag, out of the sight, and for the benefit of the judge,* his protegés, and under-partners.

A third person—a person who is not a party—a person whose presence, although he be not a party, may, in the character of witness, or any other, be necessary to justice,—is in this respect in the situation which the defendant is in, antecedently to the first judicial meeting so often spoken of.

In case of necessity, not on parties only, but on third persons, from whom information, or any other service, is necessary to justice, might this mode of enforcing it be practised without reserve; always understood, that in case of purposed vexation, the author is at the same time himself standing in the presence of the judge, ready by his immediate appointment to pay for the injury by due satisfaction or condign punishment.

By the laws of the Twelve Tables, any man might lead or drag into the presence of the judge any other, *obtorto collo*, giving his neck a twist at the same time. The twist in the neck might have been spared: that omitted, and responsibility for vexation added, the provision would not be less conducive to justice now than then, in London than in Rome.

Lawyer.—And would you have the whole time of a leading member of parliament, of a first minister, liable to be thus consumed by a

* Comm. Rep. on Imprisonment, April 1792. 27 Rep. of Committee of Finance—Appendix—Prison fees.

conspiracy of blackguards, or, on condition of perseverance, by a single blackguard?

Non-Lawyer.—No, certainly: but your conspiracy, what length could it go before it were discovered? And your single blackguard, or the first of your conspirators, punished as he would be for his very first exploit, stopped in his career at the very outset, where would be his perseverance? As to your own all-perfect system—what it *does* admit, is your apprehended mischief; what it does *not* admit, is this natural, or any other, remedy. At the time of Mr Horne Tooke, when on his trial for treason, Pitt, the minister of the day, with a crowd of other state-worthies, delivered his reluctant testimony. The relevance was at any rate not very close: suppose irrelevance as complete as possible; what burthen, under the name of punishment or satisfaction, could have been imposed on the author of the vexation? None whatever.

Default is the non-performance of that act, to secure the performance of which, any act, prescribed in the character of an act of *notice*, was really or professedly designed.

On an occasion of this sort, is it necessary, can it be necessary, to state to common sense what would be the part taken by common honesty?

Under the natural system, the occasion for notice, and eventually default (be it what it may), will be either subsequent to the first appearance of the party before the judge, or antecedent, consisting in non-appearance.

If subsequent to such appearance, there can be no difficulty. At the first appearance, measures are supposed to be already taken, (since

in every case they may be taken), effectual measures, taken without difficulty, and with full warning of the consequences of neglect, for the continuation of the intercourse as long as it can be necessary for any of the purposes of justice. If antecedent to such appearance; then, for the purpose of giving him official and sufficient *notice*, sufficient information of the nature of the burthen to which default may subject him,—personal intercourse with the party himself, is by the supposition impracticable. But, with the adverse party, the plaintiff,—the party at whose instance the rendering of this service by or at the charge of him the defendant is prayed for,—this intercourse has, by the supposition, taken place. The defendant by the supposition is not forthcoming: intercourse with him hath as yet been found impracticable: simple latency, absconsion, expatriation, exprovinciation — which of all these accidents is the cause? Whosoever he be, whosoever he is or has been; relations, neighbours, acquaintance, some or all of these, if he is a human creature, he must have had. From these sources, or some of them, (if the acquaintance which the plaintiff, his adversary, has with him be not of itself sufficient), information concerning him will be to be obtained: and, for the indication of these sources of information, the plaintiff, who is so much concerned in interest to afford it,—the plaintiff, if it be not in his power of himself to afford sufficient information, may at any rate be relied on as a sure resource.

Though a channel of correspondence be settled upon, and agreed to be employed, yet, on legal

occasions, as on those of ordinary life, the process is exposed to failure; the channel that ought to have been employed, has not been employed; or, though employed, the intended communication has, after all, failed of being received by the person to whom it should have been made.

On this head, in natural procedure, as in ordinary life, the first question is, of course—received or not received? If not received, then sometimes comes in the ulterior question, to whom shall the failure be imputed? To the party by whom the notice should have been received? or to the party at whose instance, and by whose instrumentality (in the first instance at least) the communication ought to have been made?

Under the technical system, the question, *received or no?* is a question never made: instead of it, *good or bad?* is the only question ever heard of, in regard to notice. If *good*, no matter whether received or no: it will be deemed to have been, or (what is the only material thing) acted upon as if it had been, received. If bad, no matter, again, whether received or no: it will be deemed not to have been received; and upon that supposition will the conduct of the judge be grounded.

The notice is regarded as *good*, when the communication is supposed to have been made according to the forms which have been settled, or supposed to be settled. Made according to these forms, it is not the less good for not having been received. Made in a manner varying, or supposed to vary, in any respect, from these forms, it is not the *better* for having been received.

According to the principles of common honesty, the points aimed at have been already stated: that, wherever notice is requisite to justice, notice be not given only, but, wherever actually received, be deemed to have been received; and that the operations employed for the giving and the receiving of it be as free from delay, vexation, and expense, as possible.

Given the situation of the north, given also the situation of the south. Given the points aimed at by common honesty, given, in like manner, are the points aimed at by common law:—that the notice requisite to justice may, as frequently as possible, fail of being received; that, when actually received, it may as frequently as possible fail of being deemed to have been received, to the end that he by whom it was given may be dealt with as if he had not given it; and that the operations relative to it may be in such manner attended with delay, vexation, and expense, as to yield to the partnership as large a mass of profit as possible.

The courses taken for the fulfilment of these ends are by far too multifarious to be here particularized. The diversifications agree in this, viz. that, besides being needlessly dilatory, vexatious, and expensive, they are as inadequate as they can be made: the commodious channels presented by the improved state of society being industriously neglected, all real means of intercourse being inexorably declined. How should it be otherwise? To employ them, the judge would have to see and hear parties with his own eyes and ears: and to see and hear parties would be to give up the ends of judicature.

On favourable occasions, sham communications are employed without disguise: the forms of communication being employed, under circumstances in which it is known that the information pretended to be communicated will not be received; viz. either will not be received at all, or will not be received time enough to answer the pretended, and not intended, purpose.*

The forms prescribed to be employed in the first instance being elaborately inadequate, profit flows in through a variety of channels. Suits on the question whether the notice given was good or bad: the notice, though good, not having been received, suits for relief from the consequences: notice given in the first instance being found bad, demand for fresh notice: the only form of communication allowed to be given in the first instance, being upon the face of it, or by experience, found to be ineffective, or reasonably or unreasonably apprehended so to be,—*motion* that communication made in some other way may *pro hâc vice* be held good.†

* Of communication made in a form contrived for the purpose of being ineffective, the case of the three distringases* (though, in that case, compulsion is in a manner combined with notice) may serve in some sort for an example. Real object, the forcing the corporation to employ an attorney, that the suit may commence and go on in technical course: form of communication employed, (instead of sending for an acting member of the corporation, and speaking to him), a sort of pantomime; a few shillings-worth of their goods seized, or pretended to be seized, and a few months afterwards a few shillings-worth more. By virtue of this sort of communication, at the end of seven or eight months the attorney is set to work, and commencement given to the suit.

† That "*service*," (as the phrase is) made in this or that particular way, may be "*good service*."

* Vide supra, Chap. 4 of this Book.

Parties excluded, discussions about notice rest of course on the ground of affidavit evidence. No questions asked! the essential character and use of affidavit evidence. No questions asked! the resource and motto of fraud, on all occasions, and in all places. No questions asked by receivers of stolen goods; no questions asked by learned judges.

Notice of the fact, on which, according to law, a proceeding at the charge of one or other of the parties is to be grounded,—notice of any such fact is nothing, unless the notice of the law accompany it: *means* of compliance are presented to view; *motives* for compliance, not.

One grand and standing object is, accordingly, to keep the law in a state as incapable as possible of being conveyed to notice. That which exists not, is not a subject of knowledge. Hence the matter of another device; the unfeigned love and indefatigable magnification of that sham law, in England denoted by one of the half dozen senses of the term *common* law, and in France so much more appropriately by *jurisprudential* law, or jurisprudence. Hence also the accessory devices embroidered upon that ground; jargon in all its forms, fiction, and the double-fountain principle: all which see.

In respect of the mode best adapted to the conveyance of notice; besides the diversifications above hinted at, as resulting from the state of society, others of a more permanent nature are suggested by circumstances of diversity, such as, under the system of common sense and natural procedure, are too obvious to be overlooked. The party *sui juris*, or under power: of one sex, or the other: in a state of perfect

sanity, or in a state of comparative imbecility through immaturity or caducity of age: the party a housekeeper, or not: if not a housekeeper, has he a fixed abode, or is he in a state of itinerancy: his abode known, or as yet not known: within, or not within, the geographical boundaries of the jurisdiction of the court. From these and other diversities in respect of condition in life, may arise a demand for diversification too obvious to need, and requiring too many words to admit of, further mention here.

To these natural and rational sources of diversification, the technical system (in England at least) has substituted others, more suitable to its purposes, and more congenial to its nature: diversity of courts, diversity in the sorts of causes, and diversity of stages in the same cause.

In French practice, the defendant, after he had given authority to an attorney to act for him, was called upon to *elect* his *domicile:* meaning neither more nor less than this, viz. to name the house, to which, whatsoever communication for the purpose of the cause might require to be made, being made accordingly, shall be presumed to have reached his hands. The domicile so elected was the office of his attorney. Between client and attorney, so long as the relation and the confidence attached to it continues, it is not in the nature of things that any evasion or detrectation of intercourse should exist on either side.

In England, as in France, and everywhere else, (even under the natural system), to whomsoever the misfortune falls of being obliged to

employ an attorney, the office of the attorney will in general be (regard being had to the interests of both parties) the most eligible domicile: and, if at the outset of the suit, so through every subsequent stage of the dispute; whatsoever turns it may happen to it to take.

Under the technical system in England, election of domicile does take place, and it does not take place.

It does take place, in this respect:—The greater part of the business done being sham business, business made to make fees, business which has nothing to do with the merits; what is done and received in the party's name is not communicated to him. Having (lest the uselessness of it shall be perceived) been rendered unintelligible to him, it is convenient to the lawyer, and not disadvantageous to the client, that he should be spared as much as possible the plague of hearing of it. Without any election, the domicile of each attorney is known or knowable to every other; and thus far, without any such election in form, the effect of it takes place.

It is the interest of the partnership that as much intercourse as possible should be kept up between the professional members of it on the opposite side of the cause, the one with the other, and as little intercourse as possible between one party and the other, and between each party and the lawyer on the other side. Between the party and his lawyer, it is neither in their inclination nor in their power to prevent or impede the intercourse.

But, in addition to this sham business, in the

course of which, though everything is *supposed* and *asserted* to be done by the party, nothing is done by him in *effect;* in addition to this sham business, to which the party is not, unless by accident, privy; business will every now and then arise, which cannot be done unless the party knows of it. Here then would be an occasion in respect of which, if justice instead of fees had been the object, election of domicile would have been made to take place: service on the client would have been performed by service on his attorney.

But among the sources of fees is evasion of notice: evasion, real on one side, apprehended, or pretended to be apprehended, on the other. By election of domicile, *Anglicé* by causing service on the attorney to be in all cases service on the client, this source of fees would have been dried up. Accordingly, such permanent election of domicile is unknown to English practice.

The persons to whom notice is addressed are either known or unknown: unknown, as in the case of creditors.

When the debtor is alive and forthcoming, common sense would direct men in the first instance to the debtor. Technical judicature finds always some other channel of correspondence better adapted to its purposes.

Scotch judicature for example,—besides the *pier and shore of Leith*, has the *Minute-book* and the *Wall:* the pier and shore for fugitives; the minute-book and the wall for creditors.*

Rule: If notice be not conveyed to those whose

* Lawrie, p. 180.

interest it is to receive it, be sure that either its being received is not for the advantage, or that its not being received is for the advantage, of those on whom it depends.

Think on this occasion of bank directors, and unclaimed dividends. Think again of lord high chancellors, and masters of the rolls, and unclaimed pittances of miserable suitors: and see by what omnipotence it is that the money employed in augmentation of masters' salaries is created out of nothing.

Behold in each master's office a gulph, by which, when a man's money is swallowed, either his right to it is concealed from him, or, if he know of it and claim it, more is squeezed from him than is paid. First men make the wrong, then they make their profit from the wrong: nor is that enough for them, but they must have praise for it.

Sham notice presents two main modifications: 1. When notice pretended to be given is not given, not being meant to be received: 2. When, received or not received, it is manifestly incapable of answering its pretended purpose. In the one case it is ineffective, in the other useless. By the English practice in the case of outlawry, in the class of causes called *civil* causes, an example may be seen of both these modifications, according as it is considered in its application to the one or the other of two descriptions of persons: persons out of reach of the pretended notice (whether put into that state by latency, expatriation, or ex-provinciation); and persons incapable of profiting by it, being incapacitated by indigence.

Process of outlawry* is a mode of proceeding by which a man is put into the condition of an outlaw. To be in that condition, is to forfeit all his goods and chattels, together with the profits of lands: goods and chattels upon the performance of the first ceremony, profits of lands after other ceremonies, all of course yielding their fees. Add to this, perpetual imprisonment, if he be caught; besides other plagues in plenty, not worth detailing after these.

Who are the persons whom the partnership has subjected to this fate? Two descriptions of persons: those who have not wherewithal to defend themselves from it, that is, to employ lawyers to defend them; and those who, for any cause, (be they ever so poor or ever so rich), happen to be so circumstanced as to be out of the way of receiving the notice. Not that, on this occasion any more than others, the condition of poor and rich is exactly upon a par. A difference there is, and it may easily be imagined in favour of which side. A rich man, unless he be uncommonly unfortunate, can be kept in it only for a time: a poor man continues in it for ever, and without remedy.

To put a man in it, is a power given to every other who is content to pay the price. Proceeding in a particular course, chalked out for this purpose, a man brings an action against you for anything that comes uppermost: no matter what it is, since it is not necessary that it should have the smallest foundation in fact: and if one carried on in this way is not sufficient to ruin you, he brings as many more as he

* 1 Tidd, 125.

pleases. The great majority of the people are unable to employ an attorney to defend them respectively in any one such suit; much more in any number of such suits, increasable without stint: consequence, outlawry, as above described.

There are two principal offences, to which, as already intimated, this punishment is annexed. One is poverty; or rather (reference being had to the circumstances of the plaintiff) inferiority of affluence. The other is expatriation; being out of England: whether for a man's own business or pleasure, or in the public service, makes no difference. While a soldier is bleeding for his country at the antipodes, judges in England have a shop open, in which they are ready to sell his liberty, with the faculty of destroying his property, to any one who will come to them and pay the price for it.

Previously to a man's being sentenced to this punishment, a notice, in some shape or other, must in every case be given to him. But it is not necessary that in any case he should have received it. He never does receive it: it never is intended that he should: it is always intended that he should not: it is always a sham notice. The man is in the East Indies: the notice consists of a mess of jargon, muttered by an attorney's clerk, in some office or public house in London*, calling upon the man to appear there or thereabouts in a few days.

* When a man is transformed into an outlaw, a *caput lupinum*, a wolf's head, as we learn from the highest authorities, takes place of the original head planted by nature upon his shoulders. While John Wilkes was in Paris, an attorney's

The case in which a man cannot be outlawed for nothing, without risk to the person at whose instance this punishment is inflicted on him, will help to show (if it be necessary to show) that it is not for want of knowing how to remedy it, that those who profit by this enormity persevere in the commission of it.

On a criminal prosecution, it cannot be practised as abovementioned without risk. The necessity of a bill found by the grand jury is the bar to it. Not that the power given to that sort of court is the real obstacle: the real obstacle consists in the oath attached to the testimony, without which the bill could not be found: *i. e.* to the punishment attached to it in case of falsity.

clerk performed this metamorphosis upon his head, by pronouncing the magical words at a public-house called the Three Tons, in Brook street, Holborn. A discovery was made, that one of the words belonging to the formulary was wanting, or misplaced. The effect of this discovery was, to replace upon the shoulders of the blasphemer his natural head, such as it may be seen in Hogarth's print of it.

A list of persons is periodically published under the name of the East India Directory. A monthly list, called Steele's List, shows such of the king's subjects as are serving their country at different stations, in the naval branch of his service. In the periodical book called the Court Calendar, may be seen the names of others of his majesty's subjects, serving in various foreign stations. All these, together with all the inhabitants of all the colonies, form a part of the whole number of persons whom, without the shadow of a cause, without enquiring into the cause, and under a determination not to enquire into the cause, the judges of all the courts are ready, on all appropriately fixed days, to sentence to this punishment, at the instance of anybody who will pay the fees.

Selden, as he tells us in his *Table Talk*, outlawed the king of Spain, for not making his appearance in Westminster Hall, in pursuance of a notice thus delivered.

The same punishment would afford the same security, grand jury or no grand jury.

The observation is necessary; otherwise a lawyer would have his answer ready: *in civili* you cannot have the same security against groundless outlawry as you have *in criminali*, because *in criminali* you have a grand jury, and *in civili* you have none.

To put an end to this abuse, along with many others, what is wanted is, no jury, grand or petty, but personal appearance of the plaintiff *coram judice*, for the purpose of examination upon oath, in the first instance.

CHAPTER XIV.

NINTH DEVICE—PRINCIPLE OF NULLIFICATION.

THE instruments and operations to which the principle of nullification is in use to be applied, may be divided into two classes; non-judicial, and judicial. Of the non-judicial class, *contracts* (including agreements and conveyances) present the most extensive as well as most familiar example. These belong not to the present purpose; but (so close is the analogy) what is here said with reference to judicial instruments and operations, would, without much exception or difference, be found applicable to those others.

Applied to a judicial operation or instrument, the effect and object of the principle of nullification is (according to the most comprehensive description that can be given of it) in the case of an *operation*, to cause that to be considered as *not* having been done, which *has* been done:—in the case of an *instrument*, or a clause or portion of an instrument, to cause that to be considered as *not* existing which *does* exist.*

Examples:—Order from the judge to the party to appear in person, at a certain time and

* In this point of view, the principle of nullification may be considered as a modification or application of the principle of *fiction*. See the chapter on that device.

place. He appears accordingly: this appearance is null and void: for this obedience he suffers, as if he had not obeyed. Suffers! Why? Because the pleasure of the judge was (as he ought to have understood, the order being to the contrary), that he should *not* appear in person, at that or any other time and place; but should employ an attorney to appear instead of him, at other times and places.

Defendant proved guilty of a capital crime; found so by the jury: acquitted afterwards by a judge. Why? Because, in the description of the crime, a lawyer, whom the prosecutor was obliged to employ, had omitted to employ a particular word, which neither legislator nor judge had ever ordered to be employed, and which was not in the language. For the purpose of giving impunity to the criminal, the judge makes the rule, pretending to find it ready made.

On a more particular view, the effect of the nullification principle in respect of the ends of justice will be seen to be different, and indeed opposite, according as it is in favour of the plaintiff's or of the defendant's side of the cause that the operation in question has been performed, or the instrument in question exhibited.

1. In favour of the defendant's side; if the suit be a criminal one, the object of the suit (the application of punishment to the defendant, if he be guilty) is either prevented altogether, or retarded: so, if it be a non-criminal suit, the administration of satisfaction to the plaintiff: for example, the causing him to receive a sum of money that is his due.

2. In favour of the plaintiff's side; if the

suit be criminal, the effect of the nullification is to cause the defendant to receive punishment, and that punishment undue: if the suit be non-criminal, then, on the score of satisfaction, to render to the plaintiff some service, and that service undue.

From causes which lie too wide of the present purpose, so it is that,—in comparison of the instances in which the operation of it is in favour of the defendant's side, especially *in criminali*,—those in which it is in favour of the plaintiff's side (in such sort as that the defendant shall either on the score of satisfaction or on that of punishment, be subjected to a burthen which is not due) would be found extremely rare. In other words, the effect of it is much more frequently to paralyze the force of the law, than to give a wrong direction to it. This, therefore, is the effect which in general, and unless on special notice to the contrary, it will be proper to consider as attached to the application of this principle.

To which side soever of the cause the operation of the principle applies, the effect of it is susceptible of two other distinctions, which require to be observed.

1. It applies either to the whole number of steps taken, or about to be taken, in the cause, or to some part only of that number. In the former case the nullification may be said to be *complete*;* in the latter case, *partial*.†

* Synonyms,—thorough; entire; pure and simple; operating (in the language of school logic) *simpliciter*.

† Synonyms,—limited; operating *secundum quid*, in the language of school-logic; *quoad hoc*, in the language of jurisprudence.

Thus, in another and fairer and honester as well as pleasanter sort of game, the *royal game of the goose*, one sort of unlucky cast throws you back only a part of the way you have made; another, the whole of it.

2. Again: Where the nullification is complete, in some instances it has the effect of operating as a bar,—on the plaintiff's side, to all ulterior demand, to all fresh suit on the same score,—on the defendant's side, to all ulterior defence; in other instances, not. In the former case, it may be termed definitive or peremptory; in the other case, dilatory or temporary, or rather non-peremptory.

Another distinction: The cause of nullification,*—the pretended irregularity in the operation, or the pretended vice or defect in the instrument,—may be made to operate backwards only, or forwards only, or both ways.

The principle of nullification is what lord Bacon would have called a polychrest: a constellation of injustices.

1. If the article of substantive law which it serves to frustrate be in the form of statute law, it not only contributes to the uncertainty of the law, but contributes to undermine the authority of the legislator, substituting that of the judge in place of it. In the individual case in question, it repeals the law of the legislator *pro tanto;* and it serves as an example and an encouragement to judges to repeat such acts of repeal in other instances.

2. Although the article of substantive law thus frustrated exist in no other form than that of a

* Synonyms,—quirk, quibble.

rule of jurisprudential law; in other words, if it be no more than a sham law, made or imagined by a judge, without any determinate set of words to put it into, instead of an article of oral law, made by the legislator in a determinate set of words; in this case, though no such advantage is made as in the former case in the way of usurpation, yet in the way of uncertainty the advantage is the same. The substantive law, which was of itself uncertain, as being in the form of jurisprudential law, is rendered still more so, by the shock thus given to the system of adjective law, on which its execution depends.

3. It possesses, and in a pre-eminent degree, the virtue of an *ex-post-facto* law. Whatever general rule of law is established in the way of jurisprudence, that is, by judges, acting as such, is in effect an *ex-post-facto* law. The mischief of an *ex-post-facto* law consists in its being unexpected: whence, the suffering produced by it is at once inevitable and unnecessary: unnecessary, since an article of statute law to the same effect would have produced all the good, without any of the suffering. But what can be so unexpected as that a malefactor should be acquitted, because a clerk has written a wrong word?

4. It punishes one man, for the fault, or the supposed fault, of another. It punishes the party injured, it deprives him of redress, because an attorney's clerk, or a clerk under the orders of the judge himself, has written a word, which is supposed to be wrong. Under the natural system, an error being discovered, if it were deemed worth correcting, it would be corrected, and the suit

would go on as if there had been no error: but under the technical system, such correction would not serve the ends of judicature.

The more foreign the ground is to the merits, the more the decision contributes to the giving to the law the desired appearance of a lottery, in which a favourable decision is a prize, and the tickets, the prices paid by plaintiffs and defendants for their respective chances.

5. In all cases of a criminal nature, it serves for lodging the power of pardon in hands unknown to the legislator. The lower and more numerous the hands, so much the better; so long as the power of allowing or disallowing the pardon is reserved in the hands of the judge. The persons in which this power is vested, are all the persons to whose mistake, or supposed mistake, this consequence is annexed: every attorney or attorney's clerk, every official clerk or official clerk's clerk. If the consequence is settled, and the clerk unpunishable, the clerk is, in respect of this prerogative, more of a king than the king himself; for the king cannot pardon without the concurrence of at least two other persons,* and the clerk needs no concurrence, but what, by the supposition, he is sure of.

A decision which is not grounded on any alleged cause of nullification, is said to be grounded on the merits: † *è converso*, a decision which is grounded on an alleged cause of nullification, ‡ is not grounded on the merits.

* The keeper of the privy seal, and the keeper of the great seal.

† Gallicè, *portant sur le fond.*

‡ Gallicè, *portant sur la forme.* In the French expression

Under the technical system, (but more especially under the English edition of it), a judge says, with equal facility and indifference, my decision was grounded on the merits, or my decision was not grounded on the merits. In some future age, such openness will appear hardly credible. In each case, a shorter phrase might serve:—My decision was according to justice; or, my decision was contrary to justice.

A decision not grounded on the merits, bears upon some ground foreign to the merits; upon some alleged cause of nullification, some quirk, some quibble.

When the decision is in favour of the quirk, it is then simply and decidedly a decision against the merits. Yet, when it is against the quirk, it is only *sub modo* that it can be said to be in favour of the merits.

The back of the judge is turned upon the merits, not only when he decides in favour of the quibble, but at an earlier period; viz. when he takes upon him to listen to an argument on the subject of the quibble. Then is it that one offence against justice is committed; and, if the decision is in favour of the quibble, that makes a second offence against justice.

Whether the decision be for or against the quibble,—point blank against, or to a certain degree in favour of, the merits,—mischief to the community (it will be seen) is produced, advantage to the man of law. When it is *for* the

there is less perspicuity, but, on that very account, more decency. The outrage to justice, though the same in spirit, is not openly avowed.

quibble, a portion of mischief (it will be seen) is produced, over and above what is produced in the other case.

But it would be an error were it supposed, that, by a decision pronounced against the quibble, any sacrifice is made of the ends of judicature, of the interests of the partnership. That the service habitually rendered to that interest may be at its maximum, it is necessary (it will be seen) that the instances in which the decision is *against* the quibble, and, so far, *for* the merits, should be frequent. Equality is as good a proportion as any other. It is where the numbers of decisions for and against the quibble are seen to be equal, that the uncertainty is at its maximum; and uncertainty is the mother of *argument*, that is, of *business*.

Suppose the question were, whether the length of your nose should operate as a reason for depriving you of a sum of money proved to be due to you: and suppose the decision in the affirmative. Would the injustice commence with the decision? No, surely: it would commence with the argument: or, to speak strictly, with the token (whatever it were) by which it had been manifested that arguments *pro* and *con* on that question would be heard.

The exemplification may appear ludicrous; but the purpose of it is a grave purpose. Among the quibbles, on the ground of which decisions have been given against the merits, enough might be found in which the distance from the merits was not greater, and in which the mischief done by the contempt put upon the merits was even more considerable. If, in that case, the outrage to justice present itself, at first view, as more

flagrant than in these, it is only because in that case the colour of the ground is new, (for which purpose it was chosen); in those others, old, and the eye familiarized with it.

Fancy not that if a premium had been offered to him who should invent the most absurd ground of nullification, the most flagrant injustice that could be committed on this ground, anything more absurd or more flagrantly unjust could have been invented than those quirks (sometimes successful, sometimes unsuccessful) which are to be found in such abundance in the books.

True it is, that, in the station of a judge, injustice can never be done, without a something in the character of a ground or reason; equally true it is, that, in that station, nothing can be imagined more irrational than what, in the character of a ground or reason, has been made, and may continue to be made, to serve.

Fancy not, that, if it had happened to the *nasal* reason to form the ground of a decision, reported in good law-French, the decision, with its ground, would have been defended with less pertinacity, or spoken of with less reverence, than any of those others which form so large a portion of the chaos, called, in lawyer's language, *common law*.

As to the uses of this device; the catalogue of them has already been in great part seen, in the catalogue of the mischiefs.

Use 1. Making business; viz. *pro hâc vice*. This use (as already observed) is the more peculiar fruit of the process of temporary nullification, in contradistinction to peremptory: but even where it is peremptory, the argument in

that same cause is the fruit of the principle; and this whether the irrelevant objection be allowed or disallowed; since, on that ground at any rate, had it not been for the principle, there would have been no argument.

Use 2. Nursing uncertainty: the perennial source of made business, flowing from the land of quirks and quibbles, in all future cases. But as to this use, see further, under the head of the principle of jargonization.

Use 3. Establishing and supporting arbitrary power. See further, chap. 23. *Double-fountain principle.*

Use 4. Blinding the legislator: rendering the law unintelligible to him: putting it out of his power to see what is going forward, to form to himself any clear conception, either of what ought to be done, or of what is done. See again the jargonization principle.

Use 5. Awe-striking, as well as blinding, the people: causing them to regard complaint as groundless, and hopeless, and injurious, and culpable: deterring them thus from complaint, howsoever intense their sufferings. See again the jargonization principle.

Use 6. Repelling the eye of the legislator by disgust. See once more the jargonization principle.

Use 7. Securing a fund of popularity.

This use is confined to the criminal branch of the law: the effect produced by the principle, when thus applied, being the acquittal of malefactors.

Such has been the success of hypocrisy in this line, that the deluded people have learnt to regard with sentiments of love and reverence

and gratitude, instead of indignation, the treachery of those ministers of justice, who, by the help of this capital engine of iniquity, have persevered in the habit of giving aid and impunity to all sorts of malefactors.

If an advantage so much greater than at the outset could naturally have been expected, contributed little or nothing to the creation of the technical system, it contributes at any rate in no small degree to the preservation of it.

Under this delusion,—the more ill-grounded, and (whether ill or well-grounded) the more excessive the lots of punishment are, which stand attached to acts prohibited under the name of crimes,—the more eager are the people to see this surreptitious and anti-constitutional power of pardon, thus employed, in eating out the very heart of the substantive branch of the law.

Hence, a sort of auxiliary device and resource of the technical system consists in adding in all practicable ways to the atrocity of the penal system: pouring out punishment, as from a cornucopiæ or a Pandora's box, without regard to proportion or demand. This may be done in either of two ways: either by applying to the legislator and getting fresh statutes, or without any such trouble, by jurisprudential construction, screwing up misdemeanours into felonies: till at last there comes to be but one sort of offence, and that a capital one. It is thus that, under the auspices of hypocrisy, ambition and cruelty play into one another's hands. By double iniquity, a man renders himself double service. By breaking the law, he receives the blessings of the people for his humanity, when, by making

it, he has received their veneration for his love of justice.

Advice to judges. When a case of compassion presents itself, (and the more atrocious the penal system, the more frequently will cases of that stamp present themselves) instead of recommending to mercy, get the defendant off by a quirk. The defendant, for example, has stolen thirty-nine guineas: recommend it to the jury to value them at as many shillings. Observe, now, how many points you will compass by this one stroke. You reap the seven advantages already mentioned; and, besides all that, you cherish in the bosom of the people the habit of regarding with affection and respect the vice which is one of the main engines of your system, and cherish at the same time the habit of blind obsequiousness in the bosom of your rivals, the juries.

If,—you being on the ministerial side, as it is most natural for you to be,—the author of a real or supposed crime, particularly obnoxious to administration, comes under prosecution, and an attempt is made to save him by a quirk; you have a choice to make. On the one hand, you see the service you may do to your party by a due execution of the law; on the other hand, the service you may render to your partnership by the violation of them. Your choice will depend upon existing circumstances: but it is a pleasant sort of a dilemma, not to be able to stir a step without reaping an advantage.

The popularity gained by this principle in criminal cases, will serve you for the support and defence of it in that other class of cases (non-criminal cases) in which the favour of the

public does not extend to it. In these fat cases, the advantage reaped from the principle is much more substantial than in those other meagre ones. In criminal cases, at least in nineteen instances out of twenty, the defendant is mere skin and bone; the plaintiff, called prosecutor, little better. The effect of the flaw too is commonly peremptory, or it would not be worth noticing, or worth making. In *non-criminal*, called *civil* cases, costs come frequently out of the estate; and (be that as it may) the parties may be of any degree of opulence. Here, then, you make the effect of the flaw but temporary; and the quantity of business which the cause affords is thereby doubled.

The grosser and more abundant the pretences for nullification, the more easily may business be made, without the expense of treachery on the part of the professional assistants of the party who suffers by the flaw: and in this case, compared with the other, the encouragement to such treachery is much more inviting and more pure. Many a man who would not charge his conscience with the destruction of the innocent, or even, in a matter purely civil, with the final sacrifice of a client's righteous cause, will be restrained by no such scruple from the lending a hand to the manufacture of a little extra business, by a slip too natural to attract notice.

In England, as elsewhere, the body of the laws may be divided into two parts: the beneficial, and the pernicious. No where will the existence of the distinction be disputed; no, not even among lawyers: since what little there is in it that tends to the reduction of delay, vexation, and expense, may, even in the estimate

of an official panegyrist, make sure of a station on the left hand side. No man that will not admit the reality of the division; no two men who would draw the line exactly in the same place.

In England, however, the distinction is more marked than perhaps in any other country: the cause may be found in the mixed nature of the constitution, and the stages through which it has passed in its ascent to its present elevation. Be the constitutional law of the country what it may, the tenor and fabric of the law must ever be favourable to the interests and wishes of the individuals who, for the time being, are in possession of power: favourable to them, proportionally adverse and unfavourable to all whose interests run not in the same channel with theirs. Hence, taking the whole fabric together, there will exist continually, on the two opposite sides, so many perpetual and perpetually opposite contentions and endeavours,—on the side of those in power, to strengthen the system,—on the side of those out of power, to weaken it. The system imagined by the Manichæans for the government of the physical and moral world, is thus exemplified, in fact, in the ordering of the concerns of the political world.

Excellent as the constitution is in its materials, and capabilities; supported as no doubt it has every now and then been by truly heroic exertions of public virtue; neither wisdom, nor virtue, nor the union of both, will go any considerable length in accounting for the details of it. The features in it on which we pride ourselves with so much reason, and on which

we may felicitate ourselves with so much more reason, are to be considered rather as diagonals resulting from the conflicting forces of personal interest, than as perpendiculars erected by virtue on the basis of wisdom.

The struggles between parties have frequently been struggles for existence. When existence is at stake, all other objects are eclipsed by it: everything bends to the present emergency.

When the adjective branch of the system is weakened in any part, the weakness extends to the substantive branch *in toto:* when the foundation of a house decays, the danger extends to everything that is above. But, when immediate destruction is in prospect, no price can be too great that holds out a hope of present safety. When law is against men, men will be against law. If, by a flaw introduced into the texture of the system of procedure, a precious life which otherwise might have fallen may be saved, any future mischief that may by contingency creep in at the flaw makes no impression on the mind. The beam I introduce to support a falling house, may be pregnant with the dry rot; but if the house would fall without an immediate prop, and there is no other within reach, the beam goes up of course, all thought of the dry rot is put aside.

The sacrifice of future contingent good to greater present good, is reconcileable to the dictates of the purest wisdom. What the dry rot is to a house, the principle of nullification, the principle according to which decisions are pronounced on grounds foreign to the merits, is to the system of adjective law, and the system of substantive law which rests upon it.

It is applicable to the purpose of saving from the power of the law any sort of person, be he who he may, so he be for the moment exposed to its penalties: the corrupt placeman who abuses the powers of government, or the patriot who opposes his resistance to the abuse.

When, in a penal case, on a ground foreign to the merits, the decision is against the merits, it destroys *pro tanto*, in the individual case in question, the power of the substantive law. It destroys the power of a bad, it destroys the power of a good, law. Considering it in the light of a perpetually-applicable and all-extensive principle, is it not, however, capable of meriting, upon the whole, the appellation of a beneficial one? In idea, yes: but upon what supposition? Upon this; that, in the substance of the penal system taken together, there is more evil than good: in other words, that it would be more for the advantage of the country to have no penal laws at all, than such as are actually in force. Upon any other? Upon this other: that, the good and the evil being in equal proportions, the application of the nullifying principle is more likely to fall upon the evil than the good. On either of the above suppositions, but on no other, is the nullifying principle, this favourite and ever busy principle, anything better than an execrable nuisance. But for either of these suppositions is there any the smallest ground?

The true remedy is, what? So obvious, the pen is almost ashamed to write it. To rid the substantive system of the peccant matter: not to introduce into the adjective system a princi-

ple of debility, by which the efficacy of the good and bad is reduced together, and alike.

When Wilkes, the victim of the court, and the idol of the populace, was prosecuted for the two writings, one of which had been the cause of the resentment, and the other furnished the means of gratifying it; in the instance of this delinquent, as of every other, the licensed accessaries after the fact, consulting the oracle of chicane, betook themselves to the principle of nullification for the means of safety. Their researches presented to them, in one of the legal instruments, one of those imaginary flaws, on which iniquity under the mask of humanity has bestowed the power of rescuing delinquency from the pressure of the law. But the demon to whom, even in mischief, all certainty is odious, had provided an instrument by which, if applied in time, flaws of that kind may be closed: not amended, the flaw would have been a fatal one: but, to flaws of this description, power had been in the habit of applying a remedy. Addressed in proper form, the judge (Lord Mansfield) substituted the valid slang to the invalid slang. Immediately Westminster Hall was in an uproar: what could not be done by reason, was to be done by noise and calumny. The forgerer who inserts a word in a deed, alters it: the judge who amends a record, alters it: the cry was, *He has altered the record!* and what you were to understand was, that he had committed an act of forgery on it.

To the enabling the partnership to turn to the best account the principle of nullification, the form of jurisprudential law was indispensably necessary. Without the aid of that deceptitious

form, something might indeed have been done by so convenient a principle, but nothing in comparison of what has been done.

As in the substantive branch, so in this adjective branch, the law, if it had not been in the form of jurisprudential, would have been in the form of statute law. In that case, whatsoever it had required to be done, in the course of the cause, by either party (suppose the plaintiff); whatever operation it had required to be performed; of whatever tenor, purport, or effect, it had required an instrument, on this or that occasion, to be delivered; it would have given a description of that operation, of that instrument: and, if on pain of nullity, intending that such should be the consequence of failure, it would have given warning to that effect.

Of the legislator, (except in so far as it might happen to him to be corrupted or deceived by the man of law), the object would of course be to render such failures as rare as possible: to that end, he would as surely have pursued the course just mentioned: whatever on each occasion his pleasure were, he would have declared it. If it be your wish that your servant should go on an errand to a particular place, you tell him so, mentioning the place: you do not (unless you are perfectly assured of his knowing already) leave it to him to guess that you want him to go on an errand, and to what place.

Of the partnership, (for the sake of the profit drawn in by means of the principle of nullification, by the reiteration of operations and instruments, together with the other less prominent

advantages) the object was, of course, to make such failures as frequent as possible.

Their first and constant care accordingly was, that no such directions should ever be given. The foundation, a foundation not the less sure for being negative, having thus been laid for these failures; causes of failure, and consequent grounds of nullification, were built in infinite numbers upon the foundation so laid. Day by day the party in the right was punished, punished with the loss of his due, because his lawyer had omitted to fulfil directions, which, lest they should be complied with, had been omitted to be declared to him, or so much as to be framed. The directions which should save the suitor from being deprived of his due by his own lawyer, where are they to be found? Upon the blade of the sword that Balaam wished for.

This was not yet enough. While A was punished for the disobedience of B to the unuttered and unutterable directions, care was taken to place them out of the danger of being guessed at. Absurdity and inconsistency, figures which cost as little to the English lawyer as prose did to Monsieur Jourdan, secured this point without difficulty.

In punishing one man for another's not having done so and so, it was not possible to avoid altogether the giving of some sort of description (how inadequate soever) of that, for the not doing of which, the punishment was inflicted. A description of this sort, though, on the occasion of the cause in hand, and in the character of a direction, too late to be of use,

might yet, if committed to memory or writing, supply in some sort, as far as it went, the place of a direction, in some future contingent cause. Though not itself a law, a general law, it might, to him who should be diligent and fortunate enough to catch it and preserve it, answer in some sort the purpose of a law. A professional lawyer having nothing to do in the cause, would (for his own instruction, or on a commercial speculation, in the view of the profit to be made by selling the information to others) commit every now and then to paper, and eventually publish, in a suitable mass, a body of instruction of this sort thus collected. It is thus that the sort of discourse has gradually been accumulated, which, by an abuse of words peculiar to the English language, has, under the common denomination of *law*, been confounded with the genuine expression of the will of a legitimate legislator. Of this nature at least is the largest and least bad part of the materials that enter into the composition of it. A collection of imaginary laws, which, had they been real, would have been *ex-post-facto* laws.

Had these spurious laws been of a rational complexion, conformable to, and such as would naturally have been dictated by, a regard to the ends of justice; had they been such as, if framed and communicated in such manner as to afford a possibility of complying with them, would have been conducive to those ends; had they at the same time been regularly committed to writing, and made public;—little by little, in the course of a few centuries, the mass of sham and spurious law so formed might (to the effect of preventing such failures) have (though

in a very imperfect and incongruous manner) supplied, to the extent of it, at each point of time, the place of genuine law. Little by little, the pitfalls so carefully left in the field of law would have been filled up, as in the siege of a fortified town the ditch has sometimes been filled up, by the bodies of the slaughtered. The ideal laws, the *quasi* laws, thus formed, being each of them conformable to the ends of justice, would have been consistent with one another: the place of promulgation might in some sort have been supplied by analogy: from two such already made laws put together, a suitor might have learned upon occasion to foresee a future one: in like manner, though unhappily not with equal certainty, as from two angles of any triangle the mathematician knows how to deduce the third.

This possibility was to be avoided: and the avoidance of it was not difficult. The more absurd a decision is, the more impossible it would have been to divine it: and the more irreconcileably repugnant to each other two decisions are, the more impossible it is to deduce from them a third. Accordingly, the wit of man never has devised, nor, under the stimulus of the highest premium, would be capable of devising, absurdities and inconsistencies grosser than are to be found in what are called the *books*, in such disastrous abundance.

How could a cover for injustice be ever wanting, when it had been made known by every day's practice that a syllable wrong written, or pretended to be wrong written, by a lawyer's clerk, was enough to make the client lose his due!

Would you see a short proof of two propositions at once; that the nullification principle is a mere instrument of iniquity; and that, by those who are in the constant use of it, it is known to be so? Behold it in this one circumstance. In a variety of instances, a flaw being suspected,—a flaw that, if not amended in time, might (it is supposed) subject the instrument to nullification,—application is made, and permission granted for the amendment of it. The permission, when thus granted, is it made use of? Not it indeed. Why should it? The defect being an imaginary one, amendment is of no use. The flaw being a sham, the amendment may be so too: as, on another stage, a sham sore leg is cured by a sham remedy. Defect, amendment, argument, deliberation, everything is a sham, but the iniquity and the pillage.

Uncured, the flaw would have made business: cured, it makes business likewise. Cure or no cure, what matters it, so it produce equal business?

CHAPTER XV.

TENTH DEVICE—MENDACITY-LICENCE.

SECTION I.—*Mendacity-licence, what.*

THE licence given to mendacity being one of the most efficient articles in the list of jurisprudential devices, it is particularly necessary to be clear and distinct in the explanation of it.

Under the fee-gathering system, falsehood, wilful falsehood, was, by the judge, and the rest of the partnership, found at a very early period to be on many occasions a necessary, and on all occasions a useful, instrument in their hands, to aid them in their pursuit of the ends of judicature. It accordingly became a capital and constant object with them to neglect no means or opportunity of applying it to this its use.

In whatsoever instances falsehood, being known and wilful, appears to have been habitually uttered either by the judge himself, or by others with his allowance or under his compulsion, to the advancement of the ends of judicature, as opposed to the ends of justice; what is so uttered and done, may be said to be done under the mendacity-licence.

The mendacity-licence has been in some instances acted under, in some instances assumed: *acted under*, where the falsehood uttered has been uttered by one of the parties; that is (under the exclusion put upon the parties) by his professional assistants, acting as such: *assumed*, where the person by whom it has been uttered has been the judge himself, or any of his official instruments and subordinates.

The case where it has been assumed, is the case of *fiction*, legal fiction: it will be spoken to under that head.

In the case where the licence has been acted under, it has been acted under either by choice, or by compulsion, compulsion imposed by the judge. In the former case, the licence is a simple licence, created by permission: in the other case, to the simple permission has been superadded a command: a virtual one at least, punishment applied to produce the effect of a command.

In the present chapter, our concern is with the falsehoods which are simply permitted.

When, in regard to a practice of any kind which on most occasions or to most persons stands prohibited, the intention is that on certain particular occasions or by some particular persons it shall be practised if they please; there is no other mode than the taking off, in those particular instances, the punishment, by which, in the other instances, the prohibition is created, or enforced: unless, over and above such forbearance or exception, a declaration were issued, expressly permitting and authorizing the practice in the cases to which the per-

mission was meant to extend itself; an act which, in the case here in question, would be as indecorous, not to say perilous, as it would be needless.

For securing truth, veracity, correctness, and completeness, in testimony, (when to produce these effects has really been the wish and endeavour of men in the character of legislators or judges), the expedient employed has been *punishment* in some shape or other, attaching upon each violation of that important duty.

Punishment, in whatsoever way, attached to the breach of this duty, being a known, and obvious, and obviously and confessedly necessary, means of providing for the observance of it, where the intention has been that it should be observed; wheresoever this necessary means has been forborne to be employed, a presumption not far short of certainty has been afforded that the forbearance has been intentional, having for its object to promote the utterance of the falsehood, by operating as a licence. When it appears that, for a course of ages, personal advantage has been continually reaped from this forbearance by those by whom it has been practised, this presumption is converted into a certainty, or what is little short of it.

By mendacity on the part of an extraneous witness, nothing was to be gained by the man of law. On the other hand, by the detection and supposed prevention of mendacity in that quarter, something was to be gained; viz. the reputation of discernment, and of a laudable zeal for justice. Accordingly, by virtue of a general rule, extraneous witnesses were to be subjected to examination: made to give answers to inter-

rogatories: and, by way of a security for the truth of such answers, the sanction of an oath was called in, and punishment annexed to the breach of it. By the intervention of an oath promising veracity, mendacity committed in breach of that promise was thus converted into perjury; testimonial perjury: and, to the offence thus denominated, a lot of punishment, such as was deemed competent, was annexed.

The case of the parties, was in this respect widely different. By mendacity in this quarter, a great deal was to be gained. Care accordingly was taken that the check applied to such practice in the other case should not extend to this. By receiving mendacious statements as grounds for inquiry, inquiries in abundance would thus be instituted; inquiries which, had the mendacious statements been prevented, or the falsehood of them detected at the outset, would not have had existence. Groundless demands on one hand, groundless defences on the other, were thus invited and admitted without stint.*

In the present case, however, for rendering the licence complete and effectual, the mere suspension or abolition of factitious punishment applied professedly for that purpose, and under the name of punishment, would not have been sufficient. Had the natural system of procedure, and in particular that feature of it which consists

* Plaidoyers de Linguet, vii. 347. Memoire pour de Gouy. "Il faut se rappeler avec quel mépris.... les tribunaux rejetoient ces articulations vagues, dénuées de probabilité, de circonstances, et qu'on ne hasarde si librement que parce que les loix n'y attachent d'autre peine que le défaut de succès."

in the meeting of the parties at the outset in the presence of the judge, been adhered to, the natural punishment attaching, in the shape of present shame, upon convicted or suspected mendacity, would in no inconsiderable degree have operated with the effect, and supplied the place, of all factitious punishment. The clearing the fee-gathering or technical system of so powerful an obstacle to its success as that initial meeting, was therefore a necessary preliminary to the establishment of the mendacity-licence, over and above its other uses.

From the earliest ages of political society, wilful falsehood, on the part of an individual speaking in the character of a witness for the information of a judge, had met with powerful checks. The utterance of the testimony being accompanied with the ceremony of an oath, the falsehood took the name of perjury, and was punished by the gods: having this mark set upon it, it came to be regarded with horror at least, if not always pursued by punishment, among men. If a statement thus stained, and sooner or later seen to be stained, by falsehood, being exhibited by the plaintiff, were seen to be in danger of experiencing this treatment; a plaintiff who to his own knowledge had no merits, and whose prospects of success depended on the weariness, or poverty, or absence of the defendant, the mendacity of hired or dependant witnesses, or the imbecility or improbity of the judge, might shrink from the attempt; and so, *vice versâ*, in the case of a dishonest defendant. To encourage enterprise on the one side, perseverance on either, what was to be done?

A sham distinction was to be made. To exhibit false testimony, the ceremony of an oath having been employed to ensure the verity of it, would indeed be perjury. But what a plaintiff says, what a defendant says, is not testimony, but *allegation*. Not being testimony, the sanction of an oath will not with propriety attach upon it. The sanction of an oath not attaching upon it, be it ever so false, it is not *perjury*. But, not being perjury, it is not any thing that has a name. No longer the crime of a man, of an impious and wicked man, it is little more than the failing, the venial failing, of a child. Refusing to everything that comes either from the plaintiff or from the defendant the name of testimony, and by that means, in case of falsity, the name and tremendous consequences of perjury; withdrawing it, in a word, by that means, altogether out of the reach of punishment; we grant a licence, we annex rewards to mendacity, to what otherwise would be perjury, in so far as it can contribute to the continuance or the number of those contentions by which it thrives.

Divested of that security for veracity, were the discourse of a plaintiff or a defendant recognized as divested of all title to credit, and (as such) unfit to be acted upon in any way, and by any body, the invention would not answer its purpose. But here comes in another distinction to our aid. Credit is not due to allegation for the purpose of giving termination to the cause; credit, the fullest and most unreserved and unquestionable credit, is due to it, and shall be given to it by us, for the purpose

of giving continuance and commencement to a cause. Were we to see, and to be known to see, that what the plaintiff, at the very outset of his demand, says in support of it, is void of truth, there could be no pretence for calling upon the defendant to make answer to it. At so premature a period, therefore, let it be our care to know nothing about the matter; to rest in convenient and impartial equipoise; to take it for true and not true: for not true, to the purpose of giving, in favour of the plaintiff, a termination to the cause; for true, to the purpose of calling upon the defendant for an answer to it: which in the same manner shall be both true and not true: and so, by the blessing of Providence, giving continuance to the cause.

Comparing allegation with testimony, it is curious enough to observe the difference between appearance and reality: between what is said to take place, and what actually does take place. According to the language, and perhaps the conception, of the man of law, nothing is done by the law without proof; mere allegation without proof goes for nothing. In reality, allegation without proof has more effect, is much surer of its effect, than proof itself: than proof of the nature of testimony, than proof by deposition, for example. Of what is ranked under the names of proof, deposition, testimony, the effect depends altogether upon its being believed: disbelieved, it has not any, upon the conduct of the judge, or the fate of the adversary. Of what is delivered in character of allegation, mere allegation, the effect is exactly the same whether it be believed or no.

Where the suitor and his professional assist-

ants behold in the employment of such licence a means (especially if the only means) of pursuing their respective ends; if, in their respective bosoms, the force of the improbity-restraining interests be not sufficient to restrain them from the pursuit of the ends in question by such means, their availing themselves of the licence is a result that follows of course.

Where (on whatever prospect of advantage) a man proposes to himself to prefer against another a demand, of the groundlessness of which in point of fact he himself is conscious; if, at the same time, according to the formularies in use on that occasion, it is necessary that on that occasion he should utter any assertions (general or special) which, the demand being groundless, fail in some respect or other of quadrating with the truth; in such case, falsehood in some shape or other is necessary, both to him and to his lawyer, in the pursuit of their respective ends: for, without the falsehood, the suit, by the supposition, could not be carried on: the client would therefore stand debarred from the advantage, whatever it be, which he looks for from the suit; and the man of law, from the profit attached to the sale of his assistance.

On this occasion it is not necessary to be particular in the delineation of the various shapes in which advantage from demands known to be altogether groundless may present itself, and be reaped. If the object demanded possess of itself a value, possession of that object will constitute the advantage: if the object demanded be even altogether destitute of value, still, under the technical system, it follows not by any means that the suit should

not be provided with any substantial and intelligible advantage. Is the defendant in a state of comparative indigence? he may be ruined. Is he opulent? be he as opulent as Crœsus, he may at any rate be tormented.

So, if the professed object be the real object of the suit, and the value of it considerable to any amount, means are not wanting by which, without the shadow of a title, it may be possessed. If the defendant be at once rich and resolute, it may happen that nothing less than perjury may present an adequate prospect beforehand: but, if his condition be that of relative indigence, (that is, if it surpass not the condition of nine-tenths of the people), perjury may be a mere waste of wickedness and danger: the mere expenses of defence, natural and factitious together, (especially with the help of a timid frame of mind), may be sufficient to ensure success.*

* Of this licence to mendacity, and, through mendacity, to oppression,—to the most flagitious of all oppressions, that which is inflicted by the hand of law,—it is almost superfluous to say that it is no secret to those by whom and to whose profit it is suffered to continue. It has neither been always unfelt, nor always unopposed, by the legislature.

In the particular case of debt, an act was passed some time in the last century, requiring the plaintiff, as a condition previous to his being allowed to employ provisional arrestation as a means of securing the justiciability of the defendant, to aver upon oath his persuasion of the justice of his demand.

Wretchedly imperfect as was the check thus opposed to licensed oppression, it was felt, by those by whom the profit of the oppression was shared, as a most cruel injury. At a distance of many years, the recollection of it (I shall not easily forget it) drew once in my presence, from the breast of a veteran practitioner, a sigh, the sincerity of which could not admit of dispute. Aye, those were times indeed! The

Section II.—*Mendacity-licence, in what cases granted.*

In certain cases, in regard to certain instruments and discourses, it suited the interests of the partnership that the liberty granted by the mendacity-licence should have place, that mendacity should go unpunished; in certain other cases, not. When it suited their interests that it should be more frequent, they encouraged it; when it suited their interests that it should be less frequent, they discouraged it.

The effect of the licence may be considered as produced in either of two ways: 1. The allowance general, the prohibition and punishment particular, and operating in the way of exception to the general rule; or 2. The prohibition and punishment general, and the allowance particular, operating in the way of exception to that general rule. It may be considered as constituting the exception, or it may be considered as constituting the rule.

Mendacity, to all who have not a special interest in the promoting of that vice, is a thing so odious,—and, to every eye but a lawyer's, so intimately connected with injustice, so hostile to justice,—that, in regard to every sort of discourse bearing relation to justice, the obvious course seems to be, to regard the prohibition of mendacity as constituting the general rule, the

first merchant in London might then have been carried off from the 'Change, and consigned to a prison or a spunging-house, by any man, who had neither the smallest claim upon him, nor ever so much as conceived himself to have.

allowance as an exception: a rare, unheeded, unintended, and even unwelcome and lamented, exception. Yet, in comparison of the cases in which prohibition and punishment bear upon it, so great is the extent of the cases in which neither punishment nor prohibition, nor anything but encouragement (sometimes by simple permission added to the natural advantage, sometimes even by positive compulsion) bears upon it; in a word, the exception (if it be one) is so extensive; that a man may well be at a loss on which side to place the rule.

On this occasion as on every other, the problem was (as we have seen) how to produce most profit, with least infringement upon ease.

Exaction of heavy fees, (heavy, with relation to the general pecuniary ability in those early times, when money as well as money's worth was so scarce), had the double effect of increasing profit and diminishing labour at the same time: increasing profit, in proportion to the number of those who, being able to pay the price, take upon themselves the expensive character of suitors; diminishing labour, in proportion to the multitude of the vulgar herd, the bulk of the people, who, unable to pay the price, gave up their chance for justice.

The quantum of profit, which, on each occasion, it might be worth while to accept from each suitor in the shape of fees, being thus settled; the price of the commodity being thus fixed; the greater the number of those who put in for their chance for it, the better.

The first idea seems to have been, that, the more universal the allowance to mendacity was,

the better. The first arrangement accordingly appears to have been that of an universal mendacity-licence to all mankind: no distinction as yet in that respect between parties and extraneous witnesses. The proof is, that afterwards,—when, in the case of an extraneous witness, mendacity came to be punished,—punished it then was, as still it continues to be, no otherwise than through the medium of the ceremony of an oath: no oath, no perjury; no perjury, no punishment for mendacity:—and, in the time of Edward I. at any rate, and probably for centuries later, no such ceremony as that now in use under the name of an oath was employed; employed, in the common law courts, on any such occasion as that of receiving the *vivâ voce* testimony of an extraneous witness. At the same time, no want of mention of perjury; but the perjury then in question was the perjury of the juror, of the judge, of this or that other official person: of anybody but the witness.

This in the common law courts. Meantime, the ecclesiastical courts were in vigour: and they, taking their law from papal Rome, (in which the profit, of which writing is so fruitful, had always been made the most of), went on administering testimonial oaths, and punishing the breach of them under the name of *perjury*.

From this practice, compared with the common law practice, the idea of a sort of composition or middle course seems to have been deduced: a happy temperament, increasing the number of *bonâ fide* demands and defences, without diminishing the number of *malâ fide* ones.

If we administer an oath to the parties, and thus, in case of mendacity on their part, punish

them as for perjury, the truth will come out at the first meeting, and there will be an end of the cause: no lying excuses, no perpetual renovation of delays and fees by alternate absentations.* Let us, therefore, confine the oath, with its eventual punishment and present discouragement of mendacity, to extraneous witnesses. These need not, shall not, come upon the stage till the fifth act: leaving the four first acts for the torment and pillage of the parties, whose averments, being open to the objection of *interest*, and being not upon oath, shall no longer, in the character of testimony, be listened to. Giving this new security for veracity, and thence for justice, we shall increase the honest part of our custom, without prejudice to the dishonest part. We shall increase the number of our *bonâ fide* customers; whose expectation of success being founded in truth, they will, in the security thus given for truth, behold an increased probability in their favour. Continuing to allow to the averments (true or false) on the plaintiff's side, the effect of giving commencement to the suit, in confidence of the inability of the defendant to go on with it,—and, on the defendant's side, that of giving continuance to it, for the purpose of staving off the evil day, or in confidence of the plaintiff's inability to go on with it; we shall experience no diminution, no equivalent diminution at least, in the number of our *malâ fide* customers.†

* Vide infra, p. 251.

† Of an arrangement which, for the purpose of securing the commencement and continuance of a suit, admits the testimony of a man without any security for his veracity, while, for the purpose of grounding the decision which is to

Thus stood the matter in the common law courts. Meantime, the equity courts, a new class of courts peculiar to England, hit upon a further refinement, a yet more extended application of the oath: a further increase to the number of *bonâ fide* litigants on the plaintiff's side, and still without any equivalent diminution in the number of *malâ fide* litigants on either side.

The practice of writing had, by this time, received considerable extension: writing, the fruitful mother of fees, had become familiar to the man of law.

give termination to the same suit, it refuses to receive the testimony of the same person under any security or in any shape, the inconsistency and iniquity is as flagrant as the motive is obvious. In one case, going on with the suit, after it has been commenced by the averment of the plaintiff, will cost the defendant, say 50*l*. To the purpose of subjecting the defendant to this burden, the bare assertion of the plaintiff, without oath, without fear of punishment for perjury, in terms the most vague that can be devised, and without so much as his signature to fix it upon him, is not only admitted, but made conclusive: no evidence on the other side by which this effect can be stopped. In another case, or in the same case, the matter in dispute not amounting to 5s.,—to the purpose of giving termination to the suit, by proof of the matter of fact in question, the assertion of the same person under oath, under fear of punishment for perjury, in the most pointed and explicit terms, under the security afforded by cross-examination, is not admitted on any terms: neither amidst other evidence on the same side, nor subject to opposition liable to be given to it by evidence on the other side. Inconsistency enough to arrest the boldest hand, were the device to be grafted alone, upon a system directed to the ends of justice. But, in comparison of the other enormities with which the system swarms, this particular one is so inconsiderable as to have been generally passed by without notice. Gullets exercised with the swallowing of camels, do not stop to strain at gnats.

Let us give to the *bonâ fide* plaintiff (said they) the advantage of extracting from his adversary, under the sanction of an oath, his unwilling testimony; on condition that the examination shall not be performed *vivâ voce* in our presence, (in which case, the cause, being ended almost as soon as begun, would afford no fees), but in writing, and that on both sides: reserving to the *malâ fide* plaintiff, whose object is to oppress his less opulent adversary by the weight of vexation and expense, the faculty of telling a story, which, as often as he has no sufficient truth to ground it upon, may be groundless, but which, on the supposition of its being true, might afford a just cause for the commencement of the suit. Let the plaintiff, by his *bill*, tell his story (the longer the better), and put his questions (the more of them the better), in writing, and not upon oath: the defendant, by his *answer*, gives his responses, and, in giving them, tells his story, (the longer the better), also in writing, but under the sanction of an oath.

All this while, it is only from one of the parties that there will be any chance of truth: as between those two, the truth may be half told, but it will be no more than half told. So much the better: if it be the misfortune of the defendant to stand in need of the testimony of the plaintiff, this gives the benefit of a cross cause, in which the parties exchange characters: the defendant of to-day, the plaintiff of to-morrow: another bill, another answer, another cause.

Had the examination been performed *vivâ voce*, by the one party on the other, in the presence

of the judge, each being as much present as the other; both causes, original cause and cross cause, would have been dispatched at once: both of them would have been as good as lost to us.

Lawyer.—Mighty fine all this, in good truth! But what is it you have been about all this while? You have been confounding two quite different things, *assertion* and *proof*, pleading and evidence: and on this confusion rests your argument. *Evidence* is worth nothing without oath: accordingly it is never received but upon oath. But *pleading* is not *evidence:* what need therefore of its being upon oath?

Non-Lawyer.—Pardon me: nothing has been confounded, that the nature of things has separated. Proof, that sort of proof which consists of testimony, what is it but assertion? and *assertion*, if it be pertinent, and sufficiently particular as to time, place, and so forth, (the assertor speaking of the fact as being the subject of his belief, or having come within his own knowledge),—assertion, come from whence it will, what is there in it that should prevent it from being received as evidence?

No, sir: it is not by the nature of things, but by your partnership, and for the purposes above stated, that the distinction has been made. Call it *evidence* in one case, call it *pleading* in another, it is still neither more nor less than assertion in both cases. Whence then sprung the distinction? From the views which led the partnership to grant or continue the mendacity-licence in one case, to withhold it in the other. Where the licence was to be granted, assertion became *pleading:* where the licence was to be withholden, assertion was *evidence*.

Lawyer.—And so, sir, you have persuaded yourself, or wish to persuade others, that what you are pleased to call the mendacity-licence extends to every assertion that belongs to the head of *pleading*,—to every assertion that does not belong to the head of evidence? Know, sir, then, that, in a number of cases, in equity, as well as at common law—in short, wherever it has been thought proper (which is as much as to say wherever it is proper)—the sanction of an oath has been required to be attached, and is constantly attached, to assertions made by a party: made by a plaintiff as such, and coming on in the course of the pleadings, and not of evidence. There is the affidavit annexed to the bill of discovery, there is ——

Non-Lawyer.—Yes, sir, there they are indeed: there they are in the books, you need not trouble yourself. But do you think the credit of your partnership will be much served by these exceptions, these thinly scattered exceptions? Verily, verily, they do nothing better for you than (to use your own expression) the fixing you with notice. By what reasons will you justify yourselves in withholding the licence in these few cases? By none, though you were to look for them till doomsday, but such as condemn you for granting it in the rest: such whereby, in every case in which you have granted it, your conduct stands condemned.

It is not then but that the necessity there is of the same security for truth in the one case as in the other, is sufficiently understood among you, and has been over and over again brought to view. What you do then, for the encouragement of falsehood, of that falsehood which is

so profitable to you, you do with your eyes open: and whatsoever forgiveness you may ever hope for, it will not be on the ground of your not knowing what you do, that you can expect to obtain it.

In a word,—call it pleading, call it what you will,—in the whole course of the cause, from the writ to the execution, there is not one assertion made, there is not a scrap of paper or parchment scratched upon, to which the effect of evidence is not regularly attached. Take the writ: it is on the ground of the assertion contained in it, (or on no ground at all), that the defendant is compelled to *appear*, as you call it, that is, to employ an attorney: and so on, till the cause has run its course. Take the declaration:—it is on the ground of the assertions, true and false, contained in it, that the defendant is compelled either to put in his *plea*, and so on, through the several operations prescribed to be performed on his side of the cause, or, in failure of any of them, to lose his cause,—that is, to be put in as bad a condition as he could have been put in by any the most conclusive mass of evidence.

And now, sir, say, if it be your pleasure, say, if it can be of any use to you, that pleading is not evidence.

If, when thus applied, the word *evidence* be altogether insupportable to learned ears, imitate the admiring critic, who, speaking of Pope's Pastorals, confessed they were not pastorals, but said they were something better: say that it is not *evidence*, but something more conclusive.

Carelessly as the account of the sins of the

partnership is kept by the public mind; still, as the account swells, this or that device must every now and then be practised, for the purpose of rubbing them out, or covering them.

Flaming indignation, for example, kindled by a *sham plea:* and a miserable attorney, made into a scape-goat, immolated in great ceremony. A sham plea! as if, in the whole chaos of pleas, there were a single plea, that, under the mendacity-licence, in the mouth of any one who thought fit to employ it as such, might not equally be a sham one.

The plea, too, thus singled out for infamy, what is it? It is one of the least guilty ones: a lot of gibberish, by which the intended effect, *delay*, is produced, at the expense of a few words, and the profit upon those few words. Were it a hundred times the length, such as the arch-sacrificator has drawn a hundred times over with his own sacred hands,—a hundred times as long, and equally void of truth,—it would not be called a *sham* one.

If, in any instance, there be anything worse in a plea called a sham plea, than in a plea not put upon the sham list, it is this: viz. that (the sham plea so called being capable of being interposed between the declaration and the sham plea not so called, while those of the latter stamp cannot be thus added *ad libitum*) the lesser plague, though by itself the lesser, is so much superadded to the greater one. This supposition, is it often, is it ever, verified? Inquire who list, that has curiosity and patience.

Of this grimace, what is the practical lesson? the *learn we hence*, that John Bull is to lay up

in his mind? A preachment on the text, by which any abuse at pleasure is metamorphosed into a blessing; *Corruptio optimi fit pessima.* The system perfection, as far as anything human admits perfection: the system perfect, but man frail, and some men are attornies. The rules admirable, but irregularities, violations of these rules, now and then committed: everything good ascribed to the rules, everything bad to the violations.

To keep up the delusion of the people, and maintain in their bosoms the habit of ascribing to the arbiters of their fate that love of justice, the existence of which, in such a situation, is not in human nature; it was necessary that, from time to time, the appearance of punishing iniquity should be kept up: and that here and there a delinquent, though a partner in the firm, should be sacrificed in ceremony on the altar of offended justice. But to take the victim from that class of lawyers from whom the judges themselves are taken, would stamp a mark of suspicion, at least, upon the judicial character itself. Matters are accordingly so ordered, that whatever mal-practice, recognized as such, takes place, shall be the act of the attorney; and whatever profit is to be derived from mendacity and iniquity, shall drop pure into the lap of the advocate, without danger or punishment, even in the shape of shame. The attorney is thus made to act the part of scapegoat, for the benefit of the advocate, and through him, of the judge.

What is the plain truth? That the system is rotten at the core: that the system is the cause of almost every iniquity practised, almost every

suffering sustained: that whatever is done amiss by any of the partners in the firm, is to be ascribed, not to the individual, but to the partnership itself: that, when the attorney is wicked, it is for the same reason that his censor, or any one else is wicked,—because the system makes him so: and that, as to the rules, the mischiefs of violation are as nothing, compared with the mischiefs of observance.

If there were any use in quarrelling with water for running downwards, or with sparks for flying upwards, against which of the two classes should men direct their reproaches on this score? Against the class which acts under this system; or against the class that sits above it and upholds it? Against the class which knows not what it is, to find itself within the bar of either house; or the class which divides its time between the woolsack and the bench? Against the class against which the eye of constant suspicion points itself; or against a class to whose words all ears are attention, all hands obsequious?

To estimate the true temperature, if it were worth while, of the indignation excited by a sham plea, enquire whether the judge by whom you see it manifested is not of the number of those who know their way to parliament. If yes, observe, that, to bar it out, with all its fellows, there needs nothing but an oath; that familiar, too familiar instrument, by which so many of its fellows have been barred out already. Think of this; then draw your inference.

Section III.—*Uses of the mendacity-licence to Judge and Co. without the help of writing.*

In the use made of the mendacity-licence, two distinguishable applications may be noted: one, independent of the art of writing; the other, grounded on the practice of that art, and proportioned to the abuse of it. Not but that, in the cases where, even without the help of that art, the licence might, with reference to the partnership, have had its use, that use has, from the abuse made of the art, received prodigious increase.

The use that is not absolutely and completely dependent on the practice of writing, is that which consists in the encouragement and consequent birth given to *malâ fide* litigation; litigation which, on the part of the *malâ fide* litigant, is accompanied with the consciousness of the injustice of his cause.

In litigation, the *mala fides* may have place either on the side of the plaintiff, or on the side of the defendant.

Wherever, to subject an adversary to the vexation and expense of a course of litigation, nothing more is requisite than a bare assertion, unaccompanied with any security for the truth of it; any man, at the mere expense of a lie, has it in his power to subject any other at pleasure to whatsoever vexation and expense it may be in his power to introduce into that distressful state; and that without so much as a shadow of right, as easily and safely as upon the clearest title.

The plaintiff, it is true, cannot engage the

defendant in that course, without first plunging into it himself; but the quantum of vexation and expense attached to it on one side, compared with what is attached to it on the other, is susceptible of all manner of proportion: and a man will not engage in it in the character of plaintiff, but in those cases in which, comparing the probable amount of his own vexation and expense with that of the proposed defendant, he sees in it a prospect of clear advantage to himself upon the whole: and to the possible number of these cases there is no limit.

Require of him an assertion, of one sort or another, according as the particular facts on which he grounds his demand are or are not represented by him as having fallen under his own immediate cognizance; exacting from him, at the same time, for the verity, or at least for the veracity, of such his assertions, such security as in other cases (for example in the case of an extraneous witness) is regarded as sufficient; you thus nip in the bud all *malâ fide* demands: the comparatively few excepted, in which, for the chance of the coveted profit of successful mendacity, a man will be content to subject himself to the risk.

In like manner; if, at the like small expense, any man at whose charge a burdensome service of any kind (payment of a debt for example) is demanded, has it in his power to oppose a temporary bar at any rate, with or without the probability of a perpetual bar, to the burden sought to be imposed upon him, (to the burden for example of paying such debt); the licence so given to dishonesty is (for the time for which it holds good) complete and universal: as truly

so as any other licence can be rendered so by law.

Exact, on the contrary, from the defendant's side, an assertion correspondent to that just spoken of in regard to the plaintiff's side, together with the like security for veracity; you make, in the number of *malâ fide* defences, a reduction proportionable to that made in the number of *malâ fide* demands in the other case.

All this is at the same time so perfectly incontestable and so extremely obvious, that it may be pronounced morally impossible that those judges, who, at an early period of jurisprudential history, exempted parties from the obligation imposed, in respect of veracity, upon extraneous witnesses, could have acted with any other view than that of giving the encouragement, the immense and too efficient encouragement, which has been received and acted upon by profitable injustice.

There is no practice so mischievous, to the flagitiousness of which, by habit, mankind in general, and especially those who profit by it, have not been rendered insensible. What they do not see (because, by turning aside from it, they take care not to see it) is the mischievousness of the practice: what they do see is the practice itself; that custom, which constitutes the only immediate standard of right and wrong in the eyes of the generality of mankind.

Without the use, and antecedently to the general practice, of the art of writing, an advantage might, for the purposes of injustice, be made of the mendacity-licence, on both sides of the cause.

On the plaintiff's side (for instance), where his own abode was in the neighbourhood of the

court, while the defendant's abode was at a great and inconvenient distance.

On the defendant's side, the advantage had beyond comparison a much greater, indeed an infinite, latitude. Under the licence, the utmost that a *malâ fide* plaintiff could do in the way of injustice and oppression, was to subject him, in the article of journeys and demurrage, to a proportionable burden, in the shape of vexation and expense: whereas, in the character of defendant, a man who had by injustice possessed himself of property to any amount, might, with the benefit of the mendacity-licence, and with the assistance of the judges by whom it was granted, maintain himself in possession of such property for any length of time.

Accordingly, in the practice designated by the name of *fourcher par essoign;* decision staved off by two defendants coming each day with a sham excuse in his mouth, and taking care never to appear both on the same day; we see a contrivance suited in its grossness to the grossness of the age; but by which, even without any assistance from the abuse of writing, judges had established themselves in the habit of keeping an open shop for the sale of any man's property to any other man who would pay their price for it.

Essoign was the name given to an *excuse* for not appearing. Sham excuses, known to be such, were regularly admitted by the judges. To any man who, in reading Glanville, Hingham *magna*, and Hingham *parva*, but especially the two Hinghams, has the courage to open his eyes, this will be clearly visible. In the character of joint defendants, suppose the

usurper of your land and a man of straw, whom, in the character of former proprietor, he called in to warranty. Two of these sham-excuse-makers, joining together, made an engine, called, in the technology of that day, *fork*, *(fourche,)* by the help of which a man who had got possession of your land was admitted to stave you off for any length of time. *Fourcher par essoign* was the name given to the operation. When A appeared, B kept out of the way: when B appeared, A did him the same good office. If thus much could be done by a fork with two prongs, judge what might have been done with a fork of two or three dozen, or two or three score of prongs, such as they have now in equity.

Is it possible to imagine, that, if the judges themselves had not been in the plot, they could have suffered themselves to be deceived, and justice paralyzed, by so gross an artifice?

This was when jurisprudence was raw and young: so that, when once the parties were met together in the presence of the judge, the cause was at an end, pretences not having been invented for delaying any longer to do justice.

When, by one such artifice or another, generation after generation had been squeezed and kept in torture, so that the grievance was grown past all bearing, the legislature would now and then interpose, and say that such things should be done no longer:* whereupon things went on nearly as they did before; the worst that could happen to the contriver of iniquity, being the trouble of putting her into new clothes.

* Vide supra, the case of manufactured outlawries.

Drive nature off (says the poet) with a pitch-fork, she will run back upon you. Justice, under the management of these judges, was not thus obstinate. It required an Act of Parliament to say that there should be no more such *fourching*.*

* In reading of the remedies applied from time to time by Parliament, in those early days, to the abuses of judicature, remedies never curing, oftentimes aggravating, the disease; it is seldom possible, at this time of day, to discern, or even to conjecture, how far the men of law acted in the character of open oppugners, how far in that of authors or supporters, of the so-called remedy. In the application of it, iniquity under the name of jurisprudence having been swelled into a science, it was impossible that, among the efficient members of the government, the non-lawyers should have been able to stir a step, to pen a clause, without calling in, in the person of a colleague or subordinate, the assistance of the lawyers. The lawyer (according as the understanding of the non-lawyers he had to deal with admitted, and his own dexterity enabled him) would of course do what depended upon him towards diminishing the efficacy of the medicine, or converting it into a poison. In this state of the human understanding on both sides, it is evident that, in the long run, taking the whole of the course together, it was impossible for the non-lawyer, the real friend and patron of the people in the character of suitors, to avoid being jockeyed by their sham friend and implacable enemy, the lawyer.

In one case indeed, and (as already mentioned) but one, a sincere co-operating hand may have been lent, even by the lawyer, to the correction of abuse: and that is, where, but for correction, the abuse threatened to swell to such a pitch as to produce destruction;—the dissolution of society, or the destruction of the lawyers themselves: the dissolution of society altogether, by general denial of justice originating in the rapacity of the lawyers, supposing their wickedness not discovered; or the destruction of the lawyers themselves, supposing it seen through and discovered.

In the course of Cook's intercourse with the friendly savages, such were the charms of the Circes he found among them, and such the force of attraction exerted by them on the hearts of his crew, that, by the general eagerness to collect

To understand the structure of a watch, each particular wheel must be separately viewed, and its office separately considered. To obtain a clear and satisfactory conception of the system of technical procedure, it was accordingly necessary that each separate device should be sepa-

the precious metal that constituted the price of their favours, the very constitution of the ship was put in jeopardy.

It is among the evils of the technical system, among the misfortunes attending the relation between the law partnership on the one part, and the people (in the character of clients and suitors) on the other, that, to produce a petty profit to the judge, vast loss and still greater mischief in other shapes must on each individual occasion be done to the suitors. The fees squeezed by lawyers out of the purses of insolvent debtors and their sinking creditors, must every now and then have been like the nails drawn by Cook's sailors out of the sides of a ship, which a few more of such draughts would have sunk.

Treated like what it really has been, has been all over the civilized world, a perpetual conspiracy of lawyers against the people, the history of jurisprudence might, besides the amusement, be made no less instructive than the history of other conspiracies. For the jurisprudence of Rome, something has already been done in this way by Pilati. One of these days, should the popular eloquence and grammatical talent of Blackstone be ever united in the same pen with the sagacity and probity of a father Paul, this entertainment may be given to the world. Deserting the beaten track of conscious hypocrisy or blind servility, the adventurer in this department of literature may here strike out a new path to fame.

In pointing out the artifices of priestcraft, what multitudes have already exercised themselves. The artifices of lawyercraft have been not less numerous, not less successful, not less wicked, yet scarce has any hand yet lifted up so much as a corner of the veil that covers them!

Near 300 years has religion had her Luther. No Luther of jurisprudence is yet come; no penetrating eye and dauntless heart have as yet searched into the cells and conclave of jurisprudence.

rately brought to view, and the advantage, to the production of which it was of itself and by itself competent, separately displayed.

Between the mendacity-licence, and the abuse of writing in the shape of ready-written pleading, the combination was most intimate. Closer than mechanical combination, it required a sort of chemical process to dissolve it, and present the elements in a separate state.

Thus much as to what could be done, and has been done, by the mendacity-licence alone. The great improvement given to the virtue of this element by the addition of the other, will be seen in the following chapter.

CHAPTER XVI.

ELEVENTH DEVICE—READY-WRITTEN PLEADINGS.

Section I.—*Idea of a system of pleading adapted to the ends of justice.*

Should justice ever become an object, a system of pleading might be devised, which, creating no delay, and giving no mendacity-licence, should at the same time give real information to the parties, and bind in chains the despotism of the judge.

He who has a right to any subject of property,—immoveable or moveable, sum of money to be paid him by some one else, service of any other sort to be rendered by a determinate individual,—is he in whose favour some one in the list of *events* or *states of things* having, with reference to that right, the effect of *collative* (or say *investitive*) events or states of things, has taken place: no article in the list of those to which, with reference to that same right, the law has given the effect of *ablative* (or say *divestitive*) events or states of things, having subsequently taken place in his case.

The nature of the subject of property, or of the right, so demanded, (ideas never having been clear, language on this head is not determinate), determines the nature of the service which is the immediate subject of demand: the service which the plaintiff prays may be rendered to him by the judge.

General description of the proper contents for the *instrument of demand:* correspondent to the declaration at common law, the bill in equity.

1. Specification of the service demanded at the hands of the judge; including, of course, where property is in question, a specification of the subject-matter of the property.

2. Indication of some one collative event, (or more, if by accident there should be more than one), on which the plaintiff grounds his title to that service.*

Reference to the article or articles (say for shortness the article) of the body of law, on which the demand is grounded: viz. in which the right or title to a service of the sort in question is given to him in whose favour a collative event of the description in question has taken place.

Assertion of the matter of law.

Affirmation (on oath, or what is equivalent) of his belief of the happening of an individual event, coming under the description of the sort

* Where punishment or satisfaction at the charge of the defendant is the service demanded, the list of collative events will be the list of *criminative circumstances* attached to the definition of the offence; ablative, or what are equivalent to ablative events, will be the list of *justificative*, and (if any) that of *exemptive*, circumstances.

of collative event above indicated. *Assertion of the matter of fact.*

3. Reference to the article of law, by which, in relation to the same service, the quality of ablative events is given to a list of events therein contained.

Affirmation, that no individual event, coming under the description of any one of the events in that list, has, to his belief, taken place in this instance.

This (with the occasional addition of so much incidental matter as we have seen) is what comes out of course, at the judicial meeting spoken of under the head of the *exclusion put upon the parties*. Such is the stock of information required, of course, by the judge, to warrant him in rendering the service prayed for: such is the information which will of course be given by the plaintiff himself, by every plaintiff, in so far as his intellectual qualifications serve him for the purpose: such is the information which, in case of any deficiency in these qualifications, it will belong to his professional assistant, if any such be present, to draw from him, or, if not, to the judge.

According to the importance of the cause, in itself, or in the estimation of either of the parties, (he paying, provisionally at least, the extra charges, should the importance of it be deemed to have no other ground than the particular state of his own particular affections), *minutes* will therefore be taken, or not taken, of this part (as of other parts, if any) of the evidence: but at any rate a printed form, with proper blanks, will be filled up and signed by the plaintiff, to

serve, *pro tanto*, the various purposes, private and public, of a record.

Lawyer.—Mighty well; but all this, does it not suppose two things? A correspondent mass of what you call substantive law, on which this course of procedure is to be grounded, and to which it seeks to give execution and effect; and that mass of substantive law in the state, not of common, but of statute law?

Non-Lawyer.—Doubtless it does.

Lawyer.—And so, according to you, there can be no such thing as *good pleading*, without a complete body of laws in the form of statute law: that is, without the extirpation of the good old common law, the pride of ages, the Englishman's best treasure!

Non-Lawyer.—Say rather, if you please, the English lawyer's: but, as to that point, be pleased, if you have any curiosity, to restrain it till you come to the device spoken of under the head of *magnification of jurisprudence*.

Lawyer.—And so you look upon it as possible, do you, sir, to compose a complete body of statute law, extending over all causes, as well as over all persons?

Non-Lawyer.—Indeed do I, sir; and, for these fifty years or more, the more I have thought of the task, the greater does the facility of it appear to me. Not a cause is ever decided, or so much as begun, but all this, though never done, is supposed to be done. Which, according to you, is productive of most labour and most difficulties? To form an article of real law once for all; or, by an endless series of suppositions never realized, to make it over and over again in imagination,—to make so many sham substi-

tutes to it? If the difficulty be insuperable to a select draughtsman, appointed by the legislature, subject to correction from all mankind, under the authority of his employers,—one who may have been occupying a whole life in thinking of it; how comes it to be so easy for every attorney, special pleader, or attorney's or special pleader's clerk, to be continually imagining such laws as fast as called for?

Among the objects which it may be necessary for the judge to have under review, to enable him to compass the ends of justice, may be noted three; the description of which it will in all cases be useful, in some absolutely necessary, to have in a fixed form, given to them by means of the act of writing: viz. the demands on both sides; the titles, or grounds of demand, on both sides; and the evidence.

1. On the part of the plaintiff, a description of the demand in this permanent form is in general necessary for the use of the judge; to the end that, in the event of its being acceded to by him, the decision, the judgment, pronounced by him, and the execution of that judgment, may be sure to be correspondent to it.

2. The same reason applies to any demand that may happen, in the course of the cause, to be brought forward on the part of the defendant: since, in case of any such counter-demand, he takes upon himself, *pro tanto*, and in respect of it, the character of plaintiff.*

* Thus in English procedure, in the case of *distress*, on one hand, and *avowry* on the other, distrainer and avower are recognized as acting, each of them, in the character of plaintiff. See Comyn's Abr. art. *Pleader*.

3. On the part of the plaintiff, again, a designation of the title, or ground of demand, in this same permanent form, if not at all times necessary to the judge, would be more or less useful to him; to enable him (in so far as reflection for any considerable length of time may be necessary) to reflect upon it, without danger of misrecollection, at his leisure.

This, in the case of him who acts as judge in the first instance. But, in case of dissatisfaction on either side, and appeal accordingly to another court, (especially if the propriety of the conduct of the judge below is to be among the subjects of enquiry), these fixed designations will be little less than necessary. The demand actually acceded to by the judge, is it of the number of those that, according to law, are, if supported by appropriate titles, capable of being acceded to? The title on which the accession given to the demand was grounded, is it of the number of those to which the law has given the faculty of serving as a support to that sort of demand?—To enable the judge above to give a surely-grounded answer to these several questions, it seems little less than necessary that of each of them there should be a description, reduced to that permanent form which excludes all dispute about the words, and enables all persons concerned to refresh, at any time, whatsoever conceptions they may respectively have formed of it.

4. That on both sides of the cause the evidence should be invested with the same permanent character, will always be at least conducive, if not absolutely necessary, to the ends of jus-

tice; for two distinguishable purposes: 1. That, in case of mendacity, the alleged matter of delinquency, the subject or ground of prosecution, and eventually of punishment, may be ascertained beyond dispute: 2. That eventually, in case of dissatisfaction, as before, it may be seen, upon occasion, how far the decision professedly grounded on the evidence, was really warranted by it.

Such are some of the principal of the purposes with reference to which the exercise of the art of writing promises to be in all cases useful, in some cases little (if at all) less than necessary to justice, in the course and for the purpose of the suit.

But, howsoever necessary it may be at some stage or other of the cause, its employment to the exclusion of the meeting *coram judice*, where practicable, at the outset of the cause, will not be found necessary, or so much as conducive, to justice.

With reference to both points, viz. the *demand*, (*i. e.* the particular nature and description of the *service* alleged to be due), and the *title*, (*i. e.* the ground of the demand in point of law and fact, as above explained*), misconceptions and consequent mis-statements on the part of the plaintiff (unblameable as well as blameable) are apt very frequently to arise.

In so far as the true nature and propriety of his demand depends upon his own personal cognizance of the facts in question, such incorrectnesses might, in case of due attention, or at least in case of consummate and perfect intelligence,

* Supra, chap. 6. Exclusion of parties.

on his part, be avoided. But, in so far as it depends upon the personal cognizance, and thence on the testimony, of an extraneous witness, the most consummate wisdom on the part of the suitor would not suffice to render the exclusion of them in any degree secure. Still less would be the chance of their being avoided, where the source of the necessary evidence is the reluctant bosom of the adverse party in the cause.

Delivered in the face of the adverse party, as well as in the presence of the judge, a misstatement of that sort may receive its correction the next instant: mis-statements in any number may receive their correction at the same minute: delay, vexation, and expense, avoided altogether: nothing of which a dishonest adversary can take advantage, so as to render the fulfilment of a plaintiff's demand either distant or precarious.

Let the discussion be carried on in writing, even suppose the defendant honest, a single mis-statement of this sort cannot receive its correction till the length of time allotted for the defendant to put in his plea is run out; a length to which there are no certain limits. But technical law (especially English law), if it does not find a man dishonest, is almost sure to make him so, if he has anything to gain by dishonesty: under the tuition of his professional advisers, he accordingly lies by, and suffers the mis-statement to pass uncorrected: consequence to the unfortunate author, or rather utterer, of the mistake, loss of the suit; of that individual suit, at any rate: liberty or not, as it may happen, to bring on and go through with another,

if so it be that he feels himself rich and bold enough.

What is necessary to justice is, that communications of this sort should respectively be made: what is not necessary is, that they should be committed to writing before they are made.

Section II.—*Pleadings in use, their modifications.*

Pleadings, (understand ready-written, delivered in the form of writing in the first instance), is the term employed to designate any masses of discourse delivered in that form, and purporting to contain allegations made by the parties on the occasion and in the course of the cause.

In English technical procedure, they are distinguished, according to the courts under the judicature of which they are delivered, into common law pleadings, and equity pleadings.

In each court again they are distinguishable into general pleadings and special pleadings.

I. At common law. In a cause of the class called civil causes, (*i. e.* not considered as criminal causes), the first instrument is delivered on the plaintiff's side, and is called a declaration.

In this instrument, the nature of the *demand* (*i. e.* of the service demanded at the hands of the judge) is supposed to be stated; and, as supposed or pretended, (with what truth will presently be seen), with a degree of certainty sufficient for the information of the defendant and the judge: and moreover, the title, on which the demand is founded, is or is not supposed to be stated with like certainty: supposed or not

supposed to be thus stated, in here and there an instance it may perhaps be found to be so.*

In return for this, comes from the defendant's side, if any thing, an instrument called the *plea*. Laying aside *demurrer*, by which the demand is disputed so far only as concerns the ground it rests on in point of law; and setting aside also *pleas in abatement*, commonly having no other object than mere delay, and never having anything to do with the demand; the other sort of pleas, pleas in bar to the action, are either general or special. A plea is called *general*, when the effect given to it is the putting an end to the line of altercation† in this mode: it states a point, which it calls upon the plaintiff to join in submitting to the decision of a jury: and admits not in general of any instrument on the part of the plaintiff, other than the signification of his consent to do so. To do this, is to bring on what is called the general issue: to plead a plea having this effect is called, for shortness, pleading the general issue.‡

* Examples. Debt on contract, bond, demand, recognizance, or judgment.

† Comyn, Pleader, p. 387.

‡ General issues given by Blackstone, but given only as examples, are,—not guilty, non assumpsit, nil debet, non est factum, nul tort (in Gilbert on Evidence, *nul tiel tort*). His account would have been more instructive, had he completed the list of these general pleas, stating all along by their side the species of action to which they are respectively applicable. In Gilbert's book on evidence, three other pleas present themselves in the character of candidates at least for admission into the list: viz. 1. Non assumpsit intra sex annos, 2. Solvit ad diem, 3. Nullum fecit vastum: to which may perhaps be added nul disseisin, put in opposition to nul tiel tort.—Not guilty, Gilbert applies to three civil suits, viz. trespass, trover, and ejectment: besides criminal suits.

What, in all cases, it purports and is supposed to do, is, to express in general terms a denial of the justice of the plaintiff's claim; at any rate in respect of fact,—in respect of the whole, or some necessary part, of the mass of facts on which his demand is grounded; and eventually also in respect of law. What in many instances it really does, (though without professing to do, and perhaps without being generally considered as doing), is the giving him a right, at the trial, to oppose the demand by the proof of counterfacts: counterfacts, not only such as tend in disproof of the facts relied on by the plaintiff, but other facts of such a nature that the law has given to them the effect of establishing in the behalf of the defendant a counter-title, having the effect of destroying the force of the plaintiff's title, even should the facts which constitute it be established.

A special plea,—though in one respect true or false as it happens, meant or not meant to be true as it happens,—is in another respect constantly true: and, so far as it is true, the information conveyed by it is material and useful.

The matter that might be true or false, as likewise meant to be true or meant to be false, as it happened, was the matter of fact asserted by the plea.

A general plea is in every instance characterizable by a few words, which serve for the denomination of it. Pleas there are in abundance, which, though *special*, are characterizable still more strictly, viz. each of them by a single word: some of them much more frequent in their application, and in that respect more general, than several of those general ones. The only distinction therefore seems to be, the effect given or not given to the two sorts of pleas respectively, as above.

Of the information conveyed by it, that which was constantly true, was, in every case, neither more nor less than this: viz. that the matter of fact therein asserted was the matter of fact which the party, if he attempted to prove anything, intended to attempt to prove. It might happen, that, knowing it to be false and incapable of being proved, he did not, on delivering it, intend to attempt proving that or any thing else: delay being the only purpose of his delivering it. But, if he intended to attempt proving anything, that and nothing else is what he (that is his lawyer) must have intended to attempt to prove. Why? Because, by the established, and in this instance proper, practice, that and that alone is what at the trial he would be allowed to prove.

As to the general plea, that which brings on the general issue, it conveys no information at all: it conveys in no instance any more information of the ground or title on which the defendant means to rest his defence, than in most instances the declaration does of the ground or title on which the plaintiff means to rest his demand.

Thus stands the matter in regard to written pleadings. General pleading conveys no information, but there is an end to it: if any information is conveyed by pleading, it is by special pleading, but there is no end to it.

Compare this with the result of the meeting of the parties in the presence of the judge. Whatever information can be requisite, either to the parties or to the judge, may be obtained by it, and obtained at once.

II. In equity procedure, the first instrument delivered, and which of course is delivered by

the plaintiff, is called the bill. It corresponds to the declaration at common law.

What the declaration pretends, or is pretended, to do, the bill really does: it states both demand and title. The declaration conveys its no-instruction in a discourse, the length of which, though too great by the whole amount, is, in comparison of that of a bill, for the most part moderate. To the length of a bill there are no bounds.

What it calls for, is, an answer. What it produces, (not to speak of demurrers, as above) is most frequently an answer, not very unfrequently a plea: the answer, upon oath; the plea, not upon oath.

The plea is, in every instance, of the nature of the special plea above described in regard to pleadings at common law.

In equity, as at common law, pleadings used at one time to be drawn into length by altercation. In both instances, but more particularly in equity, the length of the chain has of late years been more or less contracted, by the opposing pressure of public indignation.

As to the range of the mendacity-licence under the two systems, it is already understood. In common law pleadings, it has no exception: in equity pleadings, the instrument called the answer constitutes the only one.

Section III.—*Uses of this device, in conjunction with its auxiliary devices, to Judge and Co.*

In practice, the profit produced to the partnership by the system of pleading, conducted as we see it, is a very complex mass: including

in its composition the accumulated benefits produced by the four principal articles in the already enumerated list: 1. Blind fixation of times for operations; 2. Long intervals between sitting and sitting; 3. Principle of nullification; 4. Mendacity-licence: without reckoning the master-device, exclusion of parties from the judge's presence, and other devices, the benefit of which, how considerable soever in itself, is, in the character of an auxiliary to the device here in question, less considerable, or less conspicuous.

That the nature and utility of so rich a compound may be the more clearly understood, let us endeavour to bring to light the separate virtue of each element taken by itself: what each has contributed to the common ends.

Taking this element for the basis, let us first observe its virtues when pure; and then, conceiving the several others as if necessarily added one after another (not that in fact they were so), observe what additions it stands indebted for to the separate virtues of the several other elements so intimately and happily combined with it.

1. Had it stood by itself, the sources of the mischiefs produced by it to suitors, and thence of the advantages to the man of law, would have been confined to these, viz. 1. employment of writing in cases where it was improper, as being either useless, or preponderantly expensive: 2. accumulation of surplusage.

2. From the blind fixation of times for judicial operations; from this device alone, added to that of unnecessary and excessive scribbling, might have been derived a further advantage,

besides the advantages already spoken of as drawn from this same device. The suit being brought to a premature and fruitless end by the breach of this or that blind appointment, the use of the pleadings delivered in the course of that suit might have been deemed to have terminated along with it: consequence, if another suit, then a fresh series of pleadings: useful or useless, with or without surplusage, quantity of writing doubled.

3. Another addition is made to the virtues of the compound, by the application of the principle of nullification. In regard to instruments, the principle of nullification renders much the same sort of service, as is rendered by the blind fixation of times, in regard to operations. In both instances, the object was to make a pretence for causing to be done over again, business that had been done already. For this profitable reiteration, the non-performance of this or that operation at a given time formed one pretence, the supposed incongruity of this or that instrument formed another pretence.

4. Let us next observe the additional advantage derived from the excessive length of interval between sitting and sitting. The preceding device furnishing *means*, this furnishes *motives*.

Suppose the sittings from day to day, and offices as well as courts open alike at all times, the operation omitted one day might be performed the next: the instrument pronounced incompetent one day, might be amended or replaced the next.

In this mode, the interest of Judge and Co. would indeed have been served well enough; but, both parties being materially vexed and

pillaged, neither of them very materially served, Judge and Co. would have found them both complaining, neither joining with them to deliver the other into their hands. Means for plaguing the adversary would not have been wanting; but motives would have been inadequate.

Interpose the length of interval, institute terms and circuits, manufacture inevitable delay,—in proportion to the length of it, the account of encouragement swells: the value of the delay rises in the joint ratio of the weight of the burthen from which a man is respited (or perhaps liberated), and the length of the respite: to the dishonest debtor, to the dishonest usurper of another man's right, to the malefactor in every stage of guilt, the commodity offered becomes more and more valuable, in proportion to the magnitude of the debt due, the value of the right usurped, and (in so far as any proportion between delinquency and punishment is maintained) the mischievousness of the crime.

Without this device, the partnership would have stood alone, with the whole world against them: with all their power, they might have found an united people too many for them. Availing themselves of this device, and availing themselves of it to the extent we see and feel, they made a division among their adversaries, they made a coalition with one half of them: in every dishonest debtor, in every usurper of another's right, in every malefactor, in every evil doer, they behold an eager customer, a purchaser, an accomplice.

5. The mendacity-licence may close, as it

served to crown, the list. It contributed to the common end in two perfectly distinct ways:—

1. To the dishonest defendant it was of use, by affording an additional source of delay. The fund of true allegation has narrow limits: the fund of false allegation is inextinguishable. Let the length of time gained by an allegation on the defendant's side be ever so great, say six months; without the benefit of the mendacity-licence, the advantage thus obtainable would be but inconsiderable. In multitudes of the causes that now take place, the demand is of a debt, and the debt justly due. But (the debt being by the supposition due), on the part of the defendant, the case admits not of any allegation that shall be at the same time pertinent and true. Here is delay enough, if it could find customers, but nobody is in a condition to buy it: the oath, with its eventual punishment, the oath and the scrutiny, form a bar, which (a few rash adventurers excepted) excludes all *malâ fide* customers. Remove the bar, and you have as many customers, as you can find or make dishonest debtors.

From the defendant's side, let us turn to the plaintiff's. One of two classes of dishonest plaintiffs owes its existence to this device.

There stands one man, who, having a right, (say to a sum of money due), and being of course conscious of that right, is led by anger, or some project of advantage, to convert that right into an instrument of oppression. Men of this description have no need of the mendacity-licence. The vexation and expense produced by the other devices furnish him with the means.

But men thus circumstanced are in compa-

rison but few. Establish the mendacity-licence, remove the bar set up by the obligation to speak truth, their number is without bounds.

The demon, by I forget what father of the church, was styled the ape of the Almighty. Conceive him in the character of the unrighteous judge, (that is, under the fee-gathering and technical system, of any judge), with the mendacity-licence in one hand, and the other open to receive the fees, addressing himself to rogues of all classes by two different invitations:—

"*Come unto me, all ye that are heavy laden:*" down with your money, out with your lies, and I will give you rest,—rest, peradventure for ever: rest for many and many a day, at any rate. Such is his address to dishonest debtors.

Come unto me, all ye who, seeing adversaries in your way, see them unable to defend themselves: come ye unto me, ye have no need of right, so ye bring lies and money: your money is my reward, your lies are my pretence. I will deliver your adversaries into your hand: numbering (adds the commentator) among your adversaries, all whose enemy you are, whether they are or are not your enemies. Such is his address to all such who may be engaged to tread in the paths of iniquity and oppression in the character of plaintiffs; plaintiffs, without being creditors.

Section IV.—*Pretended use of this device,—certainty.*

In the regular form of technical procedure, written pleadings are constantly required.

We have seen the information, which, under natural procedure, is given; given by the judicial meeting, given of course, and without professing it. Of this body of information, a small part only can by technical procedure be so much as professed to be given; and whatsoever professions of this kind are made, are false.

With regard to the nature of the service demanded, and the ground of the demand, it would be too much to say that no true information is ever given in any of the instruments comprised under the name of pleadings. Falsehood thus universal would not have been necessary, nor so much as in a superior degree subservient, to the purpose. What was sufficient was, that, along with the matter which, had it stood alone, would as far as it went have been instructive, so large a dose of falsehood was everywhere mixed, as was sufficient to destroy all confidence, all capacity of instruction, in such part of the mass as was true.

Certain Jews, travelling towards a sea-port, met with a Christian, and asked him the way to it. He pointed along the shore, to a path which he knew would soon be covered by the tide: they struck into it, and were drowned. To the christianity of lord Coke, by whom the stratagem is reported, it affords matter of exultation. "Thus perished," says he, "these infidel Jews."

This stratagem may be received, if not as the model, at any rate as an emblem, of the policy pursued in the adjustment of the principles of pleading. Misconception is worse than no conception: false information is worse than none. Had the communicative Christian held his peace, the infidels might have escaped. When, from a source from which he had expected information, a man finds none, the effect of his disappointment is only to put him upon the look out for another: false information, when acted upon, cuts a man off from true, and makes error sure.

The first object, therefore, was to produce misconception; misconception, and certain error in consequence. Unfortunately, the advantage derivable from this policy has its bounds. Information recognized to be false, becomes tantamount to ruin. The first gang of the infidels were drowned; but had a second been within sight, the stratagem would not have succeeded upon the second.

In pleadings, *certainty* is a qualification exacted with the utmost rigour. Certainty, a non-lawyer would say to himself, includes *truth*. No such thing. By *certainty*, though they have never said as much, they mean *precision: precision*, and nothing more. Precision is a quality which it is just as easy to give to falsehood as to truth: accordingly, so it be but precise, what is notoriously false is just as good as if it were true.

Precision and assuredness being two qualities which, consistently with truth, it is scarcely in the power of the plaintiff to give to the allegation by which, in the first instance, he states

the nature and ground of his application to the judge; the rational and obvious course is, to permit it in the first instance to be worded with that degree of generality and indecision, which cannot but accompany the conception entertained of it by the plaintiff in the interior of his mind. *

* At the hands of another individual, and, in his default, at the hands of the judge, a man may have a right to a service, to a service of any degree of importance,—and yet in the first instance, antecedently to an explanation, (to an explanation which cannot take place without a meeting of the parties in the presence of the judge), not a single circumstance may be capable of being averred with precision, consistently with truth:—not the quality and quantity of the service, the time at which it became due, the place at which it should have been rendered, the title on which the right to it is grounded, (including the numerous list of collative events, one or other of which must be affirmed, and of ablative events, all of which must be negatived, with all their several circumstances of time, place, and individual things and persons concerned): no, nor so much as, among two or more persons, the individual by whom, or at the charge of whom, the service (payment of money, suppose) should have been rendered. All depends upon information, which, by the assistance of the judge, may or may not be obtainable, but which, without that assistance, (that is to say, at the commencement of the suit), is plainly unobtainable.

In any of these cases, (cases occurring in every day's practice), what can be more barbarous than, on pain of loss of cause, under a penalty severe to any amount, unjust in every case, thus to insist upon precision, when, consistently with truth, precision is impossible?

Suppose the parties, one plaintiff, and one defendant, met together in the presence of the judge, everything of this sort will either be cleared up, cleared up at once, or put in the best train for being so.

Suppose, besides the plaintiff, two individuals, of whom it is as yet uncertain on which the burthen ought to rest: let both of them be present at the meeting, this point, it will fre-

This course was too simple for the founders of English jurisprudence. Certainty (meaning, as before, precision), certainty, it had occurred to them, was a very desirable property; as on all other occasions, so, in particular, on the occasion of all allegations and communications made for the purposes of justice. Certainty therefore, nothing short of certainty, was what on this occasion they were determined to have. But the allegation you insist upon cannot at the same time be thus certain, and be true. Well then, if that be the case, we won't insist upon its being true. In our law, in our morality, diffidence is unpardonable: as to falsehood, far from shocking us, it is on all occasions our delight. Fear nothing, plaintiff; falsehood

quently happen, may be cleared up on the spot, and in consequence one of them be left free. He has had to make this one, perhaps unpleasant, visit; at this price he is free. What is this compared to an English equity, or even common law suit? What a flea-bite is to a fracture.

Under the technical system, the right and the wrong defendant being as yet absolutely undistinguishable, the plaintiff finds himself compelled to fix upon one of them in the dark. At the end of the suit, when the evidence comes to be heard, the one thus fixed upon turns out to be the wrong one. Here then, instead of the money (supposing it money) justly due to him, the result is, the obligation of paying three, four, or five, score pounds more than a great majority of the people would be respectively able to pay, were they to leave themselves houseless, naked, and pennyless. In this condition the plaintiff has to seek his remedy against another defendant, who, if for this time he happens to be the right one, may have gone out of reach, or become insolvent; or the evidence by which, if taken in time, the obligation might have been proved upon him, may be unobtainable. But suppose the plaintiff at this time successful: will he obtain re-imbursement of the costs produced by his innocent and inevitable mistake? Not he indeed.

shall be no prejudice to you, so it be advanced with confidence.

To men who could decide thus, all idea of utility must have been altogether out of sight: adherence to practice, adherence, and that of the blindest kind, was taken for the only rule. For every purpose of information, false information must in this case have been worse than none: the effect of it, if it had any, could only be to mislead. Yet this falsehood they were determined not only to receive from the plaintiff, but to force him to give.

Of the information required to be given, and given accordingly, in pleadings, what cannot be said is, that it is in every instance false: what may be said is, that it is in so many instances allowed to be false, that, upon the whole, it is of at least as little use as if it were always so.

Not content with requiring, at the hands of a plaintiff, allegations which, supposing it in his power to render them correct, might afford to the defendant information capable of being of service to him for the guidance of his defence,—might, in a word, (in so far as it were true and correct), be useful and instructive;—they have, on various occasions, insisted on a variety of allegations, partly false, partly irrelevant, partly absurd and unmeaning, and which, if true, could not be of any use. Why insist upon them? For what reason? Because the insertion of them had been customary. Violation of truth is a thing not worth avoiding: departure from custom, from precedent, would be intolerable.

If the judicial power had seconded the views of the legislative, the state of legislation on this

ground would not have been thus deplorable. A time there was, in the reign of one of the Edwards, when the legislature, by an act which is still in force, conveyed to the respective courts (or rather to the chancellor) a subordinate power of legislation in this behalf. But power, legal power, is one thing; knowledge, intelligence, which is intellectual power, (not to speak of inclination), is a very different thing. What the legislator did convey to them, was legal power: what he knew not how to convey to them, was inclination: what he could not convey to them, was adequate intelligence: he had it not to give; they, if he had, were not in a condition to receive it. Had their stock of intelligence been ever so abundant, what should have been their inducement to employ it? The labour would have been their own; the benefit would have been reaped by their fellow-subjects: a part by suitors; the other part, and the most valuable, (because reaped without expense), by those whose good fortune it would be, by means of the information thus afforded them, to escape the misfortune of becoming suitors. Instead of pursuing the course prescribed to them, they took a course which was at once more commodious and more profitable. They left it to the plaintiff to word his own demand; and when worded by him, and worded at his peril, he learnt by the gain or loss of his cause, whether the wording of it was or was not to their taste. For themselves, they never thought anything about the matter: it was for him to declare, and at the peril of loss, and perhaps ruin, what those conceptions were, which, so far from having been declared and

made known, had never been so much as formed.

The same proposition was capable of being expressed in a multitude of different ways, and perhaps with equal propriety in any one of the whole number. When the suitor came to give words to his claim, what was the enquiry of the judge? Not whether the wording employed by the plaintiff was capable of answering the purpose, but whether they were the exact words which he himself (the judge) would have employed. If there was a hair's breadth difference, so much the worse for the plaintiff: his cause was gone.

Was there any possible means of safety for an unfortunate, or perhaps obnoxious, suitor? Oftentimes it has appeared to me that there was none. The claim was alike capable of being preferred in either of two ways: the plaintiff pitched upon the first, the judge upon the second: had the plaintiff employed the second, the judge would have stamped his exclusive approbation upon the first.

To the non-professional reader, a few specimens of what lawyers call certainty may be neither useless nor unacceptable.

A specific thing, (if you want to get it of a man, or he wants to get it of you), belongs to the class of moveables, or to the class of immoveables.

The first instrument by which any information is pretended to be conveyed, is the *declaration:* the first instrument delivered in the plaintiff's name. Under natural procedure, at the first judicial meeting, (be it a moveable thing, or a thing immoveable, that is demanded), what the

thing is that is demanded, and on what ground it is demanded, would (amongst so many other articles of information that might eventually be of use) come out of course, with every degree of certainty that was at once requisite and practicable.

How is it under technical procedure? If it is a horse your adversary wants of you, the action is called an action of *trover*, and the declaration a declaration in *trover*. To state, and with truth, what it was that was wanted of you, viz. that it was a horse, could not well be avoided: but as to the ground of the demand, the statement under this head must always indeed be precise, but (except in a case which scarce ever happens) it must as certainly be false. It must be not only false, but impertinent. Had it been necessary for him to say how the animal became his, this, in case of his demand's being unjust, might have been of use to you. This, accordingly, is what he is excused from saying: what he is obliged to say is, how it came to be *yours:* that is, in your possession for the time: (though, if his demand be well-grounded, you have no permanent right to it). You *found* the horse: this is what he would always be forced to say, even were he to know that you bought it, or that he lent it to you.

Where a thing immoveable is the subject of the demand, it is still worse. Not only the statement of the title is never given, but, though a description of the subject of the demand is always given, it is never true. If it is one acre that a man wants of you, his lawyer mentions twenty acres or two hundred; any number that he pleases. As to the title, the place of instruction is here again supplied by falsehood and

impertinencies. A foolish story is told about somebody called Doe, that was turned out by somebody called Roe; an imaginary man by another, as anybody may see in Blackstone.

Thereupon, to work the lawyers go, upon the ground of this superficially silly, fundamentally wicked, story: justice the pretence, pillage the object and result, mendacity the means.

Are you really at a loss to know what it is the man wants of you? The information pretended to be given by your adversary being all a sham; if you want any real information, it is for you, the defendant, to apply for it. Your lawyer makes a *motion* for it: so much more business: a cause within a cause. Here we see the use of the false information: to make a man pay so much the more if he would have true.

Where *ignorance* or *doubt* is the real state of the mind, assertion of *knowledge* is mendacity. Who is there that does not see this? What lawyer can avoid seeing it? Every degree of *persuasion*, short of that which is expressed by the word *knowledge*, is proscribed in pleading: it would be want of certainty. Mendacity, therefore, on the part of every suitor whose degree of persuasion falls short of the highest, is called for and compelled. Moral vice is made into a legal duty: and a duty for the breach of which there is no pardon.

Wherever a man speaks in the disjunctive, a sort of doubt is confessed: which is a sort of ignorance. Accordingly, the disjunctive conjunction *or* is proscribed in pleading. The word *and* is exacted instead of it. Why? Because *and* is always *certain*, though it be always false.

Half a dozen, or thereabouts, is the number of different *titles*, upon one or other of which, or perhaps sometimes two or more at a time, a demand of money due is most frequently apt to be grounded: work and labour done, goods sold and delivered, money lent without security, money lent on note of hand, and so forth. You sold the defendant a horse for 20*l*. and he gave you his note of hand for it. It is matter of doubt to you, which fact you may be best able to prove: the sale of the horse, or his signature of the note. At the suggestion of truth and common sense, would you say that the man owes you 20*l*. viz. either upon the score of the sale, or upon the score of the note? You would lose your money. What they make you do is, to demand two debts of 20*l*. each: one due upon the sale, the other upon the note.

In the case just put, these two demands might serve. But the practice is, where one debt is due, to claim half a dozen or more, as above; each to the same amount; each with a separate *count* (that is the word) to claim it. The more counts, the more writing: the more writing, the more fees.

Whatever be the demand, in general a declaration contains divers counts: stories, of which one may perhaps be true, most commonly all but one false.

Thereupon, at the trial, the jury being agreed, and ready to give their verdict for you the plaintiff,—doubts upon doubts, on which of all these counts to take it: the jury, who know nothing about counts, waiting in gaping admiration to know what decision, which is not theirs, shall be given to the world for theirs. Take

your verdict on a wrong count, you lose it: saving always the privilege of taking your chance (at the twelvemonth's end) for another such verdict, which may again be on a wrong count: and so *toties quoties*.

Under natural procedure, at the first judicial meeting,—in a court of conscience for example, (for parliament, whensoever it shall be its pleasure, knows where *conscience* is to be found),—all this would have been settled at once, and upon the best evidence.

Such being the case with the most common sorts of demand that could be found,—suits individually counted, in perhaps nineteen out of twenty,—to pursue the enquiry through the list of the less common ones, would be as useless as it would be endless. Such the information destined for the suitors: such the pretended, and not intended, use to the suitors; such the real and intended use, to the judges and their partners.

All this lies open to every eye that can endure to look upon it: all this, though in Blackstone's colouring, is pourtrayed even by Blackstone. Such is the ground on which he build sthe claim of his firm to the veneration and gratitude of mankind!

All this for ever before our eyes, pleadings coming in question, judges talk of certainty. To all this certainty, know they, or know they not, the non-necessity of truth? If yes, what dishonesty! if no, what ignorance!

Pretended study,—to prevent surprises: that, at the trial, both parties may come prepared. Real study,—to produce surprises: that, sometimes by the production of the surprise, some-

times by the apprehension of it, business may be made.

By the judicial meeting, surprise would really be prevented: everything that was ever called surprise. Who, except by shutting his eyes, or turning them aside, can avoid seeing it?

Lawyer. The pleadings giving, according to you, no information, or worse than none, how is it that surprises are not perpetual? How is it that parties ever come prepared?

Non-Lawyer. I did not say that no information is ever to be got from your pleadings; such consistency, I have observed already, would be of no use to you, but the contrary. What I mean to say is, that in general it is not from *that* source that the information a man stands in need of for the support of a just cause, is obtained. Whence then is it obtained? From the previous transactions between the parties. The case is comparatively rare, in which, before the suit begins, the defendant is not pretty well informed what it is the plaintiff wants of him, and on what grounds it is that he demands it: so, on the other hand, the plaintiff, on what grounds (if on any) the defendant means to dispute it.

But, where information is by either party really wanted, generally speaking, he has this alternative: either he applies for it by motion, (a cause within a cause), getting it, or not getting it; or he does without it as well as he can.*

* So utterly unfit is the initial document called the *declaration*, in the opinion of judges themselves, for any such purpose as that of informing the defendant what claim it is that is made upon him,—that a practice has grown up of

Lawyer. You will admit, at any rate, that information is afforded, as often as the pleading goes to the length of special pleading.

Non-Lawyer. Agreed: you on your part will have the goodness to admit four things: 1. That the information so given, being given under the mendacity-licence, need never have a syllable of truth in it: 2. That the more there is of it, the more business: 3. That, where there does happen to be any truth in it, the effect of it is liable to be destroyed by nullities, against which no human prudence is sufficient to secure it: 4. And that, at the end of twelve, or fifteen, or twenty, months, it is not in the power of your special pleading, be the chain of it ever so long, to give half the information (meaning true and useful information) that, at the first judicial meeting, would be given in as many minutes.

compelling the plaintiff to give in, together with the declaration, another document, called a bill of particulars, which shall *really* specify, what the declaration *pretends* to specify, the nature of the demand. According to the judges, then, who have introduced this practice, the declaration is waste paper: utterly useless with reference to the purpose for what it is pretended to be meant; productive only of a mass of expense to the defendant. The bill of particulars really giving the information, all the information that is wanted; the question, why the declaration is not abolished, is a question for those who are capable of penetrating the mysteries of the judicial conscience. *Editor.*

CHAPTER XVII.

TWELFTH DEVICE—PRINCIPLE OF JARGON, OR JARGONIZATION.

THE object and use of language (meaning ordinary language), is to convey information: information which, in some way or other, shall be of use: for which purpose, (except in here and there a case, too extraordinary to present on this occasion a claim to notice), it must be true.

The object and use of lawyers' language is twofold: partly to prevent information from being conveyed to certain descriptions of persons; partly to cause such information to be conveyed to them as shall be false, or at any rate fallacious: to secure habitual ignorance, or produce occasional misconception.

Misconception, as will be seen, is on those occasions a sort of improvement upon ignorance: all the purposes of ignorance are served by it, but in a more exquisite degree. Particular misconception is the occasional result of general and habitual ignorance. Its tendency is to rivet the chains with which the public mind has been loaded by ignorance.

All those peculiarities whereby the language made or employed by lawyers is conducive to

this effect, may be comprehended under the general name of jargon: law-jargon.

Various are the shapes in which jargon is capable of making its appearance:—1. Foreign language, dead or living: 2. Obsolete language: 3. Technical language undefined: 4. Nonsense: 5. Fiction: 6. Ordinary language perverted. None but what may be made subservient to the general end: one or another, this or that one of them, is to be employed, as occasion serves: but, that the use of them is not altogether indifferent, will be seen as we advance.

Each has its use: each was to be made the most of, as occasion served. Each has its use; some more than others, as will be seen. Anything will serve, so it be repugnant in any way to the ends of language.

A lot of jargon may consist either of propositions, one or more, or of a single term. In less compass than that of a proposition, neither truth nor falsehood, wisdom nor folly, sense nor nonsense, can be conveyed. But there are single terms (such is their force and virtue) that are sufficient, any one of them of itself, to infuse the qualities of darkness or nonsense into this or that proposition, or into almost any proposition of which they make a part. Such are the terms *felony*, *larceny*, *corruption of blood*, *attaint*, *common bail* (meaning no bail at all); *vi et armis*, force and arms, (applied to forgery, &c).

Law being the subject, whatever tends to keep men in ignorance, is of use to lawyers: but the beneficial effects of the ignorance assume a somewhat different complexion, according to the description of the person in whom the endowment is considered as being liable to

reside:—1. The people at large in the quality of suitors: 2. The legislator: or 3. Men of law themselves.

I. On the part of the people at large, it makes business, in three ways:—

1. From ignorance of the law *in criminali*, comes delinquency; from delinquency, prosecution.

2. *In non-criminali*, if a man, being ignorant, is conscious of his being so, and knows not how to act with safety, he applies to lawyers. Hence comes an appropriate branch of made business, the trade of the law-adviser or opinionist: the opinion trade. If, being ignorant, he fancies himself sufficiently knowing, not being aware of the traps that have been laid for him, so much the better. He then leaves something undone which he ought to have done, or does something which he ought not to have done: and litigation, with loss, or danger of loss of right, or of falling under some burthensome obligation, is the consequence. Business in the way of assistance, previous business in the way of advice.

3. From ignorance in respect of the adjective branch of the law, the law of procedure, (*in criminali*, and more especially *in non-criminali*), comes the necessity of having recourse to the lawyers, in unlimited numbers, in the character of assistants, or (what is much better) of substitutes. Business in the way of assistance, with ditto in the way of advice, step after step, at as many steps as possible.

Making business is not enough, without securing against diminution the quantity of

business, that is, the mass of profit habitually made.

In proportion as business is made, the people suffer: in proportion as the worms multiply and fatten, the patient faints. Did the people know that the sufferings they experience at the hands of the judge and his confederates are in so large a proportion factitious, they would be apt to cry out; their outcries would be troublesome, and might lead to relief.

Against this danger, the use of jargon is considerable. It impresses them with awe: it forms a species of the sublime. *Omne ignotum pro magnifico est.* Viewed through this medium, every object assumes such shapes and colours as could be wished. Factitious vexation, expense, and delay, become natural and inevitable: nonsense becomes science, fraud and extortion, purity: their tormentors and plunderers become their kind protectors and best friends.

It is not by its *quality* alone, that jargon lends its service to the advancement of the common cause; by the very *quantity* of it, it renders at least equal service. Judicial formulary, conveyance, whatever be the nature of the instrument, care has been taken that each particle of sense shall be drowned in a deluge of words. By the quantity of profit, the particular purpose of the individual lawyer, on each individual occasion, is served;* by the

* Marriage settlement:—property to be settled, twenty-eight thousand pounds; costs of settlement, two thousand seven hundred pounds. I have this from a conveyancer of the first eminence, himself concerned in it.

contribution made to the immensity and incomprehensibility of the chaos of which it forms a part, the interests of the whole partnership receive a lasting benefit.

It is in the demesne of jurisprudential law, that the service rendered by jargon, in virtue of its quantity, is rendered in the most transcendant degree. Where statutory law would create certainty by a word, jurisprudential, with its argumentations, gives uncertainty in a volume.

But even in the composition of statute law, the treacherous assistance of the professional lawyer has, by a disastrous necessity, been forced upon the legislator. Words being heaped together at so much a dozen, the consequence is alike necessary and obvious. In this case too, lest the virtues of tautology and surplusage should not be sufficient, the aid of disorder, and a religious exclusion of those helps to elucidation with which no other species of composition is unprovided, has been called in and carefully preserved. The details of this policy would diverge too far from the present purpose.*

II. On the part of the legislator, the service rendered by jargon to the partnership admits of some diversifications: though all resolvable into this, viz. either adding to the quantity of business (*i. e.* to the mass of profit extractible from the mass of business), or protecting

* The style of the British statutes is a disgrace to the nation in the eyes of Europe. Opening a book of these laws in one hand, open a book of French, of Austrian, of Prussian statute law in the other: without understanding a syllable of any one of the languages, a man may see enough to satisfy him, that, in the structure of the three last, the ends of language are aimed at; in that of the other, ends opposite to the ends of language.

it against diminution from that commanding source.

The interest of the legislator, in as far as it has been brought into coincidence with his duty, is, on this as on all other grounds, the same as that of the people: the ends of the legislator are no other than the ends of justice. Having the power in his hands, he will of course (unless in so far as he can be corrupted, or drawn from his duty, or led into mistakes in the exercise of it) take effectual care that the mass of made-business, and thence the mass of lawyers' profit, be as small as possible.

Towards preventing him from exerting his power in this way, the services of jargon are in the highest degree important.

1. By the heaps of filth, moral and intellectual, of which it is composed, it becomes a perpetual source of disgust, and serves as a perpetual repellent to the eye of scrutiny. "As to that cell there, sir, you must not think of looking into it: you will catch something bad: the smell will be too much for you." Jailor's *quarte* and *tierce* in fencing against Howard. Jails have had their Howard: jurisprudence waits for one.

2. It converts the whole field of legislation into a thicket, impenetrable to the legislator's eye: when he does work, he works blindfold: he works at random, at the hazard of creating more mischief than he cures. As often as this happens, then comes the lawyer's triumph: "You would be meddling; see now the consequence!"

That sort and degree of knowledge which the subject (dealt with as it has been) admits of,

is now an object of monopoly in the hands of the partnership. The stock of endowments such as the legislator must possess to do his duty, stands distributed upon a plan the most commodious imaginable. On the part of the man of law,—what there is of knowledge; power to be had for asking, were it but convenient for him to ask for it; inclination, acting in a direction directly opposite to that in which it must act, to prompt a man to apply the knowledge and power to any other than a bad purpose. On the part of the legislator,—power, and for the most part, inclination: but of knowledge, appropriate and necessary knowledge, so deplorable a deficiency, as divests the other endowments of all force and virtue.

But the mass and efficiency of jargon is continually upon the increase. In the way of reform, and previous necessary information, whatever may be the degree of difficulty one day, exists with increase the next. Every day, the more urgent the demand; the more hopeless the supply.

The partnership look on and triumph. Soon, if not already, their language will be in this tone unanimous:—Yes, so long as it was possible, a change might have been useful; but, whatever it may have been, it is now impossible: human faculties are not equal to it.

From different temperaments come different tones. Those (if such there be) who still fear the possibility, will deny the use: the use may be admitted as a point not worth disputing, by those who look to the impossibility with an eye of confidence.

Admit the impossibility, they will allow you

the expediency without scruple. The praise of candour is got by the admission, and nothing lost by it. The plea of impossibility has already become plausible; a little while, and it will become real.

III. In their intercourse one with another, jargon has again its use. It serves them as a bond of union: it serves them, at every word, to remind them of that common interest, by which they are made friends to one another, enemies to the rest of mankind.

Co-operation is thus secured; concert rendered unnecessary. Concert would be conspiracy: co-operation without concert produces all the advantage without any of the danger.

If jargon nurses ignorance among those who employ it, as well as among those at whose expense it is used, so much the better. The knowledge which is of use to the man of law is not positive knowledge, but comparative: nor even of that the reality, but the appearance: of the reality just so much, and no more, as is necessary to keep up the appearance. When the suitor, a non-lawyer, makes a mistake about law, the mischief falls upon his own head. When a lawyer makes a mistake, the mischief falls upon the suitor, or the client: care has been taken that it shall do so.* Under these circumstances, superior knowledge in superintending stations being out of the question, nothing is so convenient as genuine ignorance: unintentional mistakes cost less to make than intentional ones.

Between the veterans and the tyros, the

* Suprà, Chap. 14.—Nullification.

harmony of interests is not in this point perhaps altogether perfect; but such minutiæ belong not to this place.

Nursing ignorance, jargon serves at the same time for a screen to it. It does more: over a head of ignorance it puts a mask, exhibiting a face of science. It is the dissertation upon Sanchoniathon, presented to the Vicar of Wakefield.

This is among the circumstances, that, under the technical system, concur in rendering quirks so pleasant and convenient to the thorough-bred judge. He feels a degree of awkwardness where a decision is to be given upon the merits. If there be any statute law in the case, the letter of the law is a sort of check to him. Statute or no statute, the common sense of mankind operates at any rate as a check, and that a troublesome one. On this ground, decision, too, if it is to be on the right side, is apt now and then to require faculties, which, whatever they may have been at first, have been enfeebled by habitual diet-drinks from the fountain of jurisprudence. If a man is wrong, he exposes himself: if he is right, he gains little praise, compared with what might be got by jargon or hypocrisy: every simpleton is ready to say—What is there in all that? 'Tis just what I should have done myself. Seated in a chair, in the character of a justice of the peace, with common language in his mouth, a common coat upon his back, and no hair upon his head but his own, Solomon himself would not gain the praise of wisdom. Seated on a woolsack, Bartholon would pass muster, while talking about entering

appearances, or filing common bail, cloathed in purple and fine linen, artificial hair and ermine.

Every sham science, of which there are so many, makes to itself a jargon, to serve for a cover to its nothingness, and, if wicked, to its wickedness: alchemy, palmistry, magic, judicial astrology, technical jurisprudence. To unlicensed depredators, their own technical language, the cant or flash language, is of use, not only as a cover, but as a bond of union. Lawyers' cant, besides serving them as a cover and as a bond of union, serves them as an instrument, an iron crow or a pick-lock key, for collecting plunder in cases in which otherwise it could not be collected: for applying the principle of nullification, in many a case in which it could not otherwise have been applied.

The best of all good old times, was when the fate of Englishmen was disposed of in French, and in a something that was called Latin. For having been once in use, language, however, is not much the worse, so it be of use no longer. The antiquated notation of time suffices of itself to throw a veil of mystery over the system of procedure. Martin and Hilary, saints forgotten by devotees, are still of use to lawyers. How many a man has been ruined, because his lawyer made a mistake, designed or undesigned, in reckoning by the almanack! First of January, second of January, and so forth, where is the science there? Not a child of four years old that does not understand it. Octaves, quindecims, and morrows of All Souls, St Martin, St Hilary, the Purification, Easter day, the Ascension, and the Holy Trinity; Essoign day, day of Exception, Retorna Brevium day, day of

Appearance, alias *Quarto die post*, alias *Dies amoris;* there you have a science. Terms, Michaelmas, Hilary, Easter, and Trinity, each of them about thirty days, no one of them more than one day; there you have not only a science, but a mystery: do as the devils do, believe and tremble.

Jargon pregnant with misconception, is better than jargon preservative of simple ignorance. The sense of subjection, the humiliation, the self-distrust, the despair, on the part of the non-lawyer, the client, the suitor, is more complete.

Jargon which takes a word that is in every man's mouth, and uses it in a sense in which no man ever used it, is better than a jargon made out of foreign, antiquated, technical, or other hard words. Every man knows what *common* means: most men even know what it means when opposed to *special*, and applied to a jury. Apply it now to bail, and take order about bail, you know how. *Creditor*. My debtor is going off: he must be held to bail.—*Lawyer*. That he is already.—*Creditor*. Who are they?—*Lawyer*. Common bail; John Doe, and Richard Roe. Applied to bail, *common* signifies *none*. (You will not forget to charge for these buckram bail, as if they were real ones). Besides the profit, there is a degree of fun in this. You pick men's pockets, while you laugh at them for their patience. Kick them, or spit in their faces, you cannot; because it is a rule with you never to see their faces: but this comes next to it.

The more pointed and solemn the assurance given, the better; so it be but violated.

There was genius in writing word to a

man, Appear before me on such a day,—and then punishing him for appearing accordingly, instead of employing an attorney. There was still more genius in saying, Appear *in person*, and then punishing him as before. He had learnt that when a lawyer says, *appear*, what he means by it is extortion or deceit: but seeing such words added as *personal*, or *in person*, he thought he might trust them for once; that it was their intention for once to be sincere. He took it for a flag of truce: but, so savage is the hostility of this coalition, there is no trusting to its flags of truce.

Advice to lawyers. When non-lawyers plague you (as now and then they will) about reforms, and something must be done to quiet them, they can never refuse you a hand in the business; and it will be your part to take care that what is done shall be to little or no purpose. When you have done what can be done towards spoiling the plan, you make your mock at it: you throw ridicule on that reform, and through that on all reforms, and so you have your revenge. Thus Blackstone triumphed, when, upon the translation of the lawyer's dog-Latin scriptures into a sort of English, the darkness was but the more visible.

Another and a capital use rendered by jargon to the partnership, is the extensive possession it secures to the professional branch, of the emoluments, the comparative leisure, the power, and the honours, attached to the commanding orders of the official branch,—attached to judicial offices.

Proportioned to the advantage thus gained to the natural and irreconcileable enemies of the

community, is the mischief done to the interest of the community itself. Justice is administered by no other hands than those which, by interest and interest-born prejudice, have been trained up in a predilection for injustice.

A twenty or thirty years service among the priestesses of Venus, a qualification *sine quâ non* for admission into the college of vestals!

What is the proper nursery for judges to fill the highest and most important of judicial offices? Common sense (instructed by universal practice in all other lines of service) answers,—Service in an inferior office in the same line.

What is the proper school for a judge who fills an inferior office? A course of attendance at the feet of a Gamaliel actually in office.

CHAPTER XVIII.

THIRTEENTH DEVICE—FICTION.

What you have been doing by the fiction, could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie: if yes, a foolish one.

Such is the dilemma. Lawyer! escape from it if you can.

But no: the distinction is but in appearance: folly none in either case, except in so far as all wickedness is folly: mischievous in every case the *effect;* in every case wicked, if it had any, the *purpose*.

Fiction of use to justice? Exactly as swindling is to trade.

The fictions with which the substantive branch of the law has been fouled, belong not to the design of the present work.

The fictions by which, in so much greater abundance, the adjective branch is polluted, may be distinguished in the first instance into two great classes: the falsehoods which the judges are in the habit of uttering, by themselves, or by the officers under their direction; and the falsehoods which they cause to be uttered by the suitors.

1. Take for the first case, as one of the most striking ones, that of common recoveries: though it belongs to the substantive branch with as much propriety at least as to the adjective.

The judges formed a plan for making business, by enabling the proprietors of entailed estates to cheat their heirs. The king, as is said, through policy, or perhaps through negligence, gave them their own way. A sham action was brought against the proprietor: the proprietor, by direction of the judges, named a creature of theirs, the crier of their court, a man worth nothing, as the man of whom he had bought the land, and who stood bound to prove the title to it a good one, or, on failure, to give him another estate of equal value. The father lost the land; that is, got the power of doing with it what he pleased: but no injury was done to the children, because the father, and through him, they, his children, got the crier's land instead of it. This the judges, receiving their fees, never failed to testify: it is entered upon the record. A record is the very tabernacle of truth: let it say what it will, no man is permitted to dispute the truth of it, or of any part of it.

Sham equivalent, as above, to heirs; sham security to defendants; sham security to plaintiffs; sham notices to both, and more especially to defendants; sham pretences to one another for cheating one another of business. To give the list and the explanation of all those shams, with the consequences drawn from them, would be to heap volume upon volume. It is of such

matter that the system of procedure, as displayed in the books of practice, is composed.

Such is the matter of a record: everything is sham that finds its way into that receptacle, as everything is foul that finds its way out of Fleet-ditch into the Thames.

The spice or two of truth, buried here and there amidst those heaps of falsehood, serve but to make the compost the richer, and the better adapted to the purposes of misconception and deception; in a word, to the service of the ends of judicature. They serve to favour the operation of the *double fountain* principle: which see.

2. Take next the case of sham bail, and sham pledges of prosecution.

In the infancy of the technical system of English procedure, the performance, on the part of the plaintiff, of an operation called by the name of *finding security* was established in the character of a condition precedent to the subjecting a man, in the character of defendant, to make answer in any way to a judicial demand. The security was real, but eventual only, and not depositititious: a pair of friends binding themselves (though by promise only, and not, as in case of pawning goods, by actual deposit), to pay a sum of money, preliquidated or not preliquidated, certain or uncertain, in case the plaintiff should lose his cause. *Pledges of prosecution* was the name given to these friends.*

No such pledges are in any case found; a certificate of their being found is in every case

* Blackstone, III. Append. xiii.

given: and the certificate is among the countless host of lies, notorious lies, without which English judges know not how to administer what in their language goes by the name of justice.

So in the case of sham bail, on the part of the defendant. The defendant pays an attorney, who pays an officer of the court for making, in one of the books of the court, an entry, importing that on such a day two persons bound themselves to stand as sureties for the defendant; undertaking, in the event of his losing his cause, and being ordered to comply with the plaintiff's pecuniary demand, either to pay the money for the defendant, or to render his body up to prison. No such engagement has been taken by anybody. The persons spoken of as having taken it are not real persons, but imaginary persons: a pair of names always the same, John Doe and Richard Roe.*

* This operation, English lawyers, heaping fiction upon fiction, call *appearance:* a word which in their vocabulary has at least half a score different meanings; but that which it has in the language of common sense is not of the number. Whatever be the number of them, they all agree in this, viz. that they signify some operation which, in every instance, is completely useless to the purposes of justice, oppressive to suitors, useful to none but the fraternity of lawyers.

A written order is delivered to a man, commanding him to appear on a certain day in a certain court of justice, under a certain penalty. On the day mentioned, he appears in the court mentioned, and stays there the whole time of its sitting; this does not save him from the penalty. An English judge (such is the force of usage in hardening men in iniquity) scruples not to sanction this instrument of deception by his signature.

The impossibility that this vile lie should be of use to anybody but the inventors and utterers of it, and their confederates, is too manifest to be rendered more so by anything that can be said of it.

In the original institution of this security, the "pledges of prosecution," as little regard was paid to the ends of justice, as in the subsequent evasion of it.

Had any regard been paid to the ends of justice, the judge, were it only for the purpose of ascertaining what security the nature of the case required, and what it was in the plaintiff's power to give, would have examined him *vivâ voce:* not to speak of the many other indispensable purposes to which the same operation would have been subservient. Instead of that, this part of the duty was turned over to a subordinate officer, of which there was but one for a whole county, the sheriff. This officer, either he was personally responsible for the eventual justiciability and solvency of those pledges, or he was not. Responsible for them, for twice as many persons as there were actions

Think you to make an English lawyer comprehend how it should be possible that appearance, when the scene of it is in an English court of justice, should mean appearance? The adjunct *personal* will be apt to present itself as capable of conveying the intimation. Appearance simply, appearance of the defendant in court, means indeed, it may be said, appearance of somebody else in another place: but personal appearance,—personal appearance of the defendant in court,—cannot surely be understood as meaning anything else but the appearance of that person in that place. Vain expectation! personal is added, and the meaning of the word appearance is still, in the conception of the man of law, exactly what it was before.

brought in a year within a whole county, he would have been continually exposed to almost certain ruin. Not responsible for them, two secure instruments of injustice were lodged in his hands: for the acts of this subordinate officer were not, like those of his superiors, the judges, exposed to the scrutiny of the public eye. One was, to consult his own ease and safety, by reporting the impossibility of finding two such pledges. The other was, to make the like report for the benefit of his friends: including all such persons as, for the convenience of getting rid of troublesome demands of all sorts, might find their account in purchasing that distinction at his own price.

Not such however were the considerations which dictated the evasion which ensued. Of the due application of this security, (had it been susceptible of any useful application in such hands), the effect would have been the depriving the justice-shop, the *officina justitiæ*,* of a number of good customers. For, to a man's being a good customer to the lawyers of all sorts, so long as the suit lasted, (which was as long as they could contrive to make it last), it was not necessary that the demand should have any merits to support it, or the demandant the value of a farthing left in his purse, to pay, in the name of satisfaction, to an injured defendant at the end of it.

On the part of the judge, any such enquiry (it may be said) would have been impracticable. Nothing more easy to say; nor anything more true: because, from the first of their opening, it

* Blackstone's Comm.

had been the care of those great shops to put down all the little ones. Without hearing all suitors in the first instance, justice, it is true, could not be done to any of them: and true indeed it was, that for three or four sets of judges, sitting in Westminster Hall, to hear as many persons in the character of suitors as all England could supply, has from first to last been physically impossible. But what was possible, and not only possible but easy, was, from the whole of that extent of country (and from ten times that extent, had there been as much), to receive fees; giving, in return for those fees, scraps of written lawyer's slang in due form of law.

The plea of impossibility offers itself at every step, in justification of injustice in all its forms. The plea is as true, as so many other pleas are false: but the impossibility is, in each instance, the work, not of nature, but of the judge.

No man (says the man of law, in one of his maxims) ought to take advantage of his own wrong. What! no man? no lawyer? no judge, take advantage of his own wrong? when, under the system of procedure which has had the judges for its authors, it is thus out of their own wrong, and nothing else, that an apology, or anything in the form of apology, is, or can ever be, cooked up? What! no man? Yes; no man: subject of course to the exception, which, when anything wrong is forbidden by us, is constantly to be understood; viz. an exception in favour of ourselves, and such other persons to whom it is our pleasure to impart our licence.

True it is that under this system of yours it is impossible, without exception impossible,

ever to do justice. Nothing was ever more true. But the impossibility, from whence comes it? From yourselves. First you make the impossibility, and then you plead it. And wherefore was it made but that it might be pleaded?

3. Business-stealing, or jurisdiction-stealing falsehoods.

King's Bench stole business from Common Pleas: Common Pleas stole it back again from King's Bench. Falsehood, avowed falsehood, was their common instrument. B. R. let off one lie; C. B. answered it by another. The battle is in all the books.*

Quoth client to attorney, such a one has forged a bond upon me. Quoth attorney to client, don't dispute it, forge a release.—*Vero o ben trovato:* this advice is also in the books. If true, it shews that it was not for nothing that so good a scholar had been to the great school, the school kept by the king himself at Westminster. *Regis ad exemplum:* such was the pattern followed by him. *Ingenuas didicisse fideliter artes, Emollit mores.* . . . .

Vide the case of the story-telling club in Joe Miller. Per *Archer*, cabbage as big as St. Paul's: per *Merryman*, boiler as big as St. Paul's church-yard. *President*—Cui bono? *Merryman*—to boil brother Archer's cabbage.

Thief to catch thief, fraud to combat fraud, lie to answer lie. Every criminal uses the weapon he is most practised in the use of: the bull uses his horns, the tiger his claws, the

* Blackstone's Comm. Sellon's Crompton. North's Life of Lord Keeper Guildford, &c. &c.

rattle-snake his fangs, the technical lawyer his lies. Unlicensed thieves use pick-lock keys: licensed thieves use fictions.

Unwilling to be left behind, Exchequer stole with both hands at once, stole from both its neighbours. In design, they were all three much upon a par: but as to success, whatever may have been the cause, the thefts of the Exchequer have been little more than gleaning.

Among the falsehoods which judges caused to be uttered by the suitors, a division may again be made, into those which they contented themselves with encouraging, and those which they compelled the suitors to utter. In the one case, the powers of reward alone were employed in the generation of the lie: in the other case, the irresistible force of punishment is called in to secure it.

A sample of the simply permitted lies has been already seen, in the instance of the written pleadings in general, and more especially of special pleading at common law, and the initiative pleadings called bills in equity. The habitual utterance of these falsehoods is exactly commensurate and co-extensive with the range of the *mendacity-licence* above mentioned.

These exercises of professional genius and morality, if they do not in common parlance come under the head of *fictions*, come not the less under the head of falsehoods; falsehoods hatched in the same heads, and in pursuit of the same ends, the ends of judicature.

Of the falsehoods which are forced into the lips of the suitors, or rather (since in that way little would be to be got) into the paws of their professional assistants, a specimen may be seen

in those falsehoods (some examples of which were given in a preceding chapter*) the utterance of which is rendered necessary on pretence of *certainty*. The specimen is a rich one: falsehood upon falsehood: for the reason (as we have seen) is as rich in hypocrisy, as the practice itself is in falsehood.

When a thing happened in one or other of two ways, and you cannot tell in which, you must not say so; that would be *uncertain*: your indictment or your declaration would be void for uncertainty. You must say it happened in both. On these terms, and on these only, you are right in law: not the less so when the fact is impossible. And so if there be half a dozen or a dozen such alternatives: which there are, and more, in every day's practice.

The practice is, to tell as many different stories, as there are ways in one or other of which it is supposed the fact may have happened: it is spoken of as having happened in each of those ways: each story is called a count. Thus, if there are two such counts, there is one of them perhaps true, one certainly false: if half a dozen counts, one perhaps true, five false.

A man was murdered, by being knocked on the head and thrown overboard: whether dead or not when thrown overboard, is uncertain. Two counts: one, that the man was knocked on the head, and died of the blow; the other, that the man, the same man, was, at the same time and place, thrown overboard, and died of the drowning. Here was the same man killed twice over: and this for the better information of the supposed murderer, that he might the

* Chap. 16. *Written Pleadings*; section 4.

more clearly understand the charges he had to defend himself against. Had the fact been truly stated, the murderer would have been acquitted. This case occurred not much more than twenty years ago. The indictment stood the scrutiny of the twelve judges.*

So again *in non-criminali:* to take the sort of case of all others the most commonly exemplified. A man owes you 20*l.* and no more: you are or are not certain as to the precise description of the debt, or the evidence by which you shall be able to prove it. Your attorney, with his special pleader under the bar, with or without the advice of a barrister to boot, gets a declaration drawn with half a dozen counts in it, less or more: say half a dozen. Here then you are made to demand six separate sums of 20*l.* each, stating them as different, and saying of each that it is due to you: total 120*l.*

What shall we think of that man, but above all of that judge, who, seeing this, or not seeing it, proclaims the necessity of certainty; and is indefatigable in his eulogiums on the law, for the rigour with which it exacts the presence of that best ornament in all legal instruments?

Uses of these forced falsehoods:—

1. Half a dozen or a dozen or a score of stories told instead of one: so much the more made business.

2. Chance of mis-statement, real or supposed: whence application for nullification; certainty of a motion and an argument; even chance of a fresh suit: at any rate, more made business.

3. Verdict taken in a court alleged not to

* Leach's Crown Cases.

be the proper one: application in consequence: more made business as before.

4. The business having thus been rendered incomprehensible to a jury, what is given as their verdict is none of theirs, but settled some how or other among the men of law: neither is the judge himself responsible for it. On one or other of all these counts, the plaintiff takes the verdict at his peril: that is, the plaintiff's lawyers take it, at the peril of their client: if they take it wrong, so much the worse for the client, but so much the better for the lawyers. The lawyers make the verdict, the jury stare. Jury trial for ever! sacred palladium of English liberty.

5. Confirmation of arbitrary power in the hands of the judge: the jury serving as a stalking horse. Incapable of judging for themselves, conscious of their own incapacity, juries become helpless, and do as they are bid. How should they do otherwise? They know not what is done; they know not how to help themselves. If the court likes the verdict, it stands; if not, it is got rid of. The verdict, if an unjust one, cannot, on the score of its injustice, be got rid of without reasons. But in this way, just or unjust, (reasons being out of the question), it may be got rid of with equal ease.

6. The state of the law rendered more and more incognoscible.

By wrapping up the real dispositions of the law in a covering of nonsense, the knowledge of it is rendered impossible to the bulk of the people, to the bulk of those whose fate depends upon it. What meets their eyes is gross and palpable nonsense: a man dead and

alive at the same time; a dead man and a live man the same person: thirty or forty days making altogether but one day: a man constantly present in a place where he never set his foot: the same man judge and party, and justice all the better for it. In jargon such as this, no man in whose brain the natural provision of common sense has not been eaten out by false science, can avoid beholding so much vile and scandalous nonsense: but if, by the help of that portion of common sense which each man's fortune has imparted to him, it were possible to him to divine what disastrous sense may be at the bottom of this nonsense, the nonsense would miss its mark.

7. Legislator and people confirmed in the habit of bowing down to falsehood and absurdity, and recognizing them as being, what lawyers are continually proclaiming them to be, necessary instruments in the hands of justice. If without them justice never *is* administered, what conclusion more natural than that it never *can be?*

8. Corrupting the morals of the people. Wheresoever the use of fiction prevails, and in proportion as it prevails, every law-book is an institute of vice; every court of judicature is a school of vice.

Put into the hands of your son the Commentaries of Blackstone? Send him to attend the courts at Westminster? For learning jurisprudence, yes: but for cherishing in his bosom the principles of veracity, of sincerity, of true honour? Stay till you have made your daughter get by heart the works of Piron and lord Rochester.

9. Corrupting the intellectual faculties of the people. To what a state of debility and depravation must the understanding of that man have been brought down, who can really persuade himself that a lawyer's fiction is anything better than a lie of the very worst sort! that the whole mass taken together, or any one particle of it, was ever of any the smallest use to justice!

Fiction may be applied to a good purpose, as well as to a bad one: in giving support to a useful rule or institution, as well as to a pernicious one. The virtues of an useful institution will not be destroyed by any lie or lies that may have accompanied the establishment of it; but can they receive any increase? The virtues of a useful medicine will not be destroyed by pronouncing an incantation over it before it is taken; but will they be increased?

Behold here one of the artifices of lawyers. They refuse to administer justice to you unless you join with them in their fictions; and then their cry is, see how necessary fiction is to justice! Necessary indeed; but too necessary: but how came it so? and who made it so?*

* A man to whom you lent a horse, does he refuse to return it? Not the smallest chance will they give you for getting the animal back again, unless you say he *found* it. This is what you are forced to do when you bring an action of *trover*: by which, by the bye, you will not get your horse after all, if the defendant chooses to keep it, paying the price which the jury have happened to set upon it.

A man to whom you let your house for a year, does he at the expiration of the time refuse to quit it? Not a chance will they give you for obtaining possession again of your house, unless you trump up a foolish story about two persons, real or imaginary, one of whom turned the other out of it.

As well might the father of a family make it a rule never to let his children have their breakfast, till they had uttered, each of them, a certain number of lies, curses, and profane oaths; and then exclaim, you see, my dear children, how necessary lying, cursing, and swearing, are to human sustenance!

This is what you are forced to do, in bringing an action of *ejectment*.

On the other side of the Tweed, where no such lies are told, do not they contrive somehow or other to put a man into possession of his horse, or of his house? An English court of conscience, would it do its business any better than it does, were it to refuse to make a man repay the thirty shillings he had borrowed of you, unless you would declare that, instead of your lending him the money, he had found it?

CHAPTER XIX.

FOURTEENTH DEVICE—ENTANGLEMENT OF JURISDICTIONS.

SECTION I.—*Division of jurisdiction, how far subservient to the ends of justice.*

JURISDICTION being considered as divisible, the possible modes of division may be comprized under two denominations; geographical division, and logical, or say metaphysical: the latter comprehending every mode not included under the former.

The extent of the state in question being to a certain degree considerable, division on the geographical principle is prescribed (as has been seen) immediately by the regard due to the collateral ends of justice: viz. saving of the delay, vexation, and expense, attendant on journeys and demurrage.

The division being already carried to as great a length as is prescribed by the mere consideration of the regard due to those ends of justice; add the supposition of a certain degree of populousness in the districts marked out in conformity to those ends, the disposable time of the one tribunal (if there be but one) may be to such a degree drawn upon, as to be inadequate to the demands thus made upon it. Suppose

this to be the case, thence arises an absolute and irrecusable demand for one or other of two operations: a further division upon the geographical principle, a division of the first instituted district into more districts than one, (say into two districts); or the institution of more courts than one (say two) in the same district.

Each of these arrangements has its peculiar advantage. Divide the district into two, each with its separate court, you reduce in proportion the quantum of delay, vexation, and expense, incident to journeys and demurrage; but then you have no emulation. Leaving the district undivided, put two courts into it, each with precisely the same jurisdiction as the other, you get the advantage of emulation. Supposing all other circumstances equal, or, in case of inequality, competent allowance made for it; the number of suits brought in the course of the year in the one court, compared with the number brought within the same space of time in the other court, will, if made public, constitute a sort of index, exhibiting the respective heights at which the reputation of the two judges, or sets of judges, for the time being, stand in the scale of public estimation.

Of these two advantages, the former is much the more certain in its nature. It depends on causes purely physical: causes much steadier in their operation than any psychological ones. It is subject to no accidents: between two places the distance is not apt to change: no expedient can lessen that distance. Of this advantage, however, no notice has been ever taken; at least by English lawyers. How should it? Recognize this circumstance in

the character of an advantage, you recognize at once the worthlessness of the system which labours to such an excess under the opposite inconvenience.

The other advantage, being in its nature the more vague and unsusceptible of calculation, is on that very score the better qualified for recommending itself, under a system, with the endurance of which a general habit of thinking with precision is incompatible. To the polemic, to the rhetorician, in whose sight victory is as precious as truth is worthless, no argument is so acceptable as one which he can make as much or as little of as he pleases.

In legislation, first the advantages and disadvantages of an arrangement are sought out and weighed; then, if the advantages are deemed to preponderate, the arrangement receives the touch of the sceptre. In jurisprudence, first the arrangement is observed to be established; this observation made, then comes the problem—Required to find out the advantages of it.

Original shortsightedness had divided the business, upon the logical principle of division, among three courts: mutual rapacity had by degrees broke down here and there the fences: mutual lassitude and impotence have left things in this state. The former arrangement, though made by the legislator, was made so long ago, that it could not but have been a wise one: the latter, though made in the teeth of the former, being a work of lawyers, was still wiser. Required to prove it so. No other argument being to be found, the principle of

emulation offered itself, and was received with open arms.

That the influence of this principle, so far as it extends, is salutary, seems out of dispute: but as to the subjecting the amount of it to any sort of calculation, the impossibility has already been brought to view.

The effect of the emulation depends upon the notoriety of the proportions: but as to the giving to the public the possibility of being acquainted with them, no such thing was ever done. Publication of tables exhibiting the degree of success in hospitals, is in every day's practice. Medical men, being destitute of power, have nothing to serve as a ground for business, but reputation: nor anything to serve as a ground for reputation, but desert; or at least statements which, taking them for true, afford presumptions of desert.

If, in both or in either of two courts, the interest created by the love of ease happens to be ever so little stronger than the interest created by love of reputation, the principle of emulation is without effect.

Judge Titius may conduct himself less badly than judge Sempronius, and yet conduct himself in a line of frequent repugnancy to the ends of justice. A system of registration so contrived as to shew continually,—in the instance of every judge, of every suit carried on under the direction of every such judge, and of every step taken in the course of every such suit,—the degree of regard paid to the several ends of justice;—such a system would afford a still more steady and uniformly-operating secu-

rity for good behaviour, than can be afforded by the mere operation of putting two courts with the same jurisdiction into one district, for the chance of the benefit to which, in their instance, it may happen to the principle of emulation to give birth. The superiority has long been constant and decided: the two judges, or one of them, if they live long enough, sink into the vale of years: what then becomes of the emulation, which, fifty or sixty years earlier, both being at Eton or Westminster, would have rendered each so eager to take the other's place?

Be it allowed, however, that in certain situations it may be, if not upon the whole advantageous, at least not in any very high degree disadvantageous, that in one and the same judicial district (that district not being a very extensive one) there should be two courts; with power over the same sorts of causes (viz. under inconsiderable exceptions, all sorts of causes); operating according to the same system of procedure; collecting evidence in the same mode and in the same shape; exerting in every case sufficient powers, and therefore in every case the same powers, the one as the other, for effectuating the forthcomingness as well of things as of persons, as well in the character of the matter of satisfaction, and (where necessary) of punishment, as in the character of sources of evidence. Each being possessed of the several powers adequate to those several purposes, each consequently ought to be possessed of the same powers: the powers of each being subjected to the most effectual system of checks capable of being

employed consistently with the adequate execution of these several powers in subservience to the several ends of justice, the powers of each ought to be subjected to the same checks.

Such are the terms on which the existence of two courts in the same district may be, according to the extent of the district, either advantageous upon the whole, or not decidedly and in any very high degree disadvantageous: the advantages from emulation, viz. in respect of superior security against misdecision, being set against the disadvantages in respect of increase of delay, vexation, and expense, by journeys and demurrage.

Change the terms in any respect, you will find no cases in which the effects of such multiplicity can be other than disadvantageous.

Give to one court cognizance of causes of one description, to another court cognizance of causes of another description,* each to the

* It might appear at first sight, that, on the supposition of a quantity of business greater than can be dispatched in the disposable time of a single court, and, therefore, of an adequate demand presented for two courts, it would be desirable to make a separation of the whole mass of causes into *simple* and *complex* causes, allotting the simple causes to the one court, the complex ones to the other.

That a distinction ought to be made between these two classes of causes, is proved by other reasons.

A great majority of the whole number of suits do not require more than a few minutes each, to hear and terminate: this is matter of experience. Yet here and there a cause shall arise, which, to do justice to it, may require more than as many days of uninterrupted attendance. Were no division established between simple and complex causes, here might be a hundred sets of suitors, with their respective witnesses, all kept in a state of torment by one single cause.

exclusion of the other; in the first place you lose the benefit of emulation; in the next place you produce, without any use, the danger of collision. On the part of the plaintiff, uncertainty to which of the two courts he ought to apply, on the occasion of this or that individual cause: on the part of the defendant, uncertainty whether to submit, or not to submit, to the cognizance endeavoured by the plaintiff to be given to the one or the other court, on the occasion of that individual cause: on the part of each court, uncertainty whether it ought to take cognizance of this or that sort of cause.

Like a broken-down carriage in a procession, it might happen to a long cause to produce irreparable damage, stopping, for days or weeks, dozens or scores of causes, to each of which, upon an average, as many minutes might suffice.

It would however be in some respects better, (two courts in one district, together with separation of complex from simple causes, being supposed to be resolved on), that one of the two courts should not be confined to simple, the other to complex causes, but each court occupied with causes of both descriptions, dividing its time between them. 1. On this plan you have the benefit of emulation; on the other, not. 2. Confine the simple causes to one court, the complex causes to the other, the latter seems in danger of getting a bad name: the delay inseparably attached to the nature of the cause, may come to be charged, as matter of blame, to the personal account of the judge.

It is better, as between simple causes and complex ones, to allot to them different portions of the same day, than different days.

1. Latter part of every day for appointed causes, fore part of the day for chance causes, is easier to remember, than such and such days for the one, such and such other days for the other. Coming on a wrong day, a man finds the door of justice shut against him.

2. On the principle of distinction of days, there are entire days on which cases (for some there are) that cannot wait

With the purest intentions on the part of those by whom the line of demarcation is drawn, and with intentions equally pure on the part of those whose duty it is to conform to that line, the application of the metaphysical principle of division has ever been a difficult one, and one which is constantly liable to give birth to those doubts and contestations, the prevention of which is aimed at by it. With the purest intention in both quarters: much more with sinister and corrupt intentions in either quarter, or in both; much more again, if the two functions shall everywhere have been (as under the fee-gathering system) united in the same hand, that hand employed in carving out jurisdiction, for itself to fatten upon.

It will be matter of difficulty, in the maturest and strongest state of the public mind: much more must it have been in those ages of bar-

one hour without danger of irreparable mischief,* find justice inaccessible. Of this mischief, the principle of distinction of hours stands clear.

3. In the case of a superfluity of time on the one part, and a superfluity of business on the other, it will be easier to borrow of the morning for the afternoon, or of the afternoon for the morning, than to borrow of one day for another.

A suit of a simple nature has been commenced within the fore part of the day; with the help of another half hour, borrowed from the afternoon, it may be dispatched: in the first suit appointed for the afternoon, the parties, or one of them, are not quite ready, or, though ready, can with less inconvenience wait the half hour, than the parties in the simple cause can wait the whole day, or perhaps two days.

Suppose no complex business at all appointed for the afternoon: chance business may be received in lieu of it, instead of waiting a day, as it must otherwise have done.

* Ship on the point of sailing; female in the hands of a ravisher on board of it. Other cases might be instanced in abundance.

barity and ignorance in which those lines of demarcation have been scratched in so many directions, with so much emolument to the draughtsmen, and so much delay, vexation, and expense, to the suitors, of succeeding times.

In regard, moreover, to modes of collecting evidence, and of securing forthcomingness,—one of the two courts being provided with a set of powers and checks, adapted, in the best manner that can be devised, to those respective purposes; if, in the provision made in any respect in the instance of the second court, there be any variation, that variation (since by the supposition it cannot be for the better) will either in itself be upon a par with the arrangement that corresponds to it in the case of the first court, or it will be for the worse. The best that can happen to it is to be upon a par: but in this case,—though of itself, by the supposition, either would have been as good as the other,—yet, there being also, by the supposition, diversity without use, the effects of that diversity cannot but, to the extent of it, be purely disadvantageous. In its purest possible state of simplicity, the law, in every part of it, draws upon all men for a portion of labour and intelligence more than all men have to bestow upon it: here is an inevitable imperfection, with the inevitable inconveniences that are its consequences: add to this inevitable degree of complexity (that is of non-notoriety, and thence of uncertainty) a single degree that is not inevitable, every word thus added is a nuisance.

SECTION II.—*Distinction between law and equity, how far should it be included in the list of devices?*

In speaking of the entanglement of jurisdictions, and in particular of the entanglement created by the sham distinction between *law* and *equity*, I mentioned it as an article in the list of *devices*: it may be expected that it shall be shewn by what title it occupies the place given to it in the list.

It will be found that the device is not in the creation, but in the preservation of it. Of itself, it can scarcely make out a sufficient title to the name. In its original creation, it was not mischievous, but beneficial.

Among the contrivances as yet brought to view under the name of devices, not one but what, in proportion as, in effect as well as design, it was subservient to the sinister ends of judicature, was repugnant, purely repugnant, to every end of justice. Equity judicature, though in design directed with as much fidelity as the other to the same ends, and though in effect contributory in a very high degree to some of those ends, (viz. the collateral ends of delay, vexation, and expense, considered as the necessary avenues to profit), was in effect contributory also in a very high degree to the direct ends of justice: to the prevention of misdecision, and of failure of justice.

But, though itself not in strictness entitled to be numbered among the devices purely hostile to the ends of justice, yet so intimate has been its combination with them, so close the alliance, that, in any survey taken of them, the omission

of so capital a feature would have left a most material deficiency.

In England, so unexampled was the imperfection of the original scheme of judicature, so many of the exigencies of society had it left without provision altogether, that an addition, from some quarter or other, was matter of absolute necessity. These necessary additions, with an almost inconceivable stupidity, the original set of judges refused to make. By another set of judges, bred up in a different, a foreign, and in a great degree even a hostile, school,—under the authority, or by the sufferance, of the same sovereign, these additions came by degrees to be made. But the new hands by which these indispensable additions were made, would not work but upon their own terms. The terms imposed upon suitors by the judges of the old school, profitable as they were to the imposers, grievous proportionably to the suitors, (rendered such by the set of devices, as above explained), were not yet grievous enough, were not yet profitable enough, for the judges of the new and foreign school. The home-bred judges shook off by degrees the obstacle opposed to their designs by the presence of the parties, and at last contrived to avoid seeing them till the very last instant, when it is impossible to help it, and when no good can come from it: from first to last, Rome-bred judges never would suffer the parties to come into their presence at all. Home-bred judges, when writing was scarce and dear, insisted upon its being employed, in considerable quantity, to no purpose, or to worse than none: Rome-bred judges refused to meddle with a

cause, without a vast and boundless mass of writing employed in the first instance.

The evil done by the judges of the original English school, in respect of the exigencies left without provision,—the evil thus done by them, in so far as doing nothing can be called doing, was immense. The good done by the judges of the Roman school, in respect of the provision made by them for the same exigencies,—the good thus done by them, though done so badly, as well as upon such bad terms, was proportionably extensive. The good thus done, consisted in the aid thus lent to the direct ends of justice.

The evil done by the new workmen in the execution of the new work, consisted in the enhancement of the evils of delay, vexation, and expense: evil done, not for its own sake,—of that gratuitous wickedness they must stand acquitted,—but, as in the case of the old workmen, for the sake of the profit extracted out of the expense.

We have seen the engines employed by the old school, in the manufacture of that mass of profit-yielding evil which it fell to their share to organize. In the fabrication of the augmented mass manufactured by the new set of hands, engines the same in the main were employed, but with here and there a variation in the proportions.

All this while, be it never for a moment out of sight, that,—how well soever, when compared with the common-law branch of the technical system, equity, with its peculiar branch of that system, may be entitled to the appellation of a remedy,—compared with the natural system, it is so much sheer abuse.

Whatever imperfections equity has corrected, in so bad a way, and upon such exorbitant terms, the natural mode, if suffered to have gone on undisturbed, would have prevented from ever coming into existence: and would, whenever called in, supply the defect, in the best manner, as well as upon the best terms.

How numerous are the instances of necessary rights, for which common law gives no remedy on any terms, nor equity, without keeping the parties for months or years in hot water! but for which a justice of peace, operating in the mode in which he is in the habit of operating as far as the law will suffer him, would give a more effectual and less precarious remedy, in the course of as many hours or minutes.

Think of that remedy, by which (though still a remedy) natural and necessary inconveniences never cease to receive a twenty-fold, a hundred-fold, or a thousand-fold increase! And this in an age priding itself on its civilization, and in a nation never tired of boasting of its laws!

So long, therefore, as,—while a better, an infinitely better, remedy might be had for all the defects of common law,—this entanglement of jurisdictions, a remedy so imperfect, and producing so many collateral evils, is allowed to subsist; so long, although the purpose for which it was created was a highly beneficial one, the preservation of it has an indisputable title to a place in the list of devices.

No man regarding the subject with a view to the ends of justice and the welfare of society, can seriously believe that the existence of two

repugnant masses of substantive law, that the existence of two repugnant masses of adjective law, two systems of procedure grounded on repugnant principles, is really conducive to those ends. If this be so, then to the score of device, of artifice, of fraud, of hypocrisy, must be referred whatsoever composed complacency, much more whatsoever active and busy applause and admiration, we see bestowed upon English jurisprudence, for the felicity it enjoys in the monopoly of this peculiar excellence.

Section III.—*Equity jurisdiction, its origin and extent.*

Taken by itself, or anywhere else than in company with the word *court*, *equity* is *abracadabra:* a word without a meaning.

To give a meaning to it, you must connect it with the word *court*, and say, *court of equity.**

What then is a court of equity? Any court in which the course of procedure is in a certain form: the characteristic of that form being the sort of instrument called a *bill in equity*. Any court in which the instrument, the written instrument, in which the plaintiff states his

* England had once its court of star-chamber: France its court of the marble table. Explain the business of a court of equity by a definition of equity? As well might you explain the business of the star-chamber by the definition of a star, or the business of the *cour de la table de marbre* by the definition of marble.

As often as, in his argument, a lord chancellor or a lord chief baron pronounces the word *equity;* substitute, if it be more agreeable, the word *star*, or the word *marble:* it will make no sort of difference.

demand (that is, the judicial service which he calls upon the judge to render to him) bears that name.

To bear that name, it must contain, besides occasional parts, three essential parts: the *charging* part, containing a statement of the alleged facts; the *interrogating* part, containing questions adapted to the purpose of extracting from the defendant a sort of confessorial testimony, admitting the matter of fact alleged, or so much of it as shall be sufficient to warrant the judge in acceding to the prayer; and the prayer itself, in which a statement is given of the service looked for at the hands of the judge.

The defendant, if he means to combat the obligation of rendering this service, is under an obligation of yielding the testimony thus demanded of him:* the instrument in which it is contained is called an *answer*, the defendant's *answer* to the plaintiff's *bill*.

At the time this answer is delivered in at an office, the truth of it is declared, in general terms, by a *vivâ voce* declaration, accompanied with the ceremony of an oath.

Of this ceremony, the effect is to deprive a man, *pro re natâ*, of the benefit of the mendacity-licence, granted (as already explained) to all parties on the occasion of the *pleadings* delivered in by their respective attornies, on the occasion of a suit in a court of common law. To the plaintiff, in respect of his bill, the licence is reserved; and he is even compelled

* Except the comparatively rare cases of a plea, and a demurrer, not worth explaining for this purpose.

to make use of it: to the defendant, it is not reserved.

What then is equity? Answer:—whatever has ever been done by a court of equity.

A court of equity is a sort of court peculiar to English jurisprudence, and the institution of which took place at a period of time comparatively recent, relation being had to the other courts, called courts of common law.

The powers assumed by this sort of court have applied themselves to the substantive branch of the field of law, as well as to the adjective branch, the law of procedure.

1. To the substantive branch: accordingly you have *legal* estates, and you have *equitable* estates. The same estate which by the common law courts, if applied to, would be given to one man, the equity courts give to another. The same estate, which, upon your applying for it to a common law court, the court will give to you,—an equity court, upon an application made by your adversary, will give to your adversary. In case of a conflict, or seeming conflict, of this sort, the equity court is the strongest: nor is the common law court dissatisfied; it has had its fees.

The subject which gives most occasion to this difference, is the interpretation put upon conveyances (wills as well as deeds included): the interpretation put upon these instruments, or rather, the disposition made of men's property, on pretence of interpretation. Common law gives the property to one man, equity to another: when a man's intention, or pretended intention, has been ascertained, equity will

sometimes give effect to it, in a case in which common law would refuse to give effect to it.

2. To the adjective branch. In this field, the principal operations of equity may be ranked under two heads:—1. Rendering, for the purpose of giving effect to acknowledged rights, a variety of services, which the common law courts, through stupidity or inability, had omitted to do.—2. Stopping what was in a course of being done, or overthrowing what had been done, by the common law courts, upon a variety of occasions.

Between stupidity and inability, the distinction is no other than between cause and effect. Before the equity courts grew up and trenched upon them, the common law courts did, or might have done, whatever they pleased. There was therefore no inability, but such as was voluntary. Doing abundance of things which they omitted to do, they might not only have done (which indeed was less than nothing to them) more good, but, what was everything to them, have got more money. Therefore, so far as inability extended, it had stupidity for its cause.

From whatever cause, however; the list of the things which they could not, that is to say, would not, do, was a pretty long one.

What they could do, and did do, amounted to this: they could punish a man: hang him: cut his hands or legs off: they could take a thing, a moveable thing, bodily, from one man, and put it into the hands of another: from a house or a field they could turn a man, head and shoulders, and put him into jail if he came in again: they could take, and at one time

used to take (for example, on pretence of your having been outlawed, when it was no such thing) your estate, and divide it amongst themselves: they could take the property of a dozen men (jurymen) together, and destroy or dissipate it: it was what they did as often as a new trial was granted: till about the middle of the seventeenth century, they would not grant one upon any other terms.

What they could not do, was—everything else.

Not one thing whatsoever that a man ought to do, could they make him do. A man had agreed with you to sell you an estate, and you had paid him the money: could they make him put you in possession of the estate, or put you in possession of it themselves? Not they indeed. What they could do, was to punish him, or make a shew of punishing him, for not having done it: give you, or make a shew of giving you, money, instead of the estate: to raise the money, take his goods, if he had not sense to put them out of the way, take them, sell them, and give you what they fetched: take his goods, or instead of his goods, if he had lands, and had not sense to dispose of them, take half of them, and but half, when double would not suffice.

In regard to the future, and in the way of restraint, they could stop another set of judges, a subordinate court, from doing what they chose should not be done; but they knew not how to deal with individuals: they could stop encroachments upon their judicature, but they could not stop waste. When a house was pulled down, they could punish a man for having pulled it down; when a grove or an

avenue was cut down, they could punish him for having cut it down; but as to the preventing or stopping him, it was out of their line. Mischief must first be done, before they would stir a finger to prevent it. When the steed was stolen, then, and not till then, were they ready and willing to shut the stable door. It required equity (when equity reared its head) to stop waste.

Thus, in the way of *restraint* alone, and that very imperfectly, could they operate upon the future; in the way of *compulsion*, they knew not how to deal with it.

There was a particular circumstance, to which they were in a considerable degree, if not altogether, indebted for their impotence: and that was, their connection with a jury.

How a set of men in many respects so arbitrary, came to find themselves hampered with this salutary clog, is among the many historical points involved in darkness: but so it was. By King's Bench, by Common Pleas, by Exchequer, scarce anything was to be done, but either *for* or *with* a jury.

But there are abundance of things that could not be done, and never have been done, nor ever can be done, by a jury: and amongst these are many things so necessary, so strictly necessary, that without them the existence of society, in a state of civilization ever so little above the state of barbarism, ever so little approaching to the present, is a matter physically impossible. Every function requiring occasional and occasionally repeated superintendance: every function requiring a constant eye to the future, and a ready hand to follow it. Everything

that was to be done in a cause which, in any one of a multitude of respects, was to a certain degree complex.

Except the anomalous and next to unexampled case where jurymen have been treated like cardinals in a conclave,—whatever is done by a jury, well or ill, must be done in a single sitting: shut up again after they have been turned loose, they are no jury, their claim to confidence is gone. By possibility a jury may sit together (because they have sitten together) twenty-four hours; but if they have sat together half the time, unless they take their verdict blindly from the judge, he choosing to give it to them, cross and pile would present a better chance for justice.

Habituated to act with a jury, these sages knew not how to act without one: no pipe, no dance; no jury, no justice. With a jury, or, in the meantime, for a jury, was everything to be done: what could not be done with a jury, was either not worth doing, or could not be done. Superstition bears her shackles everywhere: poetry has been cramped by unities: by unities justice too has been cramped. At the play-house, what could not be squeezed into five hours was not to be represented: in Westminster Hall, what could not be squeezed into twenty-four hours was not to be done.

Of the three common law courts (the common law half of each Exchequer judge included), there was but one, the King's Bench, that had any notion of bidding any man (except the sheriff) do anything: and if, having received the order (in law-jargon called a mandamus), a man chose to make a lying excuse, there

ended the suit. In a fresh suit, if you could prove the lie upon him, then came work for a jury, and then he might be made to pay so much money as the jury taxed him at: but as to making him obey the order, it was not to be thought of.

From their incapacity of compelling a man to do his duty, coupled with their incapacity of doing anything that could not be done in twenty-four hours, resulted their incapacity for the discharge of a number of functions, on the discharge of which the continuance of society depends.

1. Scarce an act of power, whether over person or property, could they make a man exercise, scarce a *trust*, as the phrase is, could they make him *execute*, for the benefit of another. From this they were disqualified, not only by the two causes above brought to view, but by a third likewise.

Most trusts, and in particular all domestic trusts, require continued superintendance: interposition, not constant indeed, but eventual and occasional, at a moment's warning. Cruelty, negligence, dissipation, imbecility, have not their long vacation. But the *custodes morum*, the judges, had, and resolved to have, *their* long vacation: not one week of it would they part with: the wife might be plagued to death, the child corrupted, the property consumed and wasted, it was no concern of theirs.

2. If an account of any considerable length wanted settling, they had no tolerable means of settling it. An account with a thousand items in it, five hundred on one side, as many on the other, contains the matter of a thousand suits:

were there ten thousand, they would have had no objection to dispose of them, if presented one by one; but, if presented in a mass, they know not what to make of it.

3. If a thing were in dispute between two parties, the one not in possession of the thing could settle it, by bringing an action against the other: but if a third had also a claim, they knew not what to do about it.

4. Destruction of property, (houses, trees, and so forth), they had no notion so much as of stopping, much less preventing, so long as the destroyer had a right to the use of it. *Damages*, meaning satisfaction in money, they were ready to give, as soon as he had absconded.

5. If a complex mass of property called for distribution, they knew not how to go about it. For every death that took place, (not to speak of insolvency), if the deceased was worth anything, there was a complex mass of property vacant, and requiring to be disposed of; but death was of the number of those contingencies that had escaped their providence.

6. If an executor had promised to pay a legacy left by his testator, they could take measures, as above, for making him pay it: but if, choosing rather to keep the money, he had the wit not to make any such promise, they knew not what to do with him; he might do as he would with it, for anything they could do to get it from him.

In some of these instances, they could not act at all: in others, if they did act, it was so awkwardly and so badly, they had better not have meddled with it. In comparison of their

mode, equity, with all its delays, was found a relief.

Here, then, was a gold mine; a mine rich in *business:* open to any hand that had strength to seize it, and the wit to work it.

The clergy, a set of adventurers who were always on the alert,—the clergy, dividing themselves into two parties, entered and took possession of so many different parts of it: one party with one pretence (that is, with one set of words) in their mouths, the other with another.

Some talked of holy mother church, and souls, and pious uses. For the good of a man's soul, whatever he had died possessed of, be it what it would, so it were worth having, they were ready to charge themselves with it for pious uses: and of all uses, none were so pious as their own.

The bishops, having for their proper and only ostensible function, the shewing men heaven, and keeping them on the right road to it, soon perceived that there was no earthly power, which, in such pious hands, might not be made subservient to that pious end. At an early period, (not to speak of the goods of intestates, including all the moveable property in the country), in the line of judicature, they soon got possession of causes relative to testaments, and causes relative to marriage,* with a few et cæteras not worth mentioning here. Being however the delegates of a spiritual authority, rivalizing with the temporal authority of the king, they found

* Reg. Brev.

their career checked, and limits tolerably precise (the time of day considered) set to it.

The good of souls was their object: the good of souls was their motto: and what is above, with the administering a little fatherly or motherly correction, by the bye, for paw-paw tricks, was all they were allowed to do for it. In testamentary and matrimonial causes, what was done by them, badly as it was done, would scarcely in those times have been done less badly by any other hands.

To another set, a single word, *equity*, answered every purpose. What little knowledge the times afforded, was in a manner engrossed by ecclesiastics: the king's right-hand man, his virtual first minister, under the name of chancellor, was of that profession. Whatever in the way of judicature was ready to be done, he was ready for doing it: always understood, so long as money was to be got by doing it. This great officer chose for his motto the word equity: whatsoever a bishop did, was for the good of men's souls: whatsoever a lord chancellor did, was for equity.

It has been among the artifices of men in power, to fasten upon some abstract term, to beget upon it some ideal shadowy being, from the influence of which on the imaginations of mankind they could derive respect, and into the darkness of which they could occasionally escape from envy and from censure. Ecclesiastics, the sons of the church, were liable like other men to be fools, like other men to be knaves, like other men to be liars: but the church, their holy mother, ever one, ever the same, ceased not for a moment to be all-wise,

all trustworthy, infallible. Like other men, men of law, sometimes through imbecility, sometimes through cunning, have ever and anon (not to say most commonly) cloathed their conceptions in the language of absurdity: but, that the law herself, or itself, through all vicissitudes, has never ceased to be the perfection of reason, is placed out of doubt by the concurrent testimony of Coke and Blackstone. A judge with the title of chancellor upon his head, and the word *equity* between his lips, will be no less exposed than a judge with the title of judge upon his head, and the words law, common law, between his lips, to be turned aside by imbecility or cunning into the paths of iniquity and injustice: but that equity is a personage still more perfect than that law which is the perfection of reason, is clear not only by the assumption of all equity-men, but by the confession, more or less explicit, of common lawyers themselves.*

* *Equity* is, in its original signification, exactly synonymous to its conjugate *equality*. In a certain description of cases, though that comparatively a narrow one, the dictates of utility require that in the allottment and distribution made by law of benefits and burthens, to or amongst individuals standing in certain relations to each other, the proportion of equality should be observed. In so far as this state of things has place, it is right and proper, because it is most for the advantage of the community upon the whole, that such an allottment and distribution of the objects in question should be made by the substantive branch of the law. In so far as the allotment so made by the substantive branch of the law has been adjusted to this principle, justice requires that such allottment and distribution should be conformed to and carried into effect by the adjective branch of the law; in other words, by the system of procedure.

The range of the judicature exercised for the good of men's souls, found the limits that have just been mentioned: what limits, it will naturally be asked, had equity?

To the extent of this description of cases, whatever arrangement is conformable as above to *equality*, or say to *equity*, is conformable to justice, and, as such, fit to be carried into effect. Out of this circle of cases, an arrangement which should govern itself by the principle of equality, which should make a point of allotting and dividing the object in equal proportions amongst the several co-claimants or co-repugnants, would not be conformable to justice.

Between the cases in which the adoption of the principle of equality or equity is employed in the administration of justice, and the cases in which it is not, nor can be, employed, consistently with the dictates of utility and justice,—there is not in the nature of things any such marked distinction, as that justice should be of a better sort in the one set of cases than in the other. Yet, somehow or other, to the word *equity*, the relation of which to its original synonyme *equality* has insensibly been almost forgotten, a sort of eulogistic sense seems somehow or other to have attached itself, exceeding in the degree and measure of eulogy and approbation, whatever has attached itself to the words *law* and *justice*. By *equity*, men have accordingly come to understand a double-refined sort of law, distinct from and superior to the common sort, to that sort to which the common and original appellative *law* continues to be attached. Between *law* and *equity* there seems to be a gradation of rank: and whensoever they meet, that it belongs to law to yield the *pas*, seems altogether out of dispute. How it stands between *justice* and equity does not seem quite so clear. Does it ever happen to their pretensions to meet together in the teeth? The answer may be *yes* or *no*, whichever happens to be most convenient. But if it be yes, so that the two goddesses do not agree, so much the worse for justice. Take her at the best, there is in her temper a crabbedness that people in general are not fond of: equity is decidedly regarded as the most amiable.

As to the superior favour attached to the word *equity*, it seems referable altogether to the circumstance of posteriority: though to that on more accounts than one.

In principle, none at all: what are the occasions on which a judge ought to act otherwise than according to equity?

1. Along with the involuntary good, so much mischief, nor that altogether involuntary, had been seen to be done by men in power with the words *law* and *justice* in their mouths, that the words had been rendered to a certain degree odious; and men had been upon the look out for some sort of system, by which the good might be administered, if not without any admixture of the evil, at least with a less proportion of it.

2. The formidableness of the words *law* and *justice* had been constituted in a principal degree by its application to penal cases; and more especially to those in which the punishment was most severe: and of every such terrific application the word *equity* stood clear.

Here was prejudice against prejudice. The people, in proportion as they were oppressed by law, were fond of equity: in proportion as they were oppressed by judges, that is by lawyers, they were fond of juries. Equity, according to the shortest and most comprehensive conception that could be given of it, was a sort of law in which everything was done without juries. What was to be done? Scylla was on one side; Charybdis on the other. Under juries, men found themselves ruined for want of a remedy. Under equity, they found themselves oppressed, and plundered still more grievously than under juries, by virtue of this new invented remedy. The alternative was like that of the wretched patient under ancient medicine: to lose his life's blood for want of a styptic, or be broiled by a red-hot iron applied to him instead of one.

They little think that to magnify trial by jury is to condemn equity. But lawyers, to whom inconsistencies of all kinds are daily bread, have contrived to make them easy under these as well as so many other inconsistencies. For lawyers, fond as they are of juries, are still fonder of equity. Trial by jury is trial by lawyers; but trial by equity is trial by lawyers too, and with still more work for lawyers to do than in the other case. Moreover, in process of time, and by an improvement made in equity itself, business was found, if not *in* equity, *by* equity, for juries: and along with it more business for more lawyers. Juries alone, could give no remedy; equity alone, had no tolerable means for coming at the truth.

In practice,—ask for the boundary line of equity? As well might it be asked what line had Ignoramus been describing upon the floor, when he said of himself, *Buzzo et torno sicut musca sine caput*.

Ask any institutional writer: ask a lord chancellor himself: ask both in one:* as readily will he undertake to trace out the line described by Ignoramus in his irregularities, as the boundary line of his own jurisdiction, with all its regularity; though not less regular than equitable. To spiritual courts, testamentary causes, matrimonial causes, sins: to admiralty courts, maritime causes. To these jurisdictions, already something of a boundary line in those few words. But to equity courts, what causes? Answer, equity causes. "What is to accommodate? Why—to accommodate: as if I were to accommodate you, or you to accommodate me: in a word, to accommodate."

Of your knowing (if it were to be known) what equity is, and whereabouts the line that bounds its jurisdiction runs, the practical use,—supposing you unfortunate enough to have need of something to be done for you by a court of equity,—would be that of your knowing whether it would or would not be done. In such a case, take for your direction the only answer (the only honest one at least) that can be given. Among the scanty and confused accounts that accident has brought to light of what has been done by judges in consequence of a bill in equity, rummage and see, if you can, whether anything like what you want to have done has

* Mitford on Equity.

ever been done, on grounds like those on which you would call for its being done. If yes, and the view taken of the matter by the judge happens to be the same as yours, then perhaps it may be done: if no, then probably it will not be done.

By *you*, gentle reader, whoever you are, (if you be not a lawyer), I mean your lawyers: for as to yourself, if it were in your power, from any data within your reach, to form any such conception about the matter as would be of any use to you, they, and those whose estate they have, would have been labouring for so many centuries with very inadequate success.

How could it be expected that there should be any line of demarcation between the cases where a court of equity does, and where it does not, interfere? since the limits of its jurisdiction, like that of all other jurisdictions under English law, was left to be settled by a scramble. The history of the scramble would require a volume; a short sketch of it however may be given here: it is highly instructive.

With the single exception of the spiritual power, a power which, disdaining all limits, was comprizable under no rules; in the new settlement that took place after the Norman conquest, the geographical principle of division, if not exclusively established, appears to have been nearly so, in the great outlines. In each county, a sheriff's court, competent to every sort of suit: attached to the person of the king, a supreme court, competent to every sort of suit, and moreover exercising a controul over the several local courts.

In an evil hour, this natural simplicity was

violated by a wretched attempt at logical demarcation: suits in general (spiritual excepted as before) were distributed under three unmeaning heads: pleas of the crown, common pleas, and exchequer causes. Exchequer causes meant revenue causes.* Pleas of the crown and common pleas meant nothing at all: but, in a course of ages, a meaning was to be made for them, made by a tripartite scramble: the miserable people, whose property it was tearing to pieces, remaining in hot water all the while. Pleas of the crown, judged of under the cognizance of a set of judges whose principal occupation consisted in hanging men under the name of *felons*, followed the person of the king in his perpetual rambles. Common pleas and exchequer causes became statoinary at Westminster: exchequer causes by custom, common pleas by law.

Attached all this while to the person of the king, was a most indispensable officer, whose business it was to give form and authentication to all permanent expressions of the king's will and pleasure: to all permanent mandates issued by him; to all contracts to which he was a party. This officer stood distinguished by the name of chancellor. Of the distinguished subjects in whose company the monarch spent his time, those who were not ecclesiastics some-

* By an exchequer, was meant a table in which squares of two different colours were ranged in alternate order: an excellent sort of table for several very amusing games, a very indifferent one for arithmetical calculations. Before the introduction of the Arabian arithmetic, it was in general use for that purpose. Having now for several ages ceased to be employed as an instrument, it is still seen serving as a sign in public houses.

times could read, and sometimes not: the ecclesiastics always could: the chancellor was always an ecclesiastic.

What this minister could not find time for, was the administration of justice, or whatever was administered under that name: what he could and did find time for, was to sell permissions to apply for justice elsewhere. By the opening of this shop, the people of England were divided into two classes: to those who could raise the money, justice was sold; to the remainder, it was denied. Note, that what was thus sold at the great shop was not justice itself, but leave to buy it (that is, a bad chance of it) at another shop.*

* Out of this abomination has sprung (to name one out of a thousand) the option between proceeding by *original* and by *bill*, in most sorts of causes not criminal; a demand of debt for instance. As the chancellor had found means to oppress the people, the judges found means to cheat the chancellor. Without waiting for his permit, they made a succedaneum to it in their own manufactory, and sold it for their own profit: and without any other expense than a few lies; for ink and parchment were found by the plaintiff. This spurious equivalent they called a *bill:* the genuine one retained or acquired the name of an *original* (an original writ). Of the qualities possessed by the chancellor's ware, there were some which somehow or other they could not contrive to give their own: accordingly they sold them at a cheaper rate. One of these properties was that of converting the defendant into an outlaw; of which above, in chap. 13, *Chicaneries about Notice.* Another advantage in dealing with the chancellor was, or at least is, that, in case of appeal called writ of error, you save one stage of jurisdiction: in time, from half a year to a whole one or more: in money, between 20*l.* and 30*l.*

Here then the plaintiff has his choice: for so much money he may give the defendant so much torment; for so much more money, so much more. A plaintiff, who, having a dis-

Justice was thus regularly polluted at the very fountain head: polluted, by an arrangement, in which the mischief of extortion was the most apparent; but the mischief of complication, an invisible but endless train of mischief, not the less real because too subtle for an ordinary eye to follow, was the most felt.

The judges of the King's Bench, (such was the title given to those who had cognizance of pleas of the crown), the judges of the King's Bench, having no right to meddle at all, meddled in comparison but little, in causes between individual and individual: these, under the name of Common Pleas, had fallen to the share of the judges of another court. Besides the rapacity and insincerity inseparably attached under the fee-gathering system to the very station of judge, their conduct was so peculiarly marked by absurdity, and that absurdity so constantly fruitful in mischief and misery, that the complaints of injured suitors running continually to the king left him no rest. These judges were nailed by law to their bench at Westminster: the chancellor was constantly at the king's elbow. "These people are teazing me to death: these judges seem to have lost their senses. Go out to them; do, my good lord: hear what the people have to say for themselves, and see what is to be done."

honest man to deal with in the character of defendant, has a provident attorney, goes to the chancellor's shop at once: if not, in his passage through the exchequer chamber, defendant and his attorney, with the assistance of the chief justice of the King's Bench, give him sufficient time and reason to repent it.—Vide supra. chap. iv. *Corruption particularized* (under the head *Writs of Error.*)

The good lord was a spiritualist: spiritual ideas came last from Rome. What he had learnt, he had learnt at Rome; or at least from those whose learning had come from Rome. At Rome, in addition to polemical theology, in which his lordship was an adept of course, what was to be learnt over and above reading and writing, was Roman law. By Roman law, though everything had been done badly, everything had been done. Of the distresses which, by the outcries raised by them, had given so much disturbance, a great part had been produced by those vacuities, which the stupidity of the judges had rendered them unable, or their obstinacy unwilling, to fill up.

Of the English mode of administering *soi-disant* justice, and of the sort of justice administered in that mode, his lordship knew as little as he cared. With Roman justice, and the Roman mode of administering it, he was more or less acquainted.

Roman law, the seat of monarchical despotism, and the source of the most restless usurpation, had all along been an object of just suspicion to the few great lords, who in their assembly, during its short-lived and precarious existence, shared with the king the power of sovereignty. "We understand little enough of our own laws, but we understand nothing at all of yours: our own we are used to, and we won't suffer any change." Such had been the answer by which a project copied from Roman law without thought, had been repelled in like manner without the trouble of thinking.

Popular expressions are a well-known mask, and sometimes an effectual one, for measures

that are unpopular, or might otherwise have been so. *Equity* was a term that had all along been in use, for distinguishing what presented itself as most popular in law. Against whatever changes the reverend Romanist might find himself disposed to introduce in the character of relief, he found a hobgoblin ready armed, the horror of innovation: to encounter it, he opened his rhetorical budget, and produced the soothing sound of equity. Ye are suffering under the plague of stupid and unjust judges: ye are afflicted: behold in equity, pure and holy Roman equity, behold in it a balm for all your sorrows.

To fill up, in a considérable degree, the gaps which had been left in English law by its home-bred professors, a head was found to be an instrument not altogether necessary: a hand, with a pen in it, was sufficient.

Few, except professed shoemakers, know how to make shoes; few that find any difficulty in fetching a pair from a warehouse. In the Roman law, the clergy had been used to see a sort of warehouse, in which slops of all sorts were to be had ready-made, and in any quantity, and without the trouble of taking measure. Nothing could be more fortunate. To take measure of feet for new shoes, would have been found by these adepts a comparatively easy task: to take measure of exigencies for new laws, if the laws were to be good ones, was altogether out of their line; as much so, as out of that of their home-bred colleagues. To make good shoes, they would have had nothing to unlearn: to make good laws, had their situation admitted of their harbouring any such

wish, they would have had a great deal to unlearn: almost everything they had ever learnt, since they had been learners.

Not but that the field of law had in that school been surveyed long enough, and anxiously enough: but it was in no such point of view. It had been worked in, long enough and industriously enough: but it was to no such purpose. Prepared by jargon, it had been thick sown with iniquity, delay, and vexation: thicker than even the English field: that it might be rich in fees.

A course of procedure for continued inquiries, or for continued interposition, good: from Rome too, or anywhere, if not to be had otherwise, and no better to be had. But *equity?*—what had all this to do with *equity?* What more than with so many other fair and pleasant and popular words that might be mentioned? justice, right reason, or conscience? But equity was the cant word that happened to present itself. One cant word, *innovation*, had been employed to set men against changes from that quarter:* it required some other cant word to reconcile them to it: this happened to be uppermost. Man calls himself a rational animal, and thus it is he is governed. To govern a camel, the Arabs put a hook into his nose: to govern a man, you sound a cant word in his ear: *church, liberty, equity, jury:* and with this the animal with the two legs is led or drawn as you please.

As to equity, cant it was, and nothing else, as anybody may see that chooses it.

* Nolumus leges Angliæ mutari.

What had equity to do with the forcing a man to do what he ought to do, any more than with the punishing him for not having done what he ought to have done? with settling long accounts, any more than with settling short ones? with settling a dispute between three parties, any more than between two? with making distribution of a mass of property taken together, any more than with making a separate disposition of any or all of the articles it was composed of? with making an executor, or any other man, pay what he ought to pay without having promised it, than with making him pay it after he had promised? with making a man fulfil an agreement about a hundred pounds' worth of land, any more than with making him fulfil an agreement about a hundred pounds' worth of cows or horses?

One part of the beauties of equity still remains to be brought to view.

In the jurisdiction assumed by the courts of equity, may be distinguished (in so far as, in so thick an entanglement, anything can be distinguished), two branches: which, for this purpose, may be expressed by the terms, the *originally-operating*, or necessary branch, and the *controlling*, or abusive branch. By the originally-operating branch, let us understand that which operates in the cases where the business which is done by equity is not meddled with at all by common law. This branch is that we have been glancing over, and which was rendered necessary, we have seen how. By the *controlling* branch, let us understand that which operates, where what has been doing, and doing without reproach to those by

whom it has been done, at common law, is, at the mere suggestion of the defendant, overturned if he prevails, stopped for an indefinite time at any rate, by a court of equity.

Among the various classes of depredators, one has been distinguished in which they hunt in couples. One of the pair runs violently against a man, and knocks him into the kennel: the other, with sympathetic eagerness, runs up to his assistance, drives off the assailant, helps up the sufferer, and picks his pockets. The ruffian thief is common law: the hypocrite thief is equity.

Of the *controlling* branch of equity business, the principal part will be brought to the view of the man of law by the word *injunction:* injunction, applied to the stopping of proceedings in a common law court.

A view has been given of the species of sham justice called *special pleading:* the practice of injunctions is a sort of aggravation of that grievance. The same fraud, the same hypocrisy; but, by means of still more barbarous vexation and delay, productive of still richer pillage.

For a twelvemonth or so, your debtor has been fighting you off in a common law court: the powers of common law delay are exhausted: you are on the point, as you suppose, of getting your due: in comes a writ of injunction, and now you are at the commencement of a suit in equity.

The pretence may be, no matter what: since, for the purchase of the delay, there is no sort of use in its being true. The following is as natural as any: in the common law suit, the decision in your favour was grounded on he

evidence of some one else; but you, in the common law suit the plaintiff, now by the equity suit converted into a defendant, you, of your own knowledge, know, as you have done all along, that the fact on which the verdict was grounded was not true. The common law judges will not allow you to be interrogated; the equity judges will: there needs therefore a suit in equity.

The pretence may be as mendacious, as in the case of the common law pleadings: for the same providence that granted the mendacity-licence in that case, extends it on to this.

In a court of conscience, the same common sense and common honesty that reprobate special pleadings, would have reprobated the injunction along with them. Your debtor being in the presence of the judge, and you in the same presence at the same time; whatsoever each of you knows in relation to the fact in dispute, would have come out upon the spot, extracted by your reciprocal interrogations.

You see how poor a resource special pleading is, in comparison of an injunction: that is, would be, if either were to exclude a man from the benefit of the other. A sham plea, if it comes at all, must come in the middle of the suit: and the suit, though it has ever so many of them, is still but one suit, and that but a common law suit. But an injunction is an entire suit, a second suit, and that an equity one, piled upon the first. The common law suit is a dwarf; the equity suit, a giant mounted upon his shoulders.

By the injunction, the common law suit may indeed be stopped at any stage, may be stopped

at the earliest. But your adversary and his solicitor know little of their business, if they bring it out a single moment before the last.

Note well here in what the abuse consists. Not in the giving powers for compelling the testimony of the party; for without such powers there is no justice.

The abuse then consists, not in the giving of those powers; but in the leaving to him, who wishes for them to no other purpose than that of an instrument of abuse, the faculty of delaying the use of them to so late a period; and by sending him to a fresh court, obliging him, as well as enabling him, to plunge his injured adversary, as well as himself, in the depths of a fresh suit.*

Of the morality of the priest of equity, let

* We have seen the purposes in respect of which admission of the parties with their testimony in the first instance, and if possible in the shape of *vivâ voce* testimony, is essentially conducive to the ends of justice. We have seen the fatal success with which common law had laboured to exclude all that body of light, in her workings towards the sinister ends of judicature. Equity, by partial admissions given to the excluded lights, though but too frequently broken into false and fallacious colours, has, upon her own extortionate terms, in a group of cases considerable in number and extent, rendered to justice a perhaps unintended service, while occupied in preserving to her own profit the sinister ends of judicature. Here follows a list, or at least a large sample of these cases:—

1. Bill against two or more, to know against which of them an action shall be brought.

2. Bill of discovery against defendant, for the extraction of his testimony (the self-disserving part of course is the part called for) in the epistolary mode.

3. Bill of discovery for the discovery of sources of written (add probably real) evidence, in his custody, or power, or knowledge: a wretchedly imperfect mode of searching for

three short features of his divinity serve as a sample. 1. For mendacity, so long as your debtor confines himself to the character of plaintiff, care is taken never to punish him: accordingly, lest he should be punished, care must be taken that *mendacity* shall not be *perjury*. 2. For abstaining from mendacity, were he ill enough advised to do so, he would be punished: he would be punished by the loss of his cause: for, of whatever fact the plaintiff *is not* informed, and therefore for the requisite information applies to the defendant, he must give to understand that he (the plaintiff) *is* informed, saying that it is so and so. 3. If, for the proof of any fact on your part, you have need of the confession of your debtor, care has been taken that you shall not have it without a third suit, a second equity suit, in which you are to be plaintiff, with the benefit of the mendacity-licence, and under the same obligation

it; persons who for want of interest are not capable of being made defendants in the principal suit, not being comprehendible in this preliminary suit.

4. Bill for the perpetuation of testimony: *i. e.* for the preserving it from the danger of deperition, in case of danger of death or incurable mental debility by reason of age. The interrogatories addressed in the first instance to the defendant, in the epistolary mode: not till afterwards to the extraneous witness; and then administered, and the evidence received, *in secreto, per judicem vel judices ad hoc.*

5. Bill for the examination of a witness *de bene esse*, dog-latin for *provisionally*: the witness being on the point of expatriation: to prevent the certain retardation, and more or less probable deperition, that might otherwise attach upon his testimony. N. B. In case of his return, the principal suit being in a sufficient state of forwardness, this provisional examination goes for nothing: his testimony is collected over again: if in equity, in the same mode; if at common law, in the common law mode.

of making use of it.* All this under the notion of affording, at the end of two, three, or four, years, a chance, but that a very inferior chance, of that justice which in a court of conscience, in the self-same case, would have been administered in less than a thousandth part of the time.

By the originally-operating branch of the equity business, the mischief of delay, vexation, and expense, is simply augmented: by the controlling branch it is more than doubled.

When common law has picked the bones of a cause, equity comes in and sucks the marrow.

To the evil produced by superior rapacity, as between court and court, is added the evil that results from the having two courts to be dragged through, instead of one. The device of bandying a cause from pillar to post is thus employed, and with increased effect. It is bad enough to the suitors, when the suit is to be bandied from court to court in the same system of courts: when bandied from system to system, the journey is longer, and still worse.

To the evil of more than doubled delay, vexation, and expense, is thus added the evil of complication. The evil of enhanced delay, vexation, and expense, is the more prominent

* By these three observations, a short, but of itself conclusive, proof is given of the intimacy of the connection between the exclusionary system, and the entire technical or fee-gathering system, of which it forms at once an instrument and a branch. It is to give the requisite facility to the operations of profitable injustice, that the door has been so frequently shut against the light of truth.

Through the same medium the reader may have perceived, that, under the appearance of a digression, the matter of this book constitutes such a part of the work as could not have been spared.

and sensible; the mischief of complication is more radical and extensive. Confusion in practice is thus fixed and protected by confusion of ideas. In the language of lawyers, and thence in the conceptions of their dupes, oppression being confounded with relief, men are prepared to cling to both with equal pertinacity.

When the two sets of courts were at daggers-drawn, the suitors were crushed by their collision. For above a century and a half they have been upon the best terms; and all this time the suitor has been a sufferer by their confederacy: *discordia pestis, concordia exitium.*

Had either got the better, the suitor would have had but one court to be dragged through, and now he has two.

Mark well the profundity of the artifice. In virtue of the mixture of the two systems, and the confusion generated by that mixture, mischief is everywhere, blame nowhere.

Common law procedure is imperfect: shall not the imperfection be supplied? Equity therefore is indispensable. But would equity suffice without common law? Still less; for, besides the still more excessive delay and expense, its jurisdiction is composed of nothing but a few scanty and incoherent scraps, and it trenches upon trial by jury. Viewed with reference to the ends of justice, neither is superfluous, both together are wretchedly inadequate: viewed with reference to the ends of judicature, neither is superfluous, both together constitute as perfect a system as heart could wish, or ingenuity devise.

Viewed with reference to the ends of justice, the natural system, as exemplified in the prac-

tice of courts of conscience, (though wanting powers, such as might easily be given to it, to fit it for universal use), is beyond comparison more efficient than common law and equity put together: but, in proportion as it approaches to perfection with reference to the ends of justice, in the same proportion is it inapplicable with reference to the ends of judicature.

Chaos is the grand rampart of chicane: and for the organization of chaos, the services of equity have been beyond price.

SECTION IV.—*Absurdity of the distinction between courts of equity and courts of law.*

Two sets of courts, professing to pursue the same ends, but by different and discordant means: means so completely discordant, that, though both systems may be wrong, wrong to any degree, yet by this discordance alone, were there no other cause, it is rendered impossible for them to be both right.

Common law with you, equity against you. And has it ever been seriously imagined that there exists in the nature of things any difference corresponding to this difference in sounds? that in the same sort of case, in the same individual case, there should be two sets of courts, one proceeding and bound to proceed by one set of rules, the other by another set of rules; the one bound to do what the other is bound to undo; one bound to govern itself by a set of rules, which, if the rules by which the other is bound to govern itself be right rules, cannot but be wrong ones? Is this duplicity a real improvement? Are the ends of justice served by it? If so, why not

pursue the example of improvement as far as it will go? Why withhold from the country the benefit of more and more sets of mutually repugnant rules? If such be the advantage of placing the suitor in the service of two ever-jarring masters, law and equity, why not give him as many more such masters as in heaven there are stars? If such be the advantage of setting the work of common law to be undone by equity, why not set *conscience* to undo the work of both, *rectitude* of all three, *propriety* of all four, and so on without end?

Why refuse the benefit of that improvement to so many causes as are tried by courts of conscience, and by justices of the peace out of general sessions? Why not to each such magistrate two sets of ears for the oyer, and two sets of voices for the terminer of each cause? an ordinary pair of ears for hearing according to law; a longer pair of ears, upon the pattern of Midas's, for hearing according to equity? an ordinary voice for pronouncing according to law; a *falsetto* for pronouncing according to equity?

Why not, for the purpose of diminishing the mass of misdecision, vexation, expense, and delay, in the practice of courts of conscience, divide the commissioners into two sets, one sitting on the left side of the court, the other on the right side; the left side acting by rules which bind them to give the cause in favour of the plaintiff, the right side by rules which, in the same individual cause, bind them to prevent the plaintiff from getting anything by the decision; and ready at any time to put a stop to the cause, from first to last?

Or if precedent be preferred, why not bestow upon the judges of courts of conscience the duplicity of nature possessed for so many hundred years by the court of Exchequer? Why not give to every court of conscience the same ideal division into two metaphysical sides, the common-law side and the equity side; by the help of which, sitting always on the same bench and on the same part of the same bench, they may have their equity days and their common-law days; as in certain shops a lady may choose whether she will buy the same muslin dear or cheap, by paying her visit on an ordinary day or a cheap day?

Can any man of common sense and common honesty lay his hand upon his heart, and say of this learning, that it is anything better than elaborated confusion, and licensed pillage?

And is this dupery to be among the glories by which British freemen are raised above continental slaves?

In England we had a court once, that sat in a chamber, with stars for ornaments in the roof of it. It had of course, like its fellows, a set of rules of its own. We had then star-chamber justice, in addition to equity justice, and common-law justice. Star-chamber justice has been convicted, and has abjured the realm.

In France there was a sort of court once that sat in a chamber with a marble table in it: court of the marble table was accordingly the appellation given to it: there we see marble-table justice.

If justice be good in proportion to the number of its varieties; after reviving star or star-chamber justice, as we have imported equity

justice from Rome, so from France let us import marble, or marble-table, justice.

The same learned persons who at present have so distinct a perception of the difference between common-law justice on the one part, and equity justice on the other part, and the absolute necessity there is for equity justice in addition to the other, will then have a perception equally distinct of the difference between common-law justice and equity justice on the one part, and marble justice on the other; and the equally urgent necessity there will then be for marble justice, in addition to both the old sorts. Always understood, that it be sold according to a different set of rules, and that there be a different set of courts or shops for the sale of it in this new shape, with a more liberal price upon it, proportioned to the superior beauty of the shape.

Trust, fraud, accident: in these three leading terms, the institutionalists used to behold the essence of all the powers exercised under the name of equity. Trust, yes: it has already been seen how, for want of knowing its value, law having, along with so many other pearls, thrown it upon the dunghill, equity picked it up. But *fraud* and *accident*, how short are their united powers of being able to typify the smallest part of the work that has already passed before us? Fraud? As to combating it, yes: doubtless, among the frauds which law was so busy in organizing or protecting, there were some which equity scrupled not to fight with: better get money, though it were by doing good, than not get it at all.

But *law* too, especially in these latter times, law

came gradually to discover that there are frauds and frauds: that if some are to be supported, policy requires that others should be fought with: and that, in short, whatsoever are destined to be defeated, better that law herself should have the defeating of them, than that the job should be left to equity.

Meantime, if it be proper that one judge, with equity in his mouth, should be occupied, or destined to be occupied, in defeating frauds, can it be endurable that another judge, or, at another time, the same judge, with common law in his mouth, should be occupied in the support of them?

And what was the legislator about, while two sets of judges, both being, or professing to be, under his command, were thus busying themselves in opposite ways about fraud; one employed in setting it up, the other in overthrowing, or *making believe* to overthrow it? Answer —Fast asleep, as usual: foxed by essence of nonsense, poured down his throat on both sides.*

If a separate court could ever be eligible for a particular sort of causes, it would be for complex causes: for causes which, in their nature, requiring an indefinitely protracted portion of the judge's time, necessitate delay; or, with less prejudice than the great bulk of causes, admit of it.

* As to *accident*, the idea pointed out by the word is so vague, and requires so much explanation to fix it, that it would be impossible to pursue it without plunging into details diverging too widely from the present purpose. Death, as we have seen, being among the contingencies too strange to be provided for, it may be imagined how well qualified these sages were for coping with other *accidents*.

In the courts called equity courts so it happens that causes of this description are found almost exclusively, in comparison with the courts of common law. Why? Because, the constitution of these latter courts confining all the real part of the business within the compass of a single sitting, and this cramp not extending to the equity courts, the latter description of courts are the only courts (the ecclesiastical courts excepted) in which, well or ill, the sort of business here in question can be so much as pretended to be done.

But, avoidable or unavoidable, what has complication to do with equity? Under Rome-bred law, all over the continent, causes of this complicated description are disposed of; and in no part of the continent is any such sponge or any such scourge known, as a distinct sort of court, under the name of an equity court.

Yes: in equity may be seen a curse peculiar to English justice. Poland has her *plica;* the Alps, their *goitres;* England has her *equity.* This plague (be grateful, Scotland!) has not crossed the Tweed.

In Scotland, these complex causes are disposed of as well as simple ones: and in Scotland there is no such court as an *equity* court; unless indeed it be said that (what comes to the same thing) for a supreme civil court (vexation, expense, and delay considered) there is no court but an equity court.

In all countries, it is true, equity is spoken of; that, or the equivalent, whatever be the language. Judgment for the plaintiff more strictly conformable to the letter of the law, where there is a law; judgment for the defendant

more consonant to equity. Equity spoken of as rectitude, propriety, probity, good faith may be spoken of: the dictates of justice, as contra-distinguished from the dictates of a bad law.

In every country where there are bad laws, there will be equity in this sense: in no country except England is there any such thing as equity, in the sense of another and a distinct body of law. In no other country are there two sorts of law; a sort of law called equity, a sort of law called law, in a continual state of conflict with one another. It is not the word that is the grievance: it is the two sets of judges pulling different ways, and, between them, tearing to pieces the property of the suitors:—it is the oscitancy of the legislator, sitting mute and drivelling, while under his nose two sets of servants, both saying to him,—"Lord, lord!" are ordering and disordering the concerns of his household, laying about between them and pillaging according to as many repugnant sets of rules, never pre-announced, and (as completely as they could be made and kept) to all but learned eyes inscrutable. It is the mountebank imposture of a particular set of dealers, pretending to possess a monopoly of that almost everywhere too dear-priced commodity, which, if honestly sought for, would be found everywhere or nowhere. This is your only shop for equity! None to be had anywhere else for any price!

Equity! applied to what we feel of the practice of the courts to which it has given a name, it is a term of derision, a cruel mockery.

Equity! in what class of ideal beings is it to be found? Is she, like justice, a sort of goddess,

and would you see her likeness? Look for it among Jefferies's and Kirk's lambs. Is it a remedy? It sweetens like sugar of lead: it lubricates and soothes like oil of vitriol, or butter of antimony.*

* *Lawyer.*—Well, sir, you who are pleased to rail thus against equity, can you tell me what equity is?

Non-Lawyer.—Yes, sir: *abracadabra:* a word without a meaning.

Lawyer.—Well then, can you tell me what it is which makes a court of equity in contradistinction to a court of common law?

Non-Lawyer.—Yes, that I can, sir: but please to observe, that it is more than any gentleman of your cloth has ever yet done. A court of equity is any court in which, be the service demanded what it may, the course of procedure is in a certain form: the instrument by which the service is demanded being the sort of instrument called a bill in equity. Give that form to your demand, you institute an equity suit: if the court be entitled to entertain a demand in that form, it is an equity court.

Lawyer.—Pray then, sir, if I must descend to the level of your ignorance, by the use of your unlearned language, can you tell me what are the sorts of services which a court of equity is in use to render, when called upon by a bill in equity?

Non-Lawyer.—No, sir: any more than you can. Equity services, any more than sheep or horses, are not to be enumerated or distinguished without names. For common-law demands there are names, though as bad a set as heart could wish, or ingenuity devise. Comyns gives about six and thirty civil ones, besides criminal. But as to equity demands, if not absolutely none, there are next to none.

Lawyer.—But cannot you give me some general words of description, under which all the sorts of demands which a court of equity regards itself as entitled to give effect to, may be included?

Non-Lawyer.—Alas! no, sir: unless those which I have already submitted to you in that view should obtain the honour of your acceptance.

Lawyer.—Sir! sir! this is but evasion: but now, sir, to put your proficiency to the test at once, (for, as I find you have

SECTION V.—*War between law and equity—Compromise between them—Its monstrous results.*

For a long time (as has already been observed) law and equity were at daggers-drawn. In proportion as time had given to each a more correct view of its own interests, it came to be understood on both sides, that there existed not in fact any such opposition between those interests, as had been imagined. Ages ago, like Locket and Peachum, they shook hands and embraced. Since then, instead of fighting and scolding, their activity has employed itself in finding out ways and means for playing into each other's hands.* Why should law quarrel

conceits of your own, I have a mind to try you), can you, or can you not, tell me what it is in a demand, that brings it within the number of those to which, if presented in the form of an equity bill, an equity court is prepared to give effect?

Non-Lawyer.—Dear sir! no more than the lord chancellor, or the pope of Rome. Why will you be so hard upon me? Why, sir, there was a gentleman once that was so learned, especially in divinity, they made him a lord chancellor: with all his learning, he did not know; at least before he was a lord chancellor: I wonder whether he has ever known since: if yes, he is not so busy now but that he might tell us. In short, sir, the best answer I can give, and it is a very poor one, is this: if there were a sort of service which I wished to have rendered to me by my lord chancellor, and if I were unable to apply for information in a proper manner to any such learned gentleman as yourself, I should rummage to see whether a case could be found in which, on an occasion exactly the same as my own, a service exactly the same as that I stood in need of had been rendered: if fortunate enough to find one, and rich enough to make use of it, I should be inclined to try the experiment: if not thus fortunate, I should not know what to do.

* Mitford, p. 128. "Indeed, in most cases it is held, that the plaintiff ought to establish his right by a determination of a court of law in his favour, before he files his bill

with equity, for having found a use for some of her refuse? When my lord chief justice has had his pickings upon the *error*, how is he the poorer, if the bones of the cause go to be picked on the other side of the passage? One day out of twenty, a fit of daintiness takes my lord chancellor: he won't try the cause, not he; not for this time without proper evidence: such cookery as his own establishment affords is not nice enough; the mess must go over the way, to be dressed in a style in which nobody but *law* knows how to dress it: and then it is that an issue is sent to be tried by the lord chief justice, sent with as polite a grace as if it were a slice of venison, dispatched with his lordship's compliments, to be tossed up over the lamp on the other side of the table.

For a long time, no conception was entertained of the possibility that equity-justice and common-law justice could be woven in the same loom, or measured out from the same shop. In process of time, when the two sorts of dealers had coalesced, and learnt to play into one another's hands, a grand discovery was made. Not only might the two sorts of courts carry on trade in a connection, and to their mutual advantage; but one and the same man (it was found) might manufacture both sorts of goods, and serve out both sorts of ware at once. To manage this, all that was necessary was, that each man should practise the art of dividing himself into two halves; neither half knowing what the other is about, until the

in equity." In this way it is that equity "prevents multiplicity of suits." It compels one suit, under the notion of preventing others that might never have taken place.

critical moment when the time comes for the equity hand to raise itself, and in such manner as by its fall to stop or overturn the work that has been done by the common-law hand.

Hence it is that England not only has been, but still continues to be, so fruitful in a sort of monster, such as Africa, with all her monstrosities, never yet disgorged: a sort of judge, a double-faced and double-feed judge, with a conscience that has two sides to it; the two surfaces with no more communication between them than between the *plus* and the *minus* side of the Leyden phial, before the chain or the wire has brought about an intercourse: two half consciences, each as ignorant of what is done by the other as the right hand and the left (though to a purpose somewhat different) have been taught to be: the equity conscience bound by sympathy in the hands of sleep, while the common-law conscience is spinning out delays, and picking up fees; fees predestined to be useless to everybody but the receivers.

Here, then, and from hence, you may see sights such as Pidcock never could show:—

1. In Westminster Hall, under the name of barons, one chief and three puisne judges, each with the two half-consciences.

2. In the city of London, a lord mayor, with a conscience for a year together, but no longer, thus split into two halves.

3. In Wales, duplicity doubled; six eminently learned persons, in England, advocates, in Wales, judges; each with the two half consciences.

4. In Ireland, where each English abuse is so sure to find a younger brother, a set of

monsters of the same breed, except that Ireland has no Wales.

5. In the distant dependencies, here a lawyer, or set of lawyers, each with his two technical half consciences; there a governor, with the technical equity half, in addition to whatsoever entire conscience he may have received from nature.

Imagine the following dialogue between a non-lawyer, an English lawyer, and a French lawyer.

French Lawyer.—Everything as it should be? Yes, that it is of course, whatever it is: and yet I hear odd things of it. They tell me you have judges who, give them so much money, decide in favour of the plaintiff; give them so much more money, morbleu, they decide in favour of the defendant. Pray is this true? How stands this matter?

English Lawyer.—What judges, what courts are you speaking of?

French Lawyer.—I understand there are a whole heap of them, more than I could remember, had they all been named to me: say, for example, the great court of Exchequer in Westminster Hall, and all the great travelling Welsh courts. In these instances then, for these are enough, I suppose, at least to begin with, pray is the report true?

Non-Lawyer.—Exactly so.

French Lawyer.—Diable! And is this generally known?

Non-Lawyer.—Universally.

French Lawyer.—But pray what says your parliament to all this corruption?

Non-Lawyer.—Corruption? Hold, sir, there

you are in a mistake. Were this done by judge A alone, or judge B alone, in a case between C and D, and not in a case between E and F, this would be corruption; for this would be irregular: but being done regularly, that is, by every such judge, in favour of every defendant who comes up to the terms, and that in every individual case whatever of this and that general description, there is no corruption in the case.

Another thing: corruption is an offence: an offence is something contrary to law: but this is all of it according to law.

French Lawyer.—Criminal if in retail, lawful if by wholesale! an odder sort of trade still than I expected to find it. Yes; let him sit on counter, bench, or woolsack, an Englishman, wherever he is, is a shopkeeper. But, pray now, tell me a little, how is it managed? The parties being met in the presence of the judge, does the judge give notice immediately, and say—Here, Mr Plaintiff, give me so much, and I give the decision in your favour; unless you, Mr Defendant, think it worth while to give me so much more, and then I give it in yours?

English Lawyer.—Parties in the presence of the judge! The court a regular court, you a lawyer, and suppose any such thing suffered in it! The cause may have been before the court for six months, or twelve months, or ever so many more months, and, unless by accident, the judge may know no more about it than you do. At last comes the trial: and then it is that the judge, that is, either one of the four judges of that same court, or some one judge of some other court, knows of it for the first time.

French Lawyer.—Well, but when at last he does hear of it? and do, for shortness, let us suppose it to be a judge of that same court: how then at last does he manage?

Non-Lawyer.—We must put a case: let one serve for a hundred. Bond by which *Ligatus* engages to *Vinctor* not to do so and so, under a penalty of twenty pounds: action on the common-law side of the court by Vinctor, alleging a breach, and claiming the penalty. Breach proved: the judge says to the jury, if you believe the witnesses, you will find of course for the plaintiff: damages twenty pounds.

French Lawyer.—Good: but what chance has the defendant all this while?

Non-Lawyer.—Have patience. In the court of Exchequer, and all those other double courts, every judge has two consciences, with a partition between them, and an ear and a hand for each. As yet it is only the common-law conscience that knows anything about the matter, the common-law ear being the only one that has been spoken to, the common-law hand the only one touched. What you are expecting is, that Vinctor will get his twenty pounds. Ligatus knows better things. When the judge directed the twenty pounds to be given to Vinctor, it was because his equity conscience, with its ear and hand, knew nothing about the matter. Four or five months after, just as Vinctor is going to take out execution, in steps Ligatus into the equity office, and files his bill. Equity ear is whispered into, equity hand touched, and so forth. Hand touched, up it starts, by a pre-established harmony, and, without any expense of thought, (for all this is done by mechanism),

lays hold of the common-law hand, and stops it: Vinctor may now bid adieu to his twenty pounds.

French Lawyer.—Good: but surely what the equity conscience will do is no secret, and the equity hand, being the strong hand, stops the other of course. A mighty pretty case this of yours: but, begging your pardon, where was the use of putting it; for where is the man that will realize it? Will any counsel be weak or dishonest enough to advise a client to be at the expense of claiming a penalty under a law that may be stopped at any time?

English Lawyer.—Dishonesty indeed! The thing not punishable! You a lawyer, and talk about dishonesty! As to weakness, there is none in the case.

Non-Lawyer.—It is all matter of calculation. You see there are two prices. The price of law is so much; the price of equity is so much more. The first thing for Vinctor to consider, is the state of Ligatus's finances. What cares Vinctor for the equity hand, if Ligatus cannot pay the price for raising it? Suppose Ligatus's finances not altogether insufficient, then, along with his temper, it will be advisable to think of the magnitude of the penalty. Due or not due in point of honesty, Ligatus, if so it happens that, being well advised, he loves himself better than he hates his adversary, Ligatus will pay the twenty pounds. Besides the chances of not obtaining the relief after all, he will find himself not a little out of pocket, when he has obtained it (if to obtain it be his fate) by addressing himself to the equity side of the learned and double conscience.

French Lawyer.—So then, you have in England, if I understand you right, two opposite sorts of law, the one or the other of which prevails, according to the form in which the plaintiff addresses himself to the judge. We had once a double diplomacy; you, according to your Burke, a double cabinet: but now it seems you have constantly a double bench, and one should think a double parliament: and this is the equity you are so proud of!

Non-Lawyer.—True, except as to parliament. The eye of parliament is single, would it but awake. But whenever equity has been on the carpet, parliament, as if blindness were a duty, has always been fast asleep.

French Lawyer.—And so then the effect of this duplicity is to have one sort of justice to sell to the poor, and another to the rich: and the rich man's justice so much the stronger of the two, as to turn the poor man's into waste paper!

Non-Lawyer.—Not exactly so: unless a particular explanation be given to the words *poor* and *rich*, and for this particular purpose.

As for the *poor*, if by the poor you mean the great majority of the people, there is no regular justice for them at all, unless it be for hanging them, or something in that style: the only classes concerned here, are two higher and much less numerous classes, the middling, and the class above the middling. It is between these two classes alone that the distinction lies; or, if you must say poor and rich, say the relatively poor and the relatively rich. It is as between them (to the extent of the debateable ground

that lies between common law and equity) that the two sorts of justice are distinguished, and the two prices put upon them: to the relatively poor, a dear sort of justice, which is not the strongest; to the relatively rich, a sort of justice which is still dearer, but is the strongest.

CHAPTER XX.

FIFTEENTH DEVICE—MEANS OF SECURING FORTHCOMINGNESS, USELESSLY DIVERSIFIED.

For various purposes, on various occasions, the ends of justice require, sometimes that *things*, sometimes that *persons*, be forthcoming, at the disposal of the judge.

Sometimes in the character of sources of evidence: sometimes in the character of portions of the matter of punishment: sometimes in the character of portions of the matter of satisfaction; or else as securities or instruments for the obtaining it.

It is in these characters, that they find a place, under such titles as *mesne process* and *execution*, in the books of technical jurisprudence.

On or by the same object,—on or by the same thing, or even the same person,—different operations require to be performed, according to the purpose or end to which justice requires that it or he be made subservient.

Where the purpose is the same, different operations may again be requisite, according to the nature of the thing, according to the condition of the person.

Of all these operations, be they what they may, not one of which vexation, expense, and

delay, in quantities variable *ad infinitum*, are not inseparable concomitants. In each instance, is the quantity or value of this mass of collateral inconvenience greater, or less, than that of the direct mischief consisting of such chance of misdecision or failure of justice, as, for want of the operation, might be the result? On the answer given to this question of fact, the propriety or impropriety of the operation will depend, in each individual instance.

Here then are so many demands for diversification: so many circumstances calling for diversity of arrangement at the hands of the legislator and the judge.*

* For example; when, under the notion of causing a man to deliver up his property for the payment of a debt, a man is thrown into prison; if the ends of justice were in view, a matter worth inquiring into (especially where, as yet, it has not been ascertained that he owes anything) would be, whether he be in his right mind or no; and whether, upon his removal, speedy or instant death is or is not likely to be the consequence.

Questions of this sort, sitting in a court of *natural* procedure, a man, if he have the bowels of a man, does not regard as beneath his cognizance.

Accordingly, when, in the case of Daniels (who, being in custody on a charge of fraud, should have been brought before the lord mayor for the purpose of examination) representation was made, alleging that danger to life might be the consequence of removal, due regard was of course paid to it: for here was an unlearned judge; and cognizance of the apprehended mischief was of course presented to his notice.

Impassible, like the Epicurean gods, learned judges look down with generous disdain on any such trifling exigencies. Accordingly,—so the fees for the *capias* (or whatever else may be the word) be but secured,—debt or no debt, a man out of his senses forms as fit an inhabitant of a jail as a man in his senses, a dying man as a man in health.

If, to the demand thus presented by diversity of exigence, little attention has been paid; attention has not been wanting to that which is presented by *diversity of courts*.

Four courts in the one great hall at Westminster: four courts, each with a mode of its own for compassing the same point. Each mode, of course, abundantly well adapted to the ends of judicature; each mode as abundantly defective, with respect to the ends of justice.

Thank heaven, that of these courts there are no more than four: each of them presenting a compound of impotence and violence: feeble where good is to be done; powerful to do evil. Had there been eight of them, we should have had eight different modes of plaguing a man, to the same end, or on the same pretence: each of them efficient or defective, according to the ends to which (as above) reference is made.*

Uses of this device:

1. Helping to furnish rubbish, materials for the sham science. For the uses of sham science to the partnership, see the device intituled Principle of *Nullification*, and the device intituled *Jargon* or *Jargonization*.

The remaining uses would be but repetitions of the uses there enumerated: making business, nursing uncertainty, establishing and support-

In either case, apply for redress, you will get none, even for all your fees; these things being among the *minima* de quibus *lex non curat:* and here no diversity appears in the practice of the courts.†

* This topic belongs, in co-ordination with *evidence*, to the general head of *procedure*.

† Commons' Report on Imprisonment for Debt, April 1792.

ing arbitrary power, blinding the legislator, awe-striking legislator as well as people, driving the legislator by disgust from the task of reformation.

Thus far as to the mere diversity, and its uses. As to the imperfections above spoken of, multitudinous as they are, there is not one of them but has its use: but to exhibit them, each with its train of uses, would require a volume within a volume. If nature, as hath been said, hath done nothing in vain, so neither hath jurisprudence.*

* Take a grain for a sample of the bushel.

Moveables or immoveables, freehold or copyhold, interest present or future, certain or contingent, money in hand or receivable,—in whatever shape or shapes the property of a debtor happens to be vested, justice requires alike that the creditor should have the benefit of it. Justice? yes: but not so English regular judicature. Diversity upon diversity: option upon option: each of course incomplete, and pregnant with injustice. Of immoveables, (to a given value), if copyhold, no part, upon any terms: if leasehold, the whole: if freehold, the half, or, if already halved, the half of that half, and so on: as if a house, like a cheese, were made to be cut out into slices. His body in a jail you might have had till lately, if you had liked it better: but then (except in this, that, or the other case) you must not meddle with any of his property: if you do take it, it is not, it cannot be, of any use to you (unless it be for revenge), but as a sponge out of which property is to be squeezed: and this use, care was taken that you should not make of it. He was sent to jail, that my Lord and Co. might receive their fees: he was kept in jail, and with all his money in his pocket, that not you, but the jailor, my Lord's nominee the jailor, might squeeze it out of him, in fees and furnishings: and, lest there should not be enough for jailor and customer, not a penny of the debts due to him were you ever enabled to receive.

CHAPTER XXI.

SIXTEENTH DEVICE—CREATION OF NEEDLESS AND USELESS OFFICES.

MADE offices are partly the effects, partly the causes, of made business. Create useless work, you create the necessity of useless hands for the performance of it.

But it may happen, that, in the first instance, a determination may be taken to add at any rate to the number of hands: that done, there can be no difficulty in adding to the quantity of business for those hands. Take any given instrument, let it be signed by one person and one person only, here you have but one office; put another person to sign it at another time, and under another official name, receiving of course a fee for this his trouble, here you have two offices: put a third person, three offices; and so on. Before, increase of business produced increase of offices: now, increase of offices produces increase of fees. In the latter case, is there, or is there not, any addition made to the quantity of business? Answer, yes, or no: whichever is most convenient. Yes, because so much more is done: no, because what more is done is done to no use, and so does not properly

deserve the name of business: it is John doing nothing, and Thomas helping him.

If half the hands employed in heaping together that execrable mass of moral and intellectual filth, called in technical language a record,—if half the hands thus employed in the practice of vice, under and for the benefit of the titled guardians of the public morals, were but employed as they so easily might be,—what service might not be rendered to the ends of justice! Misdecision, vexation, expense, and delay,—entries, the object of which would be to contribute, in a determinate assignable way, to the prevention of those several mischiefs: such are the entries, the only entries, that ought to be made, to guard against misdecision. The evidence entered at length, in the few cases that could pay for it by their importance; in the others, the names of the witnesses, with the species of evidence delivered by each, under its several distinguishable modifications, denominated for the purpose. To guard against delay, and thereby against vexation and expense, the length on each occasion, with the causes of it: and whether approved by both parties, or granted at the suit of one, maugre the opposition of the other.

Of the offices thus manufactured, does the profit go directly or indirectly into the pocket of the judge? the use to judicature is already stated. But it may go elsewhere, and still not be lost to judicature. If settling to a mass worth stooping for, it finds its way into the hands of some person of high account, high enough to possess a voice and interest in the legislative body: it goes there to form a corrupt interest:

it constitutes, *ipso facto*, a mass of the matter of corruption, employed in affording perpetual protection to abuse. Tne great man, be he who he may, becomes a member of the partnership, and, though a dormant, not the less a useful one. Add to this union his honour the minister, and here you have corruption doubly corrupted.

CHAPTER XXII.

SEVENTEENTH DEVICE — SHAM PECUNIARY CHECKS TO DELAY, VEXATION, AND EXPENSE.

UNDER this head may be placed every case in which, to an obnoxious practice attended with a profit (especially if with a pecuniary profit) to which no assignable limit applies, a fixed or limited loss has, in the character of a restraint and of a remedy, been opposed.

Exemplifications are,—

1. Fixed or limited sums given under the name of *costs*, to be paid on the score of some step, some special incidental step, productive (as almost every step is productive) of its particular delay.

2. Costs given, though unlimited, under the notion of a reimbursement made to the party injured by this or that step, at the charge of the party who has made it, or imposed on his adversary the obligation of making it,—costs, though in this sense unlimited, given in a case where the profit by the delay may be greater than these costs.

3. Deposits: money, in a fixed or limited sum, exacted or pretended to be about to be exacted antecedently to the taking of this or that step: to be returned or not returned, ac-

cording to the propriety or impropriety of the step, as evidenced by subsequent lights. When not returned, such deposit has in general been given to the adverse party, in the name of costs: in some instances it has been allotted to some public fund; such as the revenue at large, the poor,* and so forth.

A penalty to which, in any instance, it can happen to find itself inferior to the profit of the trangression, operates, in that instance, not as a penalty, but as a licence.

In most if not in all the instances in which this remedy in any of the above shapes has been applied, its incapacity of effecting its professed object, the cure of the disease, is so perfect and so obvious, that to suppose it capable of escaping the notice of the authors, would, under the notion of a compliment to their probity, be an injury to their more highly prized virtue, *intelligence*.

Does it require science to teach a man (especially to teach him in vain) that a quantity which is sometimes greater than another, will not always be equal to it?

It would therefore be an injury to this policy, to refuse it a place in our catalogue of devices.

In this character it is of admirable use: like most other articles in the catalogue, a polychrest.

1. Use to reputation: display made of the love of justice: vigilance to discover the disease, wisdom to devise the remedy, probity and activity to apply it.

2. Use to reputation again, if judiciously managed: display made of the virtue of huma-

* Lawrie.

nity, if the sum be fixed at or limited to a low rate: the lower, and thence the more ineffectual, the greater the portion of praise from this source.

3. Security of the profit to the partnership, in the several cases in which the profit to the dishonest party is inferior to his profit from the offence.

Venerable personages! Their zeal is indefatigable, their sapience unfathomable: but so perverse and so constantly increasing is the wickedness of mankind, their utmost exertions leave them still behind it.

CHAPTER XXIII.

EIGHTEENTH DEVICE—DOUBLE FOUNTAIN PRINCIPLE.

How delightful, could a contrivance be found for enabling the judge to give judgment for plaintiff or defendant at pleasure! The pinnacle of perfection would be mounted at one spring. To a first glance, the idea presents itself as no better than the love-sick vision of some fond amateur of chicane.

In practice, it has not yet stretched (it must be confessed) nor seems likely to stretch to so all-embracing an extent in the regions of jurisprudence as to cover the whole field. But, though quiet and silent in its motions, the more accurately it is measured, the more prodigious the progress of it will be perceived to be.

Sought or unsought, the effect flows naturally, and as it were of itself, from the anarchy that results from whatever degree of influence may have been preserved to the dictates of justice and common sense, in conjunction with the suggestions of this or that one among the sources of iniquity and absurdity that have already passed in review. Exquisite invention! or, at any rate, felicitous result! Reason herself pressed into the service of absurdity! Injustice

could not have thus enlarged her empire, without leaving a corner of her throne to justice.

The double-fountain device derives its name from the contrivance of those jugglers, who, by an ingenious application of the laws of hydrostatics and pneumatics, serve to the customer, out of the same vessel, wine of either of two colours, white or red, at pleasure.

This device is grafted on any one of the three former devices, the principle of nullification, the principle of fiction, and the principle of jargonization. It consists in the putting an occasional stop to the current of decision drawn from these several corrupted fountains: drawing the decision from the right fountain, *pro hâc vice*, instead of any of those wrong ones. Far from being diminished by this apparent departure from the ends of judicature, the advantage obtainable from these several devices receives considerable increase. No danger in any shape can ever attach, neither punishment nor so much as disrepute can ever attach, upon any judge, who, in spite of any number of previous decisions given against the merits on the ground of this or that quirk, or fiction, or jargon, takes upon him to decide in favour of the merits. Thus it is, that, to the extent of the ground occupied by quirk, fiction, and jargon, you possess, in virtue of those principles, alternating at pleasure with the principles of reason and justice, the faculty of giving the case in favour of plaintiff or defendant, as you incline. Praise you are sure of: all that you need consider is, which of two sorts of praise is most to your taste. Decide against the merits, on the ground of the quirk, the fiction, the jargon, you receive the joint

praise of profound science and inflexible steadiness: the praise of adhering to the rule *stare decisis*. Decide in favour of the merits, disallowing the quirk, discarding the fiction, the jargon, you receive the praise of liberality; of attachment to the laws of substantial justice.

Bribes you cannot receive, if neither side is prepared to offer any: friendship or enmity you cannot gratify, if both parties are equally unknown to you or indifferent: but whether you do or do not turn it to account in any way, the power you possess to the extent of the ground occupied by these commodious principles, is not the less arbitrary. The fault is all your own, if, as often as you have occasion in any of these shapes, you fail of administering to your prejudice or your humour the gratification put into your hands: of profiting by the opportunity of crushing your enemy, of serving your party or your friend.

A flaw is alleged in an indictment. Are the defendant's party attachments supposed to be on the wrong side? Precedents are chains of adamant to you: *fiat justitia, ruat cœlum*, is the word. Are the man's attachments where they should be? You burst by inspiration from the trammels of chicane, and you quote the quirk-abjuring ejaculation which a moment of contrition wrung from the conscience of lord Hale.

Is interest objected as a ground of exclusion to a material witness? Here you are most completely at your ease. There stand the cases, in two rows: on one hand those in which the objection has been allowed, on the other those in which it has been disallowed: length

of the rows, as nearly equal as heart could desire. Exclude the witness, you bow to the name of lord Kenyon, and with him pronounce the laws of evidence to be the perfection of wisdom: receive the witness, your bow points to lord Hardwicke, and with him you confess your disposition to admit lights.

The advantage gained by the principle of nullification would be imperfect, but for the occasional dash of ill-applied reason, by which it is made up into the double-fountain principle.

By the double-fountain principle, more business is made than could possibly be made by the fountains of corruption if set running by themselves. Suppose a flaw started; exactly the same flaw that had already been made fatal: here, if the practice of drawing decisions occasionally from reason were unknown, certainty would thus far take place: the merits would in that instance have, and be seen to have, no chance: the benefit of the argument would be lost to the profession, as well as the sweets of arbitrary power to the judge.

CHAPTER XXIV.

NINETEENTH DEVICE—LAUDATION OF JURISPRUDENTIAL LAW.

WHEREVER jurisprudential law reigns, certainty is impossible: it has no ground to stand upon. Jurisprudential law is sham law: to ascribe stability to this creature of the imagination, is to ascribe stability to a shadow.

Statute law has everywhere a tenor; a determinate collection of words: there is the *will*, and there is the expression of it: we know whose will it is, where signified, by what signs expressed, what parts are to be found in it. Jurisprudential law is law made by nobody, at no time, and in no words.

In statute law, words may here and there be ill chosen; and, from the infelicity of the choice, uncertainty as well as misconstruction may arise: but no sooner is the flaw perceived than it may be remedied. Jurisprudential law is perpetual disease, perpetually unsusceptible of all cure. From statute law, yes: but, so far as statute law extends, jurisprudential law is (or at least ought to be) extirpated: if it be not, the disease, so far from being cured, is aggravated. There is the statute law to give certainty; there is the jurisprudential law to take it away.

In jurisprudential law may be seen, not the parent only, but the protecting guardian, of all these other abuses. In it, the founders of the fee-collecting system have ever beheld the offspring of their own brain, the work of their own hands, the fruit and pledge of their own power. Statute law is the work of whom? Of the legislator: the lawful, the real, legislator. Jurisprudential, of whom? Of the judge: of the underhand workman, always making work, always disavowing it when made: of the Birmingham coiner, making his own trash, and passing it off for the king's: of the dishonest valet, stealing out in the dark, going about in his master's name, and receiving homage in his clothes.

By what legislator, by what genuine legislator, recognized as such, and in pursuit of public ends, could any devices such as those over which we have been glancing, have been set up? By what legislator? unless, perchance, under the guidance of some Achitophel member and instrument of the fee-collecting partnership, serving the ends of judicature while talking of the ends of justice.

That which exists not, cannot be known. So far as the dominion of jurisprudence spreads, ignorance is universal, misconception endless.

An article of statute law is a drop of water, in the state of water, or in that of ice: an article of jurisprudential law is the same drop in the state of vapour. In the solid or liquid state, you know where the drop is, you see it, you may weigh it, you may measure it: you see the bounds of it: those bounds are narrow and determinate. In the state of gas or vapour,

unless you have it in a bottle, you know not where it is, you do not see it, you cannot weigh it, you cannot measure it: assignable bounds it has none, unless it be the limits of the atmosphere.

Such is an article of jurisprudential law. In the form of statute law, a single line might, perhaps, contain the substance of it, and that perfectly: in the form of jurisprudential, the same article shall fill a folio volume: and the larger the folio, the more indeterminate the import of the article. To a command, there is an end: to a dissertation, there need be none.

In statute law, non-notoriety is an accidental disease: of common law, it is the inseparable essence. In statute law, the disease may be cured as soon as discovered: in common law, every remedy is so much added to the disease.

Non-notoriety is sometimes an inbred but always curable disease, sometimes an extraneous defect, in statute law: not non-notoriety merely, but uncognoscibility, an aggravated and incurable exacerbation of the same disease, cleaves to the essence of jurisprudential law.

Introduced by jurisprudential law, every pretended improvement, every improvement that, if introduced by statute law, would be a real one, every slip of common sense and common honesty forced into a soil so repugnant to both, brings into action the double-fountain principle. Fear not on this ground to earn the praise of liberality. Plant your improvements: round your periods: proclaim the ardour of your zeal for justice: all this you may do, and earn the praise of justice without prejudice to the ends of judicature. While under the genial influence of the double-fountain principle, the old rank

weeds are numerous and strong enough to spring up and choke the new plants: all this liberality is but a more refined way of carrying on the manufactory of made business.*

By the uncertainty of the law, the partnership interest is served in three distinguishable

* Compared with the absence of everything that can be called *law*, imaginary as well as real; of every pre-existing standard which can serve either to the use of the judge in the way of direction, or as against the judge in the way of controul; even jurisprudential law is a blessing of prime magnitude.

Compared with statute law, it is a nuisance.

The use however of jurisprudential law, to assist in the making of statute law, is incalculable. In the character of a foundation, it is necessary to the very existence of statute law; at any rate, of a body of statute law grounded on experience; a foundation without which it is incapable of being well adapted to what ought to be its ends.

The materials for the legislator to build with, are *cases calling for decision:* cases whereby the demand for legal obligations, and for exceptions to these obligations, is, or has been supposed to be, created. In that species of intellectual wealth which consists in collections of those cases, put into method in various ways, no nation is near so rich as the English. The decision may be absurd and pernicious; the case is not the less valuable.

From these considerations, the state of human society in respect of law may be divided into three periods:—

1. The barbarous: in which the judge is suffered, and obliged by physical necessity, to act without any pre-existing rule: and accordingly, as far as depends upon general rules, without controul, as well as without a guide.

2. The semi-barbarous: in which, as depends upon rules, the judge has no surer or more instructive guide, nor any more efficient controul, than jurisprudential law: amended more or less by such particles of statute law as the spur of particular exigencies has called forth.

3. The completely improved or civilized: in which the standard of obedience rests throughout on the basis of statute law; jurisprudential law being completely extirpated: extirpated in form, however preserved in substance.

ways: 1. The number of suits is increased: 2. The quantity of business receives a further increase, from the quantity of advice which men are necessitated to purchase; advice before a suit, during a suit, and for fear of a suit: 3. In proportion to the degree of uncertainty, the judicial members are invested with a degree of power proportionably arbitrary, and thence applicable to the purposes of the partnership in all imaginable ways.

Going to law I have a chance, not going to law I have none: such is the encouraging speech which the interest of the partnership requires should as often as possible be made by the parties, each to himself, on both sides. The oftener a speech to this effect is made and acted upon, (provided always it be on both sides), the greater and more glorious, and thence the richer in profit, the uncertainty.

Out of the manufactured necessity of advice,—advice which, by the operation of the same cause that gives birth to the necessity, is so often rendered fallacious,—arises that branch of the partnership concern which may be called the *opinion* trade. Of this, a few words under a separate head.*

Jurisprudential law, the imaginary law extracted by each man for himself out of a mass of jurisprudence, is a vast hot-bed of uncertainty. By statute law, in proportion as it extends, keeping clear of entanglement with jurisprudential law, that most poisonous of all weeds is extirpated.

Hence we have two distinguishable devices,

* Infrà, Chap. xxvi.

hatched by the technical system, more especially the English branch of it: laudation of jurisprudential law; contempt of statutory law.

In two instances that I have chanced to meet with, (there may be twenty for aught I know), the single word *policy** has served a chief justice or puisne judge of the King's Bench, for superseding the use, as they have on so many occasions set at nought the declared will, of king, lords, and commons.

Transplanted from parliament (its only proper soil) to the King's Bench, this word, coupled with the unlimited faculty of applying it, (and what limits are ever set to the faculty of applying it?) was of itself sufficient to erect judicature into a despotism. Omnipotence required but a word to create light; jurisprudence required but a word to create darkness.

Not but others, each of them capable of supplying its place, might be found in superfluous abundance, to the right and left, by any one that had taste and courage for the task.

In *Christianity is the law of the land*, there are seven words; but in those seven words, coupled with the application made of them, there is matter sufficient to supply the place of an inquisition; and to afford to orthodoxy, under each successive change, a perpetual security against

* *Utility* would not have served the purpose. Utility is a familiar unassuming word, recognizing all men's competence to judge, and for that purpose inviting them to hear, and look, and weigh, on both sides. *Policy* involves mystery, importing exclusive wisdom, and excluding from the research all who do not expect to be recognized in the character of politicians.

disturbance, by barring out all argument on either of two sides at pleasure, and supplying the place of it on the other side.

Temporal tyranny established by a single word, and spiritual added to it by seven more!

What security does any such word as *policy* afford against the sinister interests and inclinations of the judge? What security has it ever afforded in taking into his own hands offices, on the abuse of which his power is supposed to afford a check?

Will you believe lord Mansfield? Judges are higher, better, fitter legislators, than king, lords, and commons. "Common law" (says he in so many words) "is superior to an act of parliament."* Superior? how so? The reason is not the less brilliant for being unintelligible. "It works itself pure from the fountains of justice:" fountains abundant on the ground-floor of the great hall, unknown (it seems) above stairs. Send a man to common law for purity! Send him to the common sewer to cleanse himself. As he taught, he practised.

Mansfield superior, in his own theory, to king, lords, and commons. Mansfield, when a reforming fit came on him, chose to do everything by himself, with *io, mio,* and *arrio,* in the character of mutes and train-bearers.

Another sort of thing, whose reputation for working itself pure is rather better established, is Thames water. Working itself pure on shipboard, it has nothing to do with fountains.

* Atkins, i. 33.

CHAPTER XXV.

HABITUAL CONTEMPT SHEWN BY JUDGES TO THE AUTHORITY OF THE LEGISLATURE.

A STATEMENT of the instances in which the authority of parliament has been, and continues to be, trampled upon by its sworn servants, might fill volumes upon volumes.

When misinterpretation is the instrument, scientific misinterpretation; how plainly soever wilful, the contempt may in general be covered by effrontery. The sense we put upon the law is the sense which it is the intention of the author should be put upon it: so we say, to whom it belongs to say so; and who are you that take upon you to say otherwise?

Cases, however, are not altogether wanting, in which such insincerity cannot be altogether put out of sight: not by any degree of effrontery on one part, nor by any degree of carelessness and obsequiousness on all others.

Of this number are cases of *arithmetical contradiction:* as if a man were to say (is it credible that a man should have said?) this guinea and this guinea added together, do not make two guineas: or, this first guinea and this

second guinea and this third guinea added together, do not make three guineas.

By a contradiction of this kind (if a book of practice now before me is to be believed), the judges of three of the four great courts, for there is no exception, did manifest in the year 1796, and, for anything that appears, do continue to manifest, an open declared contempt for the authority of parliament.

"Where a statute gives double costs," says Mr. Palmer,* "they are calculated thus: the common costs, and then half the common costs. If treble costs;—1. the common costs; 2. half of these; 3. and then half of the latter." If this be so, then, as often as parliament has ordered the judges to give treble costs, so often do these sworn executors of the will of parliament refuse to give so much as double costs.

The grand mischief attendant on such practices is, that, in proportion as they come to light, they weaken, not to say root out of the bosom of the people, all confidence in the engagements taken by the law. They destroy the credit, not only of those who deserve so little, but of the legislator himself, who, howsoever himself deceived and imposed upon, never, certainly, wishes to deceive. For, in a case like this, except through the means of these his servants, it is impossible for the legislator ever to keep his word. But, by a determination taken by them, and regularly pursued to the extent of this wide-extending case, so have they ordered matters that he never shall keep it, in any one single instance.

* Table of Costs, p. 14. edit. 1796, fifth edition.

But, the greater the mischief resulting to the public from this treachery, the greater the advantage accruing from it to the contrivers.

Let the legislator say or do what he will, the authority upon which the fate of the subject has its immediate dependence, must, in every case, be the will of the judge. Upon the will of the legislator it does not depend, upon any other supposition than this, viz. that the will of the legislator will of course find the will of the judge conformable to it. Suppose this conformity constant, the subject is, comparatively speaking, independent of the will of the judge: to know what the will of the judge will be, no more is necessary to him than to read the will of the legislator in the letter of the law. On the other hand, suppose this conformity altogether out of the question, the dependence of the subject upon the will of the judge is absolute: in other words, the power of the judge over the subject is completely arbitrary. But the more arbitrary the judicial authority can succeed in rendering itself, the greater the degree of perfection in which the purposes of the partnership may be carried into effect. Absolute perfection in this line would be attained, if in no case the subject could find or suppose himself safe in regarding the tenor of the law, the words of the legislator, as sufficient evidence of the eventual will of the judge. In this state of things, regarding the words of the legislator as no better than a snare, the subject would view in them, on each occasion, neither more nor less than the necessity of repairing, fee in hand, to some professional member of the partnership, in whose opinion might be read the most probable

conjecture that the nature of the case admitted, of the eventual will of the official and governing members.

To this pitch of perfection, the plans of the partnership have never yet been brought: but a more effectual step towards it than that which has been made by the course of mock interpretation here exemplified, cannot be imagined. If a premium were held out for the highest insult that could be offered to the authority of the legislator by the power of the judge, (viz. by wilful misinterpretation simply, unaccompanied by a direct disclaimer), no higher than this could by the utmost effort of ingenuity be devised. Instances of this sinister policy may be found in most unhappy abundance: and by every insult thus offered to the legislator, an additional nerve is given to the arbitrary power of the judge: but a single instance, such as the one here in question, is sufficient to do prodigious service. If, where the legislator says *give three shillings*, the judge will not give so much as two; if the authority of the law is in this case openly set at nought; in what other instance can there be any sufficient assurance of its not being dealt with in the same manner? If to such contempts, and for such a length of time repeated, the legislator has been insensible,—to what others can any sufficient assurance be had of his being less so?

That the interest of the partnership requires that the uncertainty of the law should for ever be at its maximum, is evident enough: that their endeavours must have been constantly directed towards that object, follows of course: that the establishment of a precedent of the

above description, viz. a misinterpretation which cannot possibly have been other than wilful, goes further towards the effectuation of that object than a hundred or a thousand that might by possibility have been undesigned, is another proposition that seems scarcely open to dispute.

Observe the extent of the effect produced by this manifestation of anticonstitutional disobedience. To banish out of the breast of the subject all confidence in the declared will of the legislator,—in a word, to produce the requisite degree of uncertainty,—it is not necessary that it should be understood that it is a rule with the judge always to run counter to it; were that the case, no uncertainty, no such degree of uncertainty of which every man must be more or less sensible, could ever take place. What is sufficient is, that, in no particular instance, the subject (without consulting a man of law) can be sufficiently assured whether any regard will be paid to the will of the legislator, or no: and, to produce this degree of uncertainty, a single course of precedents such as the above, even without the help of so many others as might be added to them—enough to fill volumes upon volumes,—is quite sufficient.

Lawyer.—A pleasant conceit, indeed! And so then, sir, according to this vision of yours, lawyers of all classes, advocates, judicial officers, judges themselves, are all in a partnership, all traders,—and a capital object with these traders is to destroy all confidence in the breast of their customers; is so to order matters that their customers (or say, rather, those whom they would be glad to have for customers) may never believe a word of anything they say to

them! Surely this is the first time that a general destruction of confidence was supposed to be a benefit to trade!

Non-Lawyer.—Visionary enough the notion, as thus stated, certainly: but a little circumstance, sir, has escaped your notice. Where trade is open, to destroy confidence may indeed be to destroy trade. Suppose two rival shopkeepers A and B: A loses the confidence of his customers, B preserves it: what follows? B's trade of course flourishes, A's is destroyed. But of these traders (the avowed traders we are supposing) neither possesses any monopoly; whereas, in the station occupied by the real though unavowed traders we have been speaking of, the business not only *is* an object of monopoly, but of necessity ever must be. To the purposes of the partnership, I have shown you how essential it is that the judge should have destroyed, as far as possible, the confidence, on the part of the people, in the engagements taken by the legislator. By the course taken for this purpose, the reverend functionary has destroyed, it is true, in a great degree, not only the confidence that the people would otherwise have reposed in the words of the legislator, but also the confidence which they would otherwise have reposed in himself and his own proceedings. But, by this double destruction, what does he lose? Just nothing: for they are not the less under the obligation of going to his shop. On the contrary, his profit is promoted by it: since the uncertainty of the law increases with it, and his profit increases with the uncertainty of the law.

Accordingly, as I have already, sir, had the

honour of bringing to your recollection,—be it with personal character as it may, there exists not under the sun any sort of person whose public character, and in so essential a point as that of veracity, is so completely blasted as that of an English judge: so successful, because so well-directed, have been their learned labours in that line: and this not in carelessness and wantonness, but in all sobriety and sadness: inasmuch as the uncertainty of the law, and thence the magnitude and certainty of the partnership profit, were so evidently dependent on it.

Not only, by every such open contempt manifested towards the will of the legislator, has the uncertainty of the law been increased, and the certainty of lawyer's profit (and in particular of the profit attached to the *opinion* branch of the trade) been increased along with it; but so has it by every *condition* annexed to a legislative command to which the legislator himself had annexed none: and thence it is that the exclusionary system, which forms the main subject of these pages, is (as well as so many other systems of astute defeasances) so much *added*, and meant to be added, to the uncertainty of the law: that glorious system of uncertainty, which is the real as well as so generally-acknowledged source, sir, of all your glories.

In the present instance, a special sinister interest added its force to that general interest whereby (as above) they are continually urged to do as much as they dare towards destroying, on the part of the people, all confidence in the legislature. To prevent vexatious suits, was the professed as well as real object of these

restrictive and remedial clauses: but every vexatious suit prevented, is a bird, or rather a covey of birds, snatched from the snare of the fowler—from the fangs of lawyers.

While a regular and deliberate system of nsult has thus been opposed to the united authority of king, lords, and commons, where has been the House of Lords? where has been the House of Commons? In the House of Commons, is there not a committee appointed, or supposed to be appointed, at the commencement of every parliament, or of every session, called the committee of justice, or the committee of courts of justice?

An equal degree of contempt for the authority of the legislator is manifested by every application of the principle of nullification.

On a former occasion, the principle of nullification was considered in its character of an engine of fraud; in respect of its particular and more immediate effects, on each particular occasion, to the prejudice of the party having right on his side.

On the present occasion, the character in which it presents itself to view is that of an engine of usurpation.

The principle of nullification has been employed, the application of it warranted and ordained, by the legislator himself. An offence having been created, and punishment appointed, —the judge doing so and so, the proceedings against the defendant, it has been declared (declared by the legislator himself), shall be null and void: *i. e.* the defendant, though guilty, shall go free.

In this case, the application thus made of the

principle has been, on the part of the legislator, an act of inconsistency and imprudence; on the part of the lawyer, his scribe, to whose unfaithful hands he has committed the task of giving expression and effect to his will, an act of imbecility or treachery.

On the part of the judge, the mass of substantive law in question being the work of the legislator, every application made of the principle of nullification is a contempt: an act of insurrection against the authority of his constitutional superior. Condition, extension, limitation, modification, exception, (expressions interconvertible, expressions in effect the same), by the legislator, none at all annexed: none, at any rate, to the effect in question. To this declaration of the will of the legislator, the genuine and lawful legislator,—the judge, by help of the principle of nullification, attaches exceptions of his own at pleasure. To the extent of these exceptions, the will of the legislator is in effect frustrated, the law repealed.

Lawyer.—Contempt! What contempt? Do you consider who it is you are speaking of? Why use such harsh words? In the character of legislator, any more than in any other, is man infallible? Is it not a case continually occurring, the case of an exigence unforeseen by the legislator, brought by particular occurrences under the eyes of the judge? In the interpretation of laws, in the application of them to particular occurrences, exists there any where that system in which some latitude of discretion has not been considered as virtually reposed, reposed of necessity, in the hands of the judge? But, as often as any such discre-

tion is employed, is there not, according to your own account of the matter, some act of virtual repeal or enactment performed?

Non-Lawyer.—As to the power of interpretation, and the latitude proper to be assumed in the exercise of it, it is on this occasion nothing to the purpose. Any such exception as, in the honest opinion of the judge, the legislator, had the particular occurrence or state of things been present to his view, would himself have made,—an exception of this description, yes: provided always that the liberty thus taken with the actually declared will of the legislator, be confessed and notified to the legislator, with opportunity given to him, in case of disapprobation, to annul and stop it.

By an arrangement such as this, every unforeseen inconvenience would receive its remedy, and constitutional allegiance remain inviolate.

On these terms, but on these only, contravention, momentary and provisional contravention, to the actually declared will of the legislator, might be and ought to be, not only a power, but a duty: option between the letter and the spirit of the law would not be, as now, an organ of arbitrary power, operating upon the double-fountain principle.

But nullification! your principle of nullification! it is no less repugnant to everything that could in any case be or have been the will of the legislator, than to his will (on whatsoever subject) as actually expressed and declared.

Name, for example, that crime, if you can, of which it would have been in any case the wish of the legislator that it should be practised with impunity as often as the malefactor could find

means to bribe the clerk (or whosoever it be on whom it depends) to make the flaw, or supposed flaw, of which your judges, in their wisdom and their honesty, are pleased (as often as they are pleased) to make that use.

To make one instance serve as a sample for others by hundreds and by thousands, let us turn to the practice in regard to *convictions:* by which word are presented to the eye of a lawyer, convictions pronounced by justices of the peace acting out of sessions, for delinquencies referred to their cognizance by particular acts of parliament.

Trying the cause under the forms, or no-forms, of natural procedure, of pure and universal justice, the magistrate pronounces the defendant guilty: and, to ground the further proceedings, signs a record or memorandum, certifying the existence of the decision so pronounced. At the instance of the convict, the court of King's Bench, without so much as pretending to know anything about the facts, *quash* the conviction, liberate the defendant, set at nought the statute.

Non-Lawyer.—Liberate the delinquent, and without evidence, after he has been convicted, and by lawful authority, upon evidence? Pray on what ground is this done?

Lawyer.—On what ground? Because the magistrate had not set forth the evidence.

Non-Lawyer.—Why should he have set forth the evidence? Had the legislature ordered him to set forth the evidence?

Lawyer.—No: it was not necessary.

Non-Lawyer.—What then? Had any body else ordered him?

Lawyer.—No: it was not necessary.

Non-Lawyer.—What! not even you? you, who quash his decision for not having set forth the evidence? By what ingenuity was he to have discovered this to be your will and pleasure?

Lawyer.—We never meant that he should discover any such thing. Can you be so weak as to suppose we did? Are we such simpletons, do you suppose, that, when it is really our wish a man should do a thing which he would have no motive to do unless he knew it to be our pleasure,—that, in such a case, we should really omit to make him know that it was our pleasure? Did you ever know an old woman silly to such a degree of silliness? No, sir: our wish, and our determination, was to quash the decision at any rate. To quash a just decision, or to do anything else that ought not to be done, a pretence, you know (or you ought to know), we must always have. As to what the pretence is, it matters very little. If the evidence had been set forth, we should have found another. When we have a mind to get rid of a decision, do you think we are ever at a loss?

Non-Lawyer.—I must confess, I do not very well see how that misfortune should ever happen to you. But, as to the quashing of the conviction, pray what may have been the use of it?

Lawyer.—Use of it? Abundance of uses.

1. In the first place, this was making so much business. Down comes the money, quash goes the conviction, like a snail under our feet.

2. In the next place, we throw cold water on a bad precedent. The natural system is the rival and mortal enemy of our system: we

abhor it: we do what we can to crush it: by its encroachments it robs us; by its justice it puts us to shame.

The Turks have a prophecy that some day or other the Christians will drive them out of Europe. We have something between a hob-goblin dream and a prophecy, that one of these days the natural system will drive ours out of Westminster Hall. Our wish is to stave off the fatal day as long as possible.

By thus quashing, we turn the arts of the enemy against himself: he lets off a clause, to rob us of our business; and out of that very clause we make more business.

3. In the third place . . . .

Non-Lawyer.—Oh, a truce! a truce! I see very well—any man who will not shut his eyes may see with half an eye—how well you understand your business. Only one question more:—Is it a rule with you, pray, to quash every conviction that is brought to you to quash?

Lawyer.—No: that would not be good policy.

1. In the first place, if this were the case, sooner or later the legislator might find us out, and grow angry.

2. In the next place, it is not at all necessary; every alternate one does just as well: we do not stand counting; there would be no use in it: but that proportion, or thereabouts: the nearer to it the better, if there be any difference.

Non-Lawyer.—But, if every conviction were to be quashed without exception, would not this crush the designs of the enemy more effec-

tually? Would it not humble him still more, display the weakness of the natural system, and cure the people of having recourse to it?

Lawyer.—Possibly, in some degree: but that is not worth thinking about. Not to insist on the danger, of which you have a glimpse already; if in this way we served a distant end, we should disserve the immediate one. If men did not see somewhat of a chance of having their convictions held good, there would be none defended: all that business would be lost.

Non-Lawyer.—Oh yes, I see, I see: your world is like the philosopher's: nothing without its sufficient reason. But the legislature, all this while, what have they said to all this?

Lawyer.—Said? Nothing at all. Do what we will to them, they never say anything to us: they never have been used to it.

Non-Lawyer.—So then you have plenty of business in this line: a rare trade, this quashing trade!

Lawyer.—No: no great things after all: the rogues have almost grown too cunning for us. Rob us of it, to be sure, they durst not; but, little by little, they have found out a way of stealing it from us.

Non-Lawyer.—Steal business from the law? Parliament strip lawyers of their business? Oh, terrible! this is the very worst of larceny: this is *contra pacem* with a vengeance. Sad usage indeed! But pray how do they manage it?

Lawyer.—They provide a *form*, a skeleton form: and then, say they, every conviction that is according to that form is good. The form is

a skeleton form with blanks in it, such as are in Burn's Justice: the justice has nothing to do but to fill up the blanks: the business is so easy, a viper might as soon bite a hole in a file, as any of us find a flaw in it. Now what do you say to this?

Non-Lawyer.—Say? why, that you are insidiously and barbarously dealt with. But you have one thing for your comfort.

Lawyer.—Comfort, indeed! What comfort? where is it?

Non-Lawyer.—Nay, you have two comforts. One is, that of seeing how much they are afraid of you: that if they do take business from you, they take it not as robbers, but as thieves. Why think of the molehill they have filched from you? Think rather of the mountains they have left, and dare not meddle with.

Another is (for it shows itself through your lamentations), that the old business is still left to you: so that the damage after all is rather *lucrum cessans* than *damnum emergens:* the business does not increase so fast as it might; that is all.

Lawyer.—Alas! you are very much mistaken. From the old statutes there may be a remnant of business left, it is true: but it grows less and less every day. Every day brings new statutes, spreading over the old ground, and covering it with these cursed forms: by and bye there won't be a spot left in which a flaw will be to be found.

Besides that the stock of flaws and quibbles is almost exhausted; and (to let you into a secret) the people begin to find us out: we

cannot go on quashing through thick and thin, as we used to do. We are forced to draw up: we are forced, little by little, to turn liberalists. There is that passage in Hale against quibbles. It haunts us: it follows us like our shadow. It will blow us all up one of these days.

CHAPTER XXVI.

OPINION-TRADE.

THE opinion-trade is not, properly speaking, itself a device; it is a natural result, and a distinct branch, of the aggregate mass of profit reaped from the contrivances already brought into view under that name: but on this occasion the fruit cannot pass altogether unheeded, any more than the tree that bears it.

This branch of the partnership trade has for its sole foundation, the uncertainty and uncognoscibility of the law: properties essentially attached to its existence in the shape of jurisprudential law, howsoever chequered with patches here and there of statutory.

Should the legislator ever have the force to know his own will, and the grace to grant to his submissive subjects the possibility of knowing it and conforming to it, instead of being punished or plagued for not having conformed to it, there ends the opinion-trade: there vanish the opinionists, like animalcules, upon the drying up of the puddle in which they feed and float.

The publication of reports (histories of adjudged cases) is another arrangement unfavour-

able to the opinion-trade. Here we see an interest within an interest: Mammon divided against itself.

When an opinion is taken, before and in contemplation of a suit, the service sold by the opinionist consists in a conjecture concerning the part which, in the case as stated, the judge is likely to take. If, instead of the interests of the law partnership, the interests of the community were the objects regarded, means would be afforded to the subject for obtaining beforehand, at the hands of the legislator or the judge, that information, of which, at the hands of the opinionist, he purchases at present a precarious and often fallacious conjecture. A provision for this purpose would constitute a natural appurtenance to the body of the laws.

The opinionist entertains a natural antipathy towards the reporting lawyers. So far as the information they furnish extends, so far it goes towards narrowing and starving his trade.

He knows not what to say against them; and yet something must be said. They publish too much; more than used to be published: the science is overloaded by the quisquilious matter they rake together and preserve. They publish too soon; before they have taken the requisite time for digestion: the science is clogged by crudities. But, to do quite right in the sight of the opinionist, there is but one course they can take: and that is, to have done publishing, to give up their branch of the trade to his.

When the reporters have done their worst, there remain the old cases, over which they have no power. The cases themselves (the old

cases) are reported, it is true: but what perhaps may here and there not have been reported, are certain opinions of the reigning judges, the potentates of the day, respecting the matter of these cases. Sects form themselves about this and that quirk or quibble, as formerly among the Romanists. The technical system, wherever it sets foot, can never be without its Proculeians and its Sabinians. "Where the treasure is, there will the heart be also." A *plenum* of technical ideas is a *vacuum* of rational ones: the head that has fitted itself up for jurisprudence, has unfitted itself for everything else. The jargon which has been giving occupation to the official hour, gives relaxation to the social. The lawyer fights over again his arguments, as the conqueror his battles: the learned lord finds that entertainment in quibbles, which the learned king used to find in puns.

Twelve *dii majorum gentium* find an Olympus in Serjeants' inn: the opinionist lawyers are their priests. The will, or, in learned language, the *opinion*, of the god, is to be learned through no other channel than the will of the priest. The gods of the Pagan hierarchy had each his priest: the jurisprudential have theirs in common.

Advice to parties and attornies. If it be a knotty point, particularly open to controversy, —a point in conveyancing, for example, or any other that seems to lie deep,—seek not for that soundness of understanding, which would be but an *ignis fatuus;* betake yourselves in preference to some grave person in a silk gown, a *cœtaneus* and *contubernalis* of the reverend band. The table-talk of the ermine forms the privi-

leged science of the silk gown. At first hand, the opinion of the ermine is not to be bought, at any price: but, whether at first-hand or second-hand, what matter, so long as it is obtained?

From no one guinea given to an opinionist lawyer, does any judge ever receive the smallest share; for that would be a bribe: a sort of profit as unknown, as it is unnecessary, to any English judge. But the source of legal profit is in the abyss of legal uncertainty: and the benefit of the uncertainty is the patrimony of the firm, in the profits of which no member is without his share.

One abuse grows out of another abuse. It is because, in the field of litigation, the pursuit or defence of a man's due is so expensive, that he applies to the opinionist to learn whether it be worth his while to hazard the expense: and thus the expense receives an addition,* and that a certain one, in the first instance: and this additional burthen rests, without alleviation, on the shoulders of the party injured; for it is not allowed in costs.

If the cause of action lies but a hair's breadth out of the most beaten track, your attorney will not proceed without an opinion. Profit is no object to him: to the reputation of virtue he is not alike insensible. His fidelity and zeal are proved, by his anxiety not to plunge his client into an unprofitable expense: his modesty, by his unwillingness to rely on his own judgment. Nor yet, in so far as reputation is concerned, is he altogether insensible to his

* From two to thirty or forty guineas, including the attorney's share.

own just claims. For his defence against the imputation of ignorance, rashness, or rapacity, he has a right to that sanction which the usage of the profession affords to that branch of it in which he serves. Prudence thus comes in, to make up the group of virtues.

Whether in his opinion the cause be good or bad, the attorney finds his advantage in this practice. If good, profit is always increased, and not the slightest loss of reputation hazarded. If bad, he thus exonerates himself of all responsibility, his reputation is put under cover, and, if the profit of the suit is lost, the profit of taking the opinion is at any rate so much saved out of the fire.

But, of the ceremony of consulting the oracle, the loss of the suit with its profit is by no means a certain consequence. So far as the question of law is concerned, the opinionist may indeed be depended upon for not giving as law what he really does not look upon as law; so much reputation would be lost to him, and nothing gained in lieu of it. But the law depends on the facts: on the state of the evidence, as laid before the opinionist in the instrument called the *case*. By a very slight deficiency either in point of correctness or in point of completeness, on the part of that mass of supposed facts, such an opinion may be produced, as, while it engages the client in a suit predestined to be unsuccessful, shall secure both members of the partnership from all danger of reproach.

It is the interest of the attorney not to extract from his client (if he can avoid it) any fact which, if brought to view, would betray the

badness of his cause. On the part of the client, this sort of suppression finds itself continually favoured, partly by passion, partly by ignorance. Either he is not aware of the influence which the fact would have on the cause, or, if he is, the pain attached to the idea of it deprives him of the resolution to bring it out.

The propensity of the bulk of clients thus to deceive themselves, while deceiving their law-advisers, is no secret to either the honest or dishonest among attornies. The honest have to fight against it: the dishonest keep the discovery to themselves, and avail themselves of it; turning to their own account the proficiency thus made by experience in the science of human nature.

To the opinionist, whether the mass of supposed facts be correct or incorrect, complete or incomplete, is matter of the most complete indifference: or rather, if incorrect or incomplete to the effect of representing the client in the right where he is in the wrong, so much the better: since, in that case, a suit which ought not to be brought may come to be brought, and the opinionist to be employed in it

Should the incorrectness or incompleteness be upon the face of the statement so glaring as to force itself upon the notice of the learned sage, will he take the trouble to give intimation of it? Not if he be wise in the way of worldly wisdom. Labour it will cost him; advantage he will not gain in any shape: the lips of the attorney may thank him, the heart of the attorney will not thank him, for an article of information by which on one hand the deficiency of

the attorney is held up to view, while on the other hand the suit with its profit is nipped in the bud.

Numberless are the ways in which, with or without consciousness of wrong, the attorney may, without any risk of reputation to himself, engage the client in a groundless suit. Whatever the client states as fact, the attorney assumes as fact: by this demonstration of respect and confidence, he does not lose; by the opposite demonstration he might incur the displeasure of the client, as well as lose the benefit of the suit.

But, though the fact should be exactly as the client states it, the advantage which, on the occasion of the suit, the client will be able to reap from it, depends altogether upon the evidence: upon the faculty of adducing such evidence as shall obtain admission, and be found persuasive. By the attorney, it is either known or suspected, that (whether through inadmissibility or through insufficiency) the evidence will not serve. But, if he be ordinarily wise,—especially if in the person of the client he has the advantage of dealing with an uninformed mind, such as are those of the bulk of clients,—he will not be so unpolite or so imprudent as to suffer this knowledge or suspicion to pass the bounds of his own lips.

What then, after all, is the sort of intercourse thus described? It is a sort of previous enquiry or trial of the cause performed upon bad evidence, upon evidence commonly incomplete and incorrect, for the purpose of determining whether it shall be put into a course of being tried upon correct and complete evidence.

To the account of the technical system of procedure may this fruit of it be set down: since under the natural it has no place. Why? Because, under the natural, the facts are brought to light, with the utmost degree of correctness and completeness which the faculties, intellectual and moral, of the witnesses, admit of: brought to light with less delay, vexation, and expense, than what attends the production of that partial and naturally unfaithful picture, which, through so treacherous a medium as that of the pen of the attorney, is, in the course of the opinion trade, placed under the eye of the venal and uncommissioned judge, by whose decision nothing is decided.

Is it a case in which both parties are heard together? Self-partiality draws from each of them such of the facts as promise to operate in favour of his claim; the same force extracts from the lips of his adversary, information of a contrary tendency: and in both instances with as much promptitude, as well as correctness and completeness, as the collision of interests can command. Titius cannot have an interest in getting evidence for a false fact, but Sempronius has an equal interest in bringing down detection upon the falsity: Titius cannot have an interest in the suppression of a fact, but Sempronius has an equal interest in dragging it forth into light.

Is it of the number of those cases, in which one of the parties (at the commencement of the cause, the plaintiff) comes into court without the other, to demand the service which, in that stage of the cause, he stands in need of at the hands of the judge? Adverse party, with his

adverse interest, by the supposition there is none: but it is the interest of the judge, the honest interest of the unfeed judge, that, in this stage of the cause, the truth shall come to light, in a state as correct and as complete as may be. Why? Because (over and above all reputation, and the sacred regard for the ends of justice) by extracting from the applicant those truths which his inclination might have led him to suppress, or driving him out of those misrepresentations for which his inclination might have led him to obtain credence, the object of his application, unjust as by the supposition it is in this case, may be defeated at the time; and the labour of giving a joint audience to both parties, or whatever other labour on the part of the judge the grant of the ill-founded demand might have been productive of, will be saved.

Thus it is, that, in whatever point of view the field be contemplated, technical procedure, with its endless train of afflicting consequences, presents itself as the disease, the foul disease; natural procedure as the simple, the pure, the efficacious remedy.

CHAPTER XXVII.

EXTENSION OF THE ABOVE DEVICES TO SUBSTANTIVE LAW, AS FAR AS APPLICABLE.

Of the two main branches of the body of the law, the substantive and the adjective, it is to the adjective alone that the subject of evidence belongs. The application of the above or any other devices to substantive law, falls not therefore within the compass of the present work. It is for this reason, and for this reason alone, that the few exemplifications which have been given of the application of these devices have been confined within the compass of the law of procedure.

The error however would be great, if it were supposed that it is to this comparatively narrow part of the field of judicature that the application of these contrivances for the pursuit of the ends of judicature is confined. True it is, that, of these two great branches, the adjective is that in the arrangement of which the judicial authority has had the greatest share. But, in every country more or less, and in England in particular, the share which that same authority has had in the arrangement of the main branch, the substantive, has been very considerable. Even

in this branch, the part taken by the judicial authority may, in comparison of the part borne by the only competent and legitimate legislator, be stiled the principal part: jurisprudential law forming the ground, statute law sticking on here and there a few patches upon that ground. In both parts of the work the action of the same sinister interest being favoured with the same opportunities, the same character and complexion would naturally be exhibited by the work in both instances. As far as power extended and occasion favoured, the system of procedure would be adapted to the ends of judicature; the system of substantive law would be adapted to the system of procedure. The object in respect of the adjective branch, besides the multiplication of suits, (understand always profit-yielding suits), was to adapt the course of procedure to the purpose of extracting from each suit its maximum of profit. What it was in men's power to do, in working upon the substantive branch, towards the common end of both branches, confined itself to the purpose of giving birth to the greatest possible number of suits: to extract from each the greatest quantity of profit that it could be made to yield, lay exclusively within the province of the adjective branch. Flowers necessary for the crop might be furnished by both branches: it was from the adjective alone that the fruit could be reaped.

Intermediate ends common to each were, the nursing in the mind of the individual, in his character of suitor and client, the qualities of ignorance and error; on the part of the law itself, uncertainty, uncognoscibility, obscurity, ambiguity, and voluminousness.

Of the devices or contrivances directed to those ends, five (viz. exclusion of the parties, tribunals rendered inaccessible by distance, days fixed with long intervals, mechanical judicature, and acceptance of allegations in writing, at successive times, and under a licence for mendacity), these five, together with the office-multiplication principle, were arrangements exclusively adapted to the nature and texture of adjective law: the remaining ones, viz. the principle of nullification (with its supports, jargon and fiction, and its compound with the principle of reason and utility, the double fountain principle), and the habit of magnifying jurisprudential law at the expense of statutory, of representing devices as more real than realities, shadows more solid than their substances,—these five share in the privilege of being applicable to both branches, the substantive as well as adjective, with equal advantage.

And is it then all delusion, the chief pride and comfort of an Englishman, the matchless excellence of his laws?

By no means: from all that has been said, admitting it all to be just, no such consequence follows.

1. What there is good in the system, will be found to exist in a much larger proportion in the form of statute law, than in the form of jurisprudential law: in other words, to have been in a greater degree the work of king, lords, and commons, the legitimate legislators, than of judges, spurious usurping legislators, making base law underground, as their brother usurpers make base money, and like them, with one everlasting lie in their mouths, dis-

owning their work. Of what has been well done, the far greater part therefore has been done, not by lawyers, but in spite of lawyers: lawyers grumbling at it as much as they dare, and doing what they can to spoil it.

The exertions of the brotherhood have been employed, not so much in the support, as in the destruction, of society. To be assured of this, any eye that is strong and single enough to bear the sight, need but read over the statutes containing the wretchedly scanty provision that has been made by fits and starts for the amendment of the law. In that small but fertile department of parliamentary history, may be read the wickedness of lawyers. It is a history that may match with that of Cartouche, Jonathan Wild, Japhet Crook, and so forth, except that it is without names.

2. It is not in human nature that the character of the technical lawyer should have completely, and in every instance, swallowed up the character of the Englishman or the man. The private interest (it has already been shewn) is not on every point, nor on every occasion, in opposition to public interest. Sprinkled here and there over the surface of the law, some good (much or little, according to the object it is compared with), might doubtless be to be found, that drew its origin from a learned bosom. But, were the proportion much larger than it is, it might not be the less true, that, if an inventory could be taken of the number of propositions of which the mass of jurisprudential law is composed, nine of them out of ten would be found absurd in themselves, mischievous in

their consequences. Take this or that reasonable and useful proposition, you will find it swaddled up in a cluster of perhaps a dozen absurd and pernicious distinctions, extensions, conditions, exceptions, limitations.

But, for judging of the aggregate goodness of a body of law, no tolerably correct criterion can be deduced from the mere comparison of the number of rational and beneficial propositions contained in it on the one hand, compared with the number of irrational and pernicious ones on the other; no more than any estimate can be formed of the severity of a penal code, from the multitude of the penal laws contained in it. As in evidence, weight, so in provisions of law, *extent*, as well as number, must be taken into account. Sometimes an arrangement, of which the characteristic features may be composed in half a dozen words, shall have so much good in it as to compensate for a mass of irrational and pernicious matter sufficient to fill a volume. Take for instance, in judicature, the principle of publicity.

Were the most enthusiastic admirer of the English body of law as it stands, to be called upon for a list of the provisions on which his admiration grounds itself, he would find perhaps a score or two of pages, not to say a dozen or two, sufficient to contain it. Were he a non-lawyer, there would not be contained in it perhaps one, nor, even if a lawyer, many, of the propositions above alluded to under the description of irrational and mischievous.

The dunghill, were there enough of it to fill Augeas's stable, would not destroy the value of

whatever pearls might be to be found in it; but the dung would not cease to be dung, any more than the pearls in it would cease to be pearls.*

* If, in the mind of any person by whom the proofs exhibited in the foregoing pages have been perused, there can still remain a particle of doubt of the repugnancy of the technical system to the ends of justice, of its subserviency to the private interest of those by whom it has been administered, or of their consciousness of such repugnancy, as well as of such subserviency, (always excepted the persons, whosoever they may be, who, at the time of the present publication, stand invested respectively with judicial offices); two sources of information, or either of them, may, to the satisfaction of any eye that may have the curiosity to apply itself to them in this view, afford matter abundantly sufficient for the removal of any such doubt.

1. One of them is, the series of the several acts of the legislature, which, under the particular title of acts for the amendment of the law, or without any such special profession, have touched with a hand more or less strong upon the predominant, the technical, system of procedure; endeavouring, or professing to endeavour, to remove or correct this or that particular imperfection or abuse.

In each of these statutes, besides a source of law, may be viewed a source of history: in the remedy, inadequate or adequate, designed or not to be so, may at any rate (as in a mirror) be seen, in a degree more or less distinct and vivid, the shape and colour of the imperfection or abuse: abuses in number so great as to be counted, one knows not whether to say by dozens, by scores, or by hundreds: and amongst them many a one so flagrant, as to be sufficient of itself, without the aid of any of its numerous associates, to overspread the land with misery.

Two sorts of glasses or mirrors are alike capable of being employed, in taking a survey of this distant scene: one, the lawyer's, the property of which, like that of the cylindrical mirror, is to give to a mass of universal deformity an artificial symmetry: the other a perfectly plain one, which presents each object in the shape, as well as colours, that really belong to it.

Viewing the scene with a glass of the first sort,—the same which Blackstone is so busy in putting on every occasion into the hands of his pupils,—the object that strikes the eye is the unceasing care and solicitude with which the legislature, having from the hands of its ever faithful counsellor the man of law a system originally wanting but little of perfection, have watched every occasion to supply it with that little.

Viewed with the plain glass, being that through which alone an enlightened lover of mankind would ever bear to view it, the objects that strike the eye will be,—on the one hand, the enormity and multitude of the abuses; on the other hand, the negligence or ignorance of the legislator, and the patience of the people, as manifested by the length of time during which each abuse must have been covering and tormenting society with its baleful effects, before it could obtain its tardy, and almost always its altogether inefficient, or incompletely effective, remedy: age after age groaning under the disease, and then at last comes, such as it is, the remedy.* To present the body of information here hinted at, would be to republish the several statutes in question, with a commentary upon each. To point out where and how the information may be obtained, is quite as much as will be deemed suitable to the present purpose.

Secretly, and under favour of the artificial darkness, it has been from first to last the occupation of the man of law, to infuse on every favourable occasion the poison of chicane into the fountains of justice: openly, from time to time, the same insidious hand has been extracting, or making demonstrations of extracting, this or that minute particle of the poison, in great ceremony. In which character is his claim to attention strongest, and most reasonable? His real character of poisoner-general, or his assumed character of physician?

2. The other source of information is, the regulations of judicial procedure, established in different countries, as well as in the different courts in this country, by the authority of the judges. In that which has by this authority been done, may be seen (at least to the extent of it) the sufficiency of power; while in what has not been done, as well as in what

* Examples—1. Uncontrolled faculty of arrestation for debt. 2. Ditto of outlawries.

has been done, may be seen the deficiency of will:—throughout the course of so many generations and centuries, the perpetual and unvaried deficiency or rather utter absence of will (always and completely excepted the venerable persons, whosoever they be, by whom the offices in question may happen to be filled at the time of the publication of the present pages) to render the operations of judicature subservient to the ends of justice,—subservient to any other ends than those so often above designated under the name of the ends of judicature.

CHAPTER XXVIII.

REMEDIES SUGGESTED FOR THE ABOVE EVILS.

After so much as has been said of the disease, the purpose of the discussion would be in danger of being misconceived, discontent instead of reform might be taken for the ultimate object, misanthropy instead of philanthropy for the source, if nothing were said of remedies.

But, though the causes of the mischief appertain to the purpose of the present work, because without them no completely satisfactory account could have been given of the origin and probable cause of the system of exclusionary rules; the remedies, any further than as concerns the abolition of the coercive rules, and the substitution of a body of simple instructions in their stead, are not, by any appropriate tie, connected with the subject of this work. An indication as brief and general as possible is therefore the utmost that the reader will probably look for, or be pleased to meet with, in this place.

I. Removal of the external cause of the disease, the root of the corruption: substitution of salaries to fees, throughout the whole nest of judicial offices.

II. Substitution of the natural system to the technical, throughout the whole field of procedure.

III. Transformation (gradual, but at length complete) of the substantive branch of the law, from its present form of jurisprudential law, or jurisprudential patched with statutory, into pure statutory.

IV. Arrangements to be taken for annexing to offices already in existence, or to a new office or set of offices to be instituted for the purpose, an interest in the preservation and amelioration of the fabric of the laws: a system of registration calculated for the express purpose of indicating the defects of the law (if any), in proportion as experience gives them birth: and an officer or set of officers, whose function it shall be, to watch the appearance of all such effects, to take note of them, to present them from time to time to the notice of the legislator, together with an indication of the arrangements which present themselves as best calculated to answer the purpose of a remedy.

There is a time for all things: there may be a time even for justice. Fashions change: who knows, but, one day, even justice may be in fashion? Things little less strange have sometimes happened.

In the administration of what is called justice, the ends hitherto pursued have been (it has been seen) not the ends of justice, but ends opposite to those ends.

We have seen the chains in which the wisdom and virtue, as well as the power, of the nation, have for so many ages been held in thraldom:

chains forged by absurdity in the cavern of depredation. Time may come when men shall be weary of these chains.

Let us suppose (though it were only in the way of reverie), let us suppose as in a dream, to some perhaps even pleasurable, and not the less so for being fantastic. Let us suppose a time —if not in the present, in some future age, the year 2440, for example—in which, in a sort of mad fit, or by way of frolic, a resolution were taken, in one or other or both of the two proper places, to frame a system of procedure directed to the ends of justice. To gratify this odd fancy, what would be the one thing needful? It is comprised in one word: consistency. Yes: to frame a system of procedure as perfect and salubrious, as that with which the people at present are afflicted is depraved and pestiferous, the legislature needs only to tread in its own steps.

The exemplifications of the principal arrangements taken at different times by the English legislature for clipping the wings of the fee-collecting system, and substituting the pursuit of the ends of justice to that of the ends of judicature, may be comprised under the following heads, viz.

1. Institution of courts in which the natural system of procedure has been preserved or restored.

2. Partial abolition of special pleading.

3. Abolition of fees, in judicial as well as other departments.

I. Courts of natural procedure preserved or instituted.

Let us begin with bringing under review the whole list of these courts together: they appear to be as follows:

1. Courts martial: including the naval as well as the land branch of the military service: the mode of procedure not presenting, in the point of view in question, any material difference. *General* and *regimental* is a distinction, which, in the land branch, draws with it a difference respecting the constitution of the court, and the sort of causes cognizable, but none respecting the course of procedure.

2. Courts of inquiry. These, in the military service, serve for a sort of preliminary examination: an inquiry, having for its object the question whether the person who is the subject of it shall be placed in a situation so full of vexation in various shapes as that of a defendant in a criminal cause. Mode of procedure, to the present purpose, much the same.

In the above instances, but more particularly the first, the natural modes of procedure may be considered to be preserved rather than restored. Why? Because, in these instances, a strict regard to the ends of justice was so indispensable, that, under the technical system, the country could at no time have been preserved from utter ruin for six weeks.

3. Courts composed of justices of the peace, acting (whether singly or in companies) out of general sessions: the quarterly court of general sessions being courts of technical procedure.

4. Courts of request, more commonly called *courts of conscience:* one for each of the several towns or districts to which, on their respective application, it has been granted, by so many

acts of parliament, with a jurisdiction marked out by each respective act.

5. Courts composed of arbitrators chosen by the parties; with powers derived from a special article of statute law.

In whatsoever other respects the course of procedure observed in these several courts differs, in one of them compared with another, (and the difference is not great); it agrees in being unshackled by those rules with which it is fettered in the technical courts.

We have seen those devices and engines of fraud and injustice, which, having been invented and carried into effect by the technical system, constitute so many characteristics of that system. To none of these natural courts does the application of them extend.

In none of these courts of natural procedure is there anything to prevent them from directing their operations to the ends of justice. In no instance do they stand exposed to the influence of that sinister interest, by which, under the technical system, judges have been, in so deplorable a degree, diverted from the ends of justice to the factitious ends of judicature. In none of them is there any want of those powers which are necessary to enable the judge to pursue with effect the ends of justice; or if there be, and if the deficiency were supplied, as it might be and ought to be, the effect of the supply would only be to bestow upon them what is necessary to render them perfect in the character of courts of natural procedure; it would not bring them any nearer to the nature of the courts of technical procedure.

What distinction there is, is confined to evi-

dence. In the courts of conscience and arbitration courts alone, is the practice in regard to evidence free from those exclusions, of which, under the technical system, it is composed; those exclusions, the irrationality of which has been announced, and will be brought to view in detail as we advance.*

On every occasion, they afford the time requisite for making, on both sides, the necessary ground for right decision; and in particular, on both sides, for receiving whatever stock of material evidence the cause happens to supply. On no occasion do they consume more than that requisite length of time. Much less do they, on

* In arbitration courts (courts in which the judges are chosen by the parties), there is no power either to compel the attendance of unwilling witnesses, or so much as to employ fear of punishment, in the usual or in any other shape, for ensuring the veracity of willing ones: and, as no man can be subject to them without his own consent, it is only when both parties are willing to submit to justice, that their jurisdiction can come into existence. A court that cannot act except when both parties are content to do what is right, bears but too near a resemblance to a physician (if such a one there were) who would not prescribe except when the patient was in good health.

In the institution of these courts, the legislature conceived itself no doubt to be providing so many places of refuge, into which honest litigants might make their escape from the harpies of chicane. The man of law knows better things. Under his management, it has perhaps operated rather in increase than in diminution of the mass of made business. From those unlearned judges, who want nothing but power to receive the evidence in its best shape, an appeal is open on both sides to those profoundly learned judges, with whom it is an inviolable rule never to receive evidence for their own use in any shape but that which (in the opinion of everybody) wants nothing but the absence of the sort of security that has been made to depend upon the ceremony of an oath, to be the very worst imaginable.

any occasion, so work up and improve delay, as to render it a cause of necessary misdecision and injustice, by the deperition of the matter of satisfaction, or of a source of evidence.

On no occasion do they add to the unavoidable load of expense any mass of factitious expense, with or without design, either for the profit of the man of law, or the ease of the man of finance.

On no occasion do they add to that mass of vexation which, in the course of a suit at law, in one shape or other, is liable unavoidably to attach itself upon persons of different descriptions, any ulterior and factitious mass, the fruit of the negligence or the sinister policy of the legislator or the judge.

What, in a word, are the characteristics of the technical system of procedure? Exactly so many modifications of abuse. The practice of the courts of technical procedure is throughout infected with, or rather composed of, all of them: from all of them the practice of the courts of natural procedure is free.

The above observations are mere specifications of detail, to point the attention of the reader: to afford a security for the correctness of the general position in which they are included, and to manifest the impotence of *malâ fide* adversaries. By way of recapitulation, let us repeat once more the general positions in which they are comprized. The practice of the courts of technical procedure, being directed, under the impulse of sinister interest, to ends opposite to the ends of justice, is, throughout its whole texture, a compound of abuse: the practice of the courts of natural procedure, having nothing to turn it aside from the ends

of justice, and being uniformly directed to those ends, is pure from all such abuse.

The countenance shewn to the two systems, is the natural and necessary result of their respective aspects with relation to the interest of the man of law. Of the inexhaustible mass of eulogy with which the practice of the courts of technical procedure is so universally and indefatigably bedaubed, mention has been made already. When you can find nothing evil to say of your adversary, say nothing of him: this policy is no secret to the dullest mind. Of the courts of natural procedure and their practice, what do we hear said by the lawyers, or by anybody? Exactly nothing: everywhere a dead and universal silence. What can be more instructive, what more pregnant with confession, than this silence? By lawyers, nothing; for reasons too obvious to need or to bear repeating: by non-lawyers, almost as little; because so successful have been the labours of the man of law, that non-lawyers feel the risk, or rather the impossibility, of ever opening their lips on the subject, but in the way of a chorus, echoing the eulogies of their learned leaders.

Should there be here and there an individual who, moved by the principles of genuine philanthropy and honest love of justice, should be desirous of satisfying himself by a convincing test in what degree the popular creed upon this subject is the result of prejudice nursed by sinister interest, and in what degree (if any) the expression of truth; a short experiment will be found not unconducive to his purpose. Taking any of those institutions, the establishment of which has been among the devices of the technical system, as above exemplified; let him

apply it, in idea, to the practice of any of the courts of natural procedure, and ask himself in what respect any of the ends of justice will be served by it. The result may already be anticipated. Attached to the courts which gave it birth, the abuse is protected from censure (because protected from scrutiny) by the prejudices, the solemn plausibilities, the ever-thickening cloud of incense, the flowing vestments, the ermine borders, the masses of false hair; just emblems of the falsehood poured out, as from a perennial spring, from the receptacles which it envelopes. Transplant it from that its native soil; transfer it, in idea, to any of the courts of natural procedure, (courts of which the practice has nothing to recommend it to the man of law, nor anything to the non-lawyer but its subserviency to the ends of justice); it has no such defence to protect it from the eye of scrutiny: all illusions vanish: the abuse presents itself to every eye in its native colours.

Does it happen to you, for example, to be a member of the unlearned class of judges, serving your country in the character of a justice of the peace? Take up in idea (but, remember, in idea only), take up, in the character of instruments of justice, those devices, which, under the character of instruments of fraud and extortion, have been above enumerated as so many tools manufactured and habitually worked with by the superior and exclusively learned hands of lawyers. Hearing refused to parties. Tribunals put out of reach. Sittings separated by fixed and long-protracted intervals. Mechanical judicature. Pleadings in writing, at successive and distant intervals, spun out under a licence for selling lies. Nullification, destruc-

tion of just claims on grounds void of all relation to the merits: jargon without end: fiction without shame. Deck your proceedings with these flowers, all or any of them, and observe the consequence.

In the practice of courts military of all sorts, land and naval, general and regimental, courts martial and courts of inquiry, the natural course of procedure has ever been preserved: and (as already observed) for a very simple reason. At no time, in that line of judicature, could human society and the practice of the technical courts have maintained a contemporary existence: *pugnant, nec in unâ sede morantur.*

So many times as, by act of parliament, jurisdiction has been given to justices of the peace out of general sessions, or the possibility of obtaining justice against unwilling debtors to an amount not exceeding forty shillings has been communicated to creditors by the establishment of a court of requests; so many times have king, lords, and commons, joined in solemn proclamation to the following effect: The course of dealing pursued by learned judges is incapable of being employed with effect in the execution of our laws,—incapable of serving for the accomplishment of our predictions, for the fulfilment of our engagements, —incompatible, in a word, with the pursuit of the ends of justice.

In regard to natural procedure, and the courts in which it is in use, a supposition tacitly if not expressly assumed by lawyers is, that it is a sort of inferior, makeshift mode of administering justice (or something in lieu of justice), employed through necessity, for the relief of

those who cannot afford to go to the expense of justice according to the regular and proper (meaning the technical) mode: that the justice thus administered is a sort of inferior commodity, provided for the relief and accommodation of those who cannot come up to the price of the best sort: as neck-beef and sticking-pieces are provided by the butcher for those who cannot come up to the price of ribs and sirloins. That between good justice (*i. e.* justice as secure as possible from danger of misdecision) between good justice on the one hand, and dilatory, expensive, and vexatious justice on the other, there exists a sort of natural and indissoluble connection: between the best justice, (*i. e.* justice secured in the highest degree against misdecision) and prompt, cheap, and unvexatious justice, as natural and invincible an incompatibility and repugnance. That the more dilatory, the more expensive, and more vexatious your justice is, the more secure against misdecision it will be: that the less dilatory, the less expensive, the less vexatious your justice is, the worse it is in that other respect: that, therefore, a sort of option is in every case to be made; and that people have to choose whether they will have their justice good and secure against misdecision, but dilatory, expensive, and vexatious, or to a certain degree prompt, cheap, and unvexatious, but in an equal degree exposed to the danger of misdecision, and in that respect liable to be bad.

As often as a court of natural procedure has been instituted, (continues this hypothesis) this option has been made.

In the case of the court of conscience, a cheap

sort of justice has been provided, for poor and low people who cannot afford to have it good.

In the case of the extra-sessional justice-of-peace court, a sort of inferior justice is administered, partly and in some cases for promptitude (because delays would be prejudicial to the interests of government, as trustee for the public at large), partly and in other cases for cheapness: as in the case of the courts of conscience, for the accommodation of the poor and low people who cannot afford to go to the expense of the best sort.

Such is the hypothesis of interest and interest-begotten prejudice. What says the simple truth? Answer—Pretty exactly the reverse.

In complicated causes, different accidents are liable to arise, creating an indispensable demand for an extra portion of appropriate labour, of delay, (*i. e.* of time, occupied or not occupied in such labour), and thence of a proportionate extra quantity of vexation and expense.

These cases allowed for, and laid out of the account, (and they are extraordinary cases, they compose the small minority of cases), the repugnance and connection are nearly the opposite to what, by the hypothesis, they are supposed to be: and, in a word, the degree of security against misdecision is in the inverse made more nearly than in the direct ratio of the quantity of delay, vexation, and expense.

In the regular technical courts, the quantity of delay, expense, and vexation is greater, in a prodigious degree greater, than in the natural courts. This is a fact too notorious to be disputed: to be contested by any man, even by a lawyer.

But examine the system on the other ground, on that of security against misdecision, you will find this security not increased, but diminished: diminished in a high degree, and in a variety of ways.

1. By the exclusion put upon evidence, evidence in a variety of shapes, in all which (as will be seen*) it ought to be admitted: and in consequence of such exclusions, not merely danger but certainty of misdecision, or (what is equivalent) failure of justice: exclusion put upon the evidence of parties, and other indispensable or unexceptionable evidence.

2. By substitution of inferior and less trustworthy to superior and more trustworthy evidence: inferior evidence admitted, while superior evidence, even from the same source, is excluded.

3. By deperition of evidence: the consequence, partly and sometimes of the delay, partly and at other times of the expense and vexation: the party not able, or not willing, to defray the expense of procuring the evidence; including the factitious part manufactured by the system of technical procedure.

4. By deperition or latency of the matter of wealth in the character of the matter of satisfaction, the consequence of the delay: the property of the defendant (or, if in this respect incidentally become debtor, the plaintiff) dissipated, or conveyed out of the reach of justice.

5. By nullifications; and (in consequence of the delay resulting from them) deperition of evidence, or of the matter of satisfaction.

* See Book IX. Exclusion.

6. By mechanical judicature, as already explained.*

7. By non-production of evidence, or abandonment of just claim or just defence in other ways, through despair or incapacity of bearing the expense.

Man, be he where he will, will have his weaknesses. A court of natural procedure, any more than a court of technical procedure, will not be exempt from that common lot, by which every seat of power is doomed to become occasionally a fountain of injustice.

But, between a court of natural procedure and a court of technical procedure, there is this simple difference. In the court of natural procedure, injustice is matter of accident: in a court of technical procedure, injustice (as we have seen) in every shape is matter of necessity. In one of its shapes, expense, (viz. such part of the expense to the suitor as becomes matter of profit to the partnership), it was the end, the very direct and ultimate end, of the institution: in all its other shapes, delay, vexation, and misdecision, it has been, though not the ultimate, an intermediate end, as being a necessary means.

In a court of natural procedure, it is but too possible that occasional injustice should be done. In a court of technical procedure, it is not possible to avoid doing continual injustice: in the shape of needless expense, vexation, and delay, constantly, and without any exception: in the shape of misdecision, frequently. Checks being in both the same, in a court of natural procedure the practice of the worst judge that

* Supra, chap. XII.

ever lived would be a blessing, in comparison of that of the best judge that ever lived, in a court of technical procedure.

In a word, how should it be otherwise, if that be true which every page of this enquiry has been presenting to view; viz. that natural procedure has invariably had for its objects the ends of justice; technical, as invariably, ends always different from, mostly opposite to, the ends of justice?

I have spoken of *checks*. One of the pretences, if not the only pretence, employed by the technicalists in defence of their system, and the *forms* of which it is composed, (meaning those which, under the name of devices, have here been stripped of their sheep's clothing, and exposed to view), is, that these forms are so many checks to arbitrary power in the hands of the judge.

But what, I trust, is by this time pretty apparent, is, that of these *forms* there is not one which, either in intention or in effect, has ever operated or can ever operate in that character: and that amongst them there are few but what, so far from being checks, were in design, and are in effect, (far from being checks to arbitrary power), subservient to it in the character of *instruments*.

Checks:—of everything, or almost everything, capable of operating in that character, or needful for that purpose, the indication may be comprised in three words: publicity, appeal, jury. Not one of these, surely, which is in the slightest degree incompatible with the natural system of procedure.

As far as concerns the organization of the

existing courts of natural procedure, they are susceptible of great improvements: but in respect of the mode of procedure, two single features, (viz. appearance of the parties before the judge, and *vivâ voce* examination of the parties, but especially the former) are enough to render them as much superior to the best of the regular courts, as the military tactics of European are to those of Asiatic powers. They afford no work for lawyers: the wonder is not great that they should not be to the taste of lawyers.*

NOTE BY THE EDITOR.

* It is proper to observe here, that the praise bestowed by Mr Bentham upon the existing courts of natural procedure, is confined, in the strictest sense, to the *procedure* of these courts, and by no means extends to the constitution of the courts themselves. In many of these courts, it is well known that justice is very badly administered. What, however, we may be very certain of, is, that the cause of this bad administration of justice is not the absence of the technical rules; and that if, over and above all other sources of badness, the practice of these courts were afflicted, in addition, with the rules of technical procedure, they would be not only no better, but beyond comparison worse, than they are.

The real and only cause of the badness of the courts of natural procedure, (in so far as they are bad), is that which is the cause of the mal-administration of so many other departments of the great field of government; *defect of responsibility* on the part of those persons, to whom the administration of them is entrusted.

Causes of such defect of responsibility:—

1. Defect of publicity. In the case of a justice of peace, administering judicature, alone, or in conjunction with a brother justice, at his own house, or on his bowling green, or wherever he happens to be, publicity does not exist in any degree. In the case of courts of conscience, there is (I believe) nominal, but there can scarcely be said to be effectual, publicity; since the apparent unimportance of the cause prevents the proceedings in it from being reported in the news-

II. Abolition of special pleading.

In every instance, in which, by a clause in an act of parliament, a licence has been given to

papers, and would prevent it, even if reported, from attracting in general any portion, sufficient to operate as a security, of public attention.

2. Number of judges. In many of the courts of conscience, the tribunal is composed of a considerable number of officers; though any greater number than one, or at most two, (one to officiate when the other is sick, or, from any other cause, unavoidably absent), can serve no purpose but that of dividing, and in that manner virtually destroying, responsibility.

3. Defect of appeal. In a great variety of cases, no appeal lies from the decision of individual justices of peace, except to the Quarter Sessions, that is to say, from the justices individually to the justices collectively. How fruitless an appeal of this sort must in general be (not to speak of its expense) is evident enough. What little value it has, is mainly owing to the greater effectual publicity attendant on the proceedings of a court of general sessions, which are generally reported in the local papers, and always excite more or less of interest in the neighbourhood.

4. The judges exempt from punishment, or even loss of office, in the event of misconduct.

If the party injured by the decision of a justice of peace is able and willing to go to the expense of a motion for a criminal information in the King's Bench, or an indictment at Nisi Prius, or an action against the justice for damages; and if, having done so, he can prove, to the satisfaction of the judges, the existence of what is called *malice** on the part of the magistrate, by whose unjust decision he has been injured; all these things being supposed, he may then have some chance of seeing some punishment inflicted upon his oppressor; though even then probably a very inadequate one; the prevailing doctrine being, that the proceedings of an unpaid magistrate ought to be construed *liberally* and *indulgently*, as otherwise no *gentleman* will consent to take upon himself the office.

* In an action against a justice, according to Mr. Starkie, the plaintiff cannot recover more than twopence damages, nor any costs, unless it be alleged in the declaration that the acts with which the justice is charged were done maliciously, and without any reasonable or probable cause.

the defendant to plead the general issue, and give the special matter in evidence; the delay and expense attached to special pleading has, by the literal import of the words, been dispensed with. But so notorious in every such instance has the mischief been that would ensue to the defendant, who, having justice on his side, should forbear to avail himself of this indulgence, that no attorney who has any regard to his own character, (probably no attorney at all), ever did venture to forbear giving his client the advantage of it. In practice, then, the dispensation has exactly had (what it was intended to have) the effect of a prohibition: the licence by which men were allowed not to have recourse to special pleading, has had the effect of a prohibition, inhibiting, *pro tanto*, a practice so repugnant to every end of justice.

Almost every act, (to use the words of Ruffhead), "so far as it relates to officers of justice, of customs and duties, &c., and those acting under them, and highway, turnpike, and paving acts," give this authority, impose this virtual prohibition. Vide (continues he) the Statutes themselves.*

These instances amount already to several hundreds, perhaps to thousands.

But, without the above preliminaries, who ever heard of an English justice of peace who was so much as suspended from the commission, on the ground of any misconduct, however gross? And a country justice must either have very bad luck, or play his cards extremely ill, if, out of every thousand cases of misdecision, there be so much as one or two in which all these conditions meet.

* Ruffhead's Index to the Statutes; tit. General Issue.

In the greater part of them, the person to whom the indulgence is thus given is a sort of person to whom some special power has been given for some public purpose: but, though by far the greater number of cases are manifestly comprizable under this designation, others there may be that are not comprized in it.

Be this as it may: so many hundred times as the legislature has given this authority, so many hundred times has it recognized the practice of special pleading to be a nuisance: so many times as professional lawyers of the different classes (attorneys in the conduct of the defence, counsel in advising concerning the plan of the defence) have concurred in giving to their clients the benefit of this authority, so many times have they, by such conduct and deportment, subjoined their attestation to the same unquestionable and important truth.*

* Is there so much as a single case in which the necessity of special pleading will be seriously asserted, or any specific use whatever found for it? If there were any sort of case in which a pretence to that effect would be more plausible than in another, it would be the case of that sort of action (ejectment) by means of which the title to an interest in landed property is tried. But, from this most important of all claims of property, the nuisance of special pleading has been cleared away: cleared away, and (what upon the first mention of it seems unaccountable enough) not in the way of legislation, but in the way of jurisprudence, by lawyers themselves. But whatever they have sacrificed in this shape, they have made themselves ample amends for, by the clouds of fiction and jargon in other shapes, by which they have succeeded in rendering this important division of the field of procedure (naturally as intelligible as important) more completely unintelligible, and pregnant with misconception, uncertainty, and made business, than any other.

In each particular case, the recognition (it may be said) goes no further than that particular case. True: because in no one of these cases could it with anything like propriety have gone any further: because in no one of these cases did the statute, of which the clause in question made a part, belong to that too scanty class of statutes which have had for their declared object the amendment of the law: (meaning that part of the law which concerns the course of procedure).

But, in each such instance, wherefore was it that in that instance the practice of special pleading was thus abolished? For this reason, and no other, viz. that in that instance the practice was seen to be repugnant to the ends of justice. Repugnant! but why in these particular instances? Answer—Exactly for the same reasons which render it equally so in every other instance that can be assigned.

If there be any difference,—if there be indeed a case such that, though repugnant in so many hundred other cases, it would in that case be subservient,—it rests with that man, if any such man there be, who, being willing, conceives himself able, to point out that case, and to bring to view the difference.

In such case, let him mark well the task he will have to perform: viz. to shew that the points of fact in dispute in the cause will with more advantage upon the whole (regard being had to the several ends of justice, all of them taken together) be ascertained and settled by the chain of successive instruments of which the operation called special pleading is com-

posed (the judge knowing as little of the matter as he cares), than by the adjustment of the same points by the parties, together with such professional assistants as they may respectively think fit to have, at one and the same meeting, together with such subsequent ones (if any) as may happen to be necessary, in the presence and under the direction of the judge.

This is the point here in question. Subterfuges may be grounded on the particular sort of case in contemplation in these statutes: viz. the case where, by the allegation called pleading the general issue, the facts on which the merits of the cause depend may be sufficiently brought to view. Such are the subterfuges that, but for this notice, would naturally have been started: but, this notice being given, they are anticipated, and rendered unfit for use.

The converse thing is, that the complete extirpation of this nuisance would not be *improvement* but *restoration:* the abuse of language here in question having started up within time of memory. No institutional book, or book of practice, that does not refer you to a time at which the pleadings were performed *vivâ voce*, occupying in many instances fewer minutes than at present it does months. In those days, had it not been for the presence of the professional manufacturers of quibbles, (assistants, not, as at present, substitutes), and perhaps the absence of extraneous witnesses, and the minutes taken of what passed, the proceedings of the Common Pleas or King's Bench in those days would scarce have been distinguishable (in simplicity

at least), from the present mode of proceeding in a court of conscience, or before a justice of the peace.*

* A curious spectacle to any man, and an interesting one to him (if such a man there be) who has the interests of justice sincerely at heart, is to observe the diversity of the contrivances which, in different ages and countries, lawyers have had recourse to, the shifts they have sometimes been put to, to make business. In the time of Henry II,* and even so late as that of Edward I or II,† science consisted almost exclusively in nursing, for the benefit of a *malâ fide* defendant, lying excuses, by which the parties were prevented, as long as possible, from coming together in the presence of the judge. That consummation at length effected, no traces appear more of any further dispute or difficulty. The novelist takes his leave of hero and heroine, when he has brought them together in the presence of the priest: the institutionalist of those days takes his leave of plaintiff and defendant, when he has once brought them together in the presence of the judge. Ages and ages before this, Roman lawyers, acting in their own original theatre, had given themselves the benefit of a sort of special pleading; in their visit to this island they brought it with them of course. English lawyers, adding to the Roman mass of special pleading moulded to their own purposes, a mass of fiction and jargon of their own growth, have worked up a mass of mendacity and nonsense, such as the whole army of continental lawyers may look upon with envy and despair.

The climate of Scotland being somehow or other less favourable than that of England to the growth of jargon, and in particular of that nonpareil species which is called *fiction;* Scotch lawyers, notwithstanding their importations from the continent, appear (judging from some of their books) to have been sadly at a loss for materials out of which to spin out the thread of litigation: they have made a sort of Penelope's web of it, doing the work over and over again, as long as the patience of suitors could be made to last. See what has been said in Chap. IV. on the subject of sham representations.

* See Glanville. † See Hingham magna.

III. Abolition of fees.*

In the early periods of political society in general, and of the British constitution in particular, fees, in the character of a retribution for services rendered to the public by individuals, were an indispensable resource. Mischiefs, inevitably attached to that mode of retribution, there were in abundance: but in these early periods none of the conditions requisite to the provision of a succedaneum were as yet in existence: neither the experience and wisdom necessary to indicate the existence of the demand for any such substitute, nor the degree of public opulence necessary for the supply of it.

For a long time past, this necessary degree of opulence has happily not been wanting: and, by the aid of the stock of experience that has so long been accumulating, the intellectual lights necessary to the application of that experience, as to the point in question, to its proper use, appear at length to have pretty generally illuminated the public mind.

In other departments of government, the sinister influence of this mode of retribution has been brought to light by competent authority: in theory the discovery has been made, in practice it has been profited by. Parliament has raised its amending hand, and in these departments retribution by fees has been abolished, retribution by salary has been substituted in its stead.

* This, as the reader will observe, was written before the recent act, which, in the instance of the twelve judges, commuted fees for salaries. The evil, however, still subsists, in regard to a vast variety of judicial offices.—*Editor.*

The precedent (or rather, in this case as in the two foregoing ones, the mass of precedents) is, upon the face of it, conclusive: at any rate to such a degree conclusive, that, if there be any person who, admitting the propriety of the substitution in these instances, is disposed to contest it in the one now before us, it lies upon him to point out the difference.

But it would be a conception very wide of the truth, were it supposed that the reason for the substitution were no stronger in this case than in those; that the malignity of the principle of corruption were no greater in the bosom of a presiding officer of justice, than in the bosom of an officer employed in the receipt, or in any other branch of the expenditure, of the public revenue.

But it is not to those other departments alone that the benefit of the principle of reformation has been extended: the judicial department itself has experienced its purifying influence.

In so populous a neighbourhood as that of the metropolis, the power attached to the office of justice of the peace had been converted, it was thought, into an instrument of trade: the multitude of the fees receivable in the course of a day, in a sort of court in which vacations are unknown, made up for the smallness of them taken singly. In the country at large, so moderate is the rate, so elevated for the most part the situation of the person invested with that office, it is not in the nature of things that the emoluments derivable from it in this shape should, in any point of view, be an object of regard. But in the populous neighbourhood of the metropolis, it had for a long time been to

such a degree an object of regard, as to have attracted and placed in that commanding situation persons by whom it was regarded not merely as an object of desire, but as a necessary source of livelihood, serving in this respect in lieu of a profession or trade. Justices of the peace, of whom it was supposed that they had been drawn into the situation by such views, were distinguished from their colleagues in office by the appellation of trading justices.

Such was the policy by which one branch of an act of the last reign, called the general police act, was produced. Within the district there in question, fees, though still allowed, and ordered to be received, were no longer allowed to be carried to the private account of the magistrates by whose authority they were received: but, lest for want of adequate retribution there should be a want of fit persons disposed to take upon them the duties of an office so laborious, and in which it was necessary that the attendance should be so assiduous, a certain number of tribunals of this kind were set down in so many divisions of this district, a certain number of magistrates attached to each tribunal, and, in lieu of all emolument in the shape of fees, a certain fixed salary provided for each magistrate.

To some parts of the plan, objections were made, while it was in dependency for acceptance: but to the part here in question, nothing like an objection ever was or ever could be made. Nobody in this instance made a doubt of the corruptive tendency of the retribution presented in the shape of fees; to no one was it ever matter of doubt, that, in some way or

other, for the sake of the money attached to the business, magistrates of the description in question contrived somehow or other to make business: to no one was it ever matter of doubt, but that (howsoever it might be in respect of delay) factitious vexation and expense, to a degree calling loudly for the correcting hand of the legislator, was the result.

But, whatsoever may have been the proportion of business made for their own benefit by those unlearned magistrates, it never could have been great enough to approach to a competition with the proportion regularly, and from the beginning of things, manufactured by their learned superiors and superintendants. Compared with the factitious vexation regularly inflicted by the courts of technical procedure,—inflicted with the utmost regularity, without danger of punishment, without fear of reproach, with undefined power of punishment of their own creation for their protection against reproach,—punishment denounced or destined to be the severer, the juster and better merited the reproach;—compared with this, the utmost vexation attached to any profit ever made, or capable of being made, by any one of those unlearned magistrates, was a flea-bite.

Proportioned, at least with an exactness sufficient to the present purpose,—proportioned to the mischief suffered on the one part, has been the emolument received on the other. While the unlearned magistrate has been picking it up by shillings, his learned superior has been sweeping it in by pounds. Between them, to whom are we to look for the real trading justice? On the one part we see the prodigiously greater

share of the profit; on the other, the whole of the odium, and the exclusive possession of the name.

The trading justice, so called, made business: admitted. But (to say no more of profits, and quantities, and proportions) what means, what instruments, did he employ in making it? By what aggravation did he ever *add* to that degree and species of improbity, without which the effect could not have been produced? What did he ever do towards nursing ignorance, towards generating misconception, towards confounding and obliterating in the public mind the very idea of true justice? When did he ever refuse a hearing to both parties, or to either? When did he ever condemn a man unheard? In what instance is his tribunal removed, by his contrivance, out of the reach of those whose fate is attached to their attendance on it? When did he refuse, refuse to all men, so much as a show of justice, for four, for six, for twelve whole months together? In what instance did he ever keep parties for months and years upon the rack, while men in partnership and confederacy with him were loading them with vexation and expense by papers in which a small portion of unnecessary sense was drowned in a sea composed of surplusage, nonsense, and lies? In what instance did he ever, to the dismay and ruin of the suitor, break the faith plighted to him by the legislator, by a decision in which no regard was so much as professed to be paid to the merits of the cause? By what jargon did he ever befoul and corrupt the language of common sense and reason? By what lies, under the name of fiction, did he ever

defile his own lips, or compel suitors and their agents to defile theirs?

Thus it is, under the imperfect hold which the regard for justice and consistency hath as yet obtained over the human mind. Combined with weakness, improbity becomes an object of contempt; combined with power, the same improbity becomes an object of veneration. Acting on a petty scale, the unsuccessful robber mounts the gallows under his own name; acting on a great scale, the successful robber translates robber into king or emperor, and seats himself on a throne. The man who, without office or power, obtains money by false pretences, is called a swindler, and, under the name and pretence of temporary, consigned to perpetual, banishment (not to speak of slavery): the man who, in office, and with power for his protection, obtains the same money by pretences equally false, is stiled a judge, and beholds for his benefit mendacity softened into fiction, and extortion converted into law.

Thus it is, even to this day: but till when shall it continue so to be? To cause it so to be no longer, parliament needs but to tread in its own steps.

Not that, by the mere substitution of salaries to fees, the mischief could now be cured. The rule, *sublatâ causâ tollitur effectus*, may hold in some cases, but this is not of the number of them. The Augean stable was not emptied, nor even in any degree cleansed, either by the fattening or the slaughter of the animals by which it had been filled.

If the system be an *immedicabile vulnus*, in the excision of it lies an indispensable part of the

remedy: for the remedy, we need not go far: it stares every man in the face.*

* For want of the requisite limitations and exceptions, the most salutary rules may be carried too far and misapplied. It is only in so far as it may be in a man's power to multiply fees, by multiplying occasions for fees, that the principal reason for the abolition of fees has place. In other respects, it is of use that reward should keep pace as close as possible with service. The closer it keeps pace with service, the more it sweetens service; and alacrity, instead of disgust, is the result. Under a salary, it is a man's interest to be as idle and as negligent as he can venture to be, as he can be, without subjecting himself to punishment.

CHAPTER XXIX.

APOLOGY FOR THE ABOVE EXPOSURE.

IF the judicial character has been held up in a light considerably different from that in which it has been accustomed to be viewed; if it has been treated with a degree of unprecedented freedom;—it is not the *individual*, it is the *species* that has been struck at: nor yet the species, but in respect of that *situation*, in which the conduct of any other part of the human species would have been the same.

The general predominance of personal interest over every other interest—over every other force that can be applied to the human mind—is a principle not only not capable of being done away, but which for the good of mankind there exists no sufficient reason for endeavouring, for wishing, to do away: since it is upon this general predominance, that (when the matter is maturely considered) the continuance of the whole species, of every individual belonging to it, will be found to depend. Bad as the consequences sometimes are of an over-anxiety on the part of each individual for his own welfare; yet, if the chief object of each man's anxiety were placed without himself, without the sphere

of his own knowledge and experience, the consequence would be much worse. In the existing state of things, by this over-anxiety the well-being of society receives more or less disturbance: in the other state of things supposed, the very being of society would be very soon destroyed.

The man of probity and public spirit, the man of general and universal benevolence, is, not he in whose instance a continual sacrifice is made of personal interest, but he in whose instance situation and character have concurred in effecting between his personal interest and the public interest such a connection, that, in labouring to promote the public interest, he is labouring to promote his own interest at the same time.

If it be of use to man to know man's nature for what it is; most highly must it be of use to know what man's nature is, in the instance of those men on whose conduct the lot of all others is in so high a degree dependent. And, for the praise of a shew of candour utterly incompatible with true wisdom, to forego any part of a species of knowledge at once so necessary, and (it might almost be said) so new, is a species of suavity, than which nothing could be more weak, few things more injurious to the interest of the state and of mankind.

Suppose a proposition had been made for placing in the hands of Bonaparte the conduct of the war carrying on against Bonaparte. The proposition would probably not have been acceded to; but for the refusal to accede to it no possible reason could be given that would not amount to this, viz. that it would be against

his interest to conduct the war in such way as to this country should be attended with most advantage.

But to conduct the war of this country against Bonaparte in the manner most advantageous to the country, would not have been more undeniably contrary to the interest of Bonaparte, than to conduct the business of judicature in the manner most conformable to the interests of the people in respect of the ends of justice, is contrary to the interest of the judges: circumstanced as are at present these arbiters of human destiny.

The pictures which, in this no less than in other countries, interest and interest-begotten prejudice have been so universally accustomed to give of men in high situations, and more particularly of men in the situation of judges, are such in the composition of which not only the extreme of imbecility, but, if not improbity itself, the effects of it in a very high degree, are combined.

Praise bestowed upon misconduct, upon misconduct in any situation or in any shape, is a bounty given for it; operates as an encouragement to persevere in it.

As in no other situation would any instance be to be found, where, with an interest so opposite to that of the public at large, so much power of giving effect to that interest is combined; so neither would there be found any other situation in which praise has been so little merited, and at the same time so lavishly bestowed.

The notion so studiously propagated—the notion that, by holding up in an unwelcome

point of view the conduct of men in office, and more particularly in judicial office, their power or their disposition to comport themselves worthily in it is lessened,—this notion, convenient as it is to those who are thus studious to propagate it, is a notion than which nothing can be at once more erroneous and more pernicious. It holds up to view as a cause of disease, the sole remedy against that same disease.

The notion that men's obedience to the laws, that their disposition to pay such obedience, depends in any considerable degree upon the good opinion, the respect and reverence, entertained by them for the individual by whom those laws are administered, is a mere fallacy. Happily for mankind, in this country at any rate it is bottomed on much firmer ground: on ground which is not exposed to be shaken by vice and improbity in the person of individuals.

The disposition to pay obedience to the official mandates of a judge, has for its cause, not any opinion concerning the character of the individual, but the persuasion so thoroughly and so happily rooted in every reflecting breast, of the necessity of such obedience to the preservation of everything that any man holds dear. This necessity being the same, under every variation which the character of individuals in that situation ever has undergone, or is susceptible of; the persuasion is therefore altogether independent of the character of the individuals by whom the situation is at any time filled.

If, indeed, by any disadvantageous impression given of the wisdom and probity of these functionaries, any such disposition were produced on the part of the body of the people, as

that of rising up in arms against the authority of these functionaries, (which, so long as they have the support of the supreme power, could not be done without rising up in arms against the authority of the supreme power); then, indeed, the obedience of the people might thus be shaken, and insurrection and civil war be the result of the views thus given of the system of judicature.

But, though such a result is as easy to conceive as any other, nothing can be more remote from probability, or foundation in experience.

From what signs should any such effect be regarded as probable? From the present temper of the people? Deceived by the unanimous certificate and indefatigable eulogiums of all those who are supposed to understand the system—by all those at any rate who have the best means and strongest inducements to engage them to understand it,—the people are in the habit of regarding it as all-perfect; and their disposition towards it, far from being that of discontent and insurrection, is that of blind and indiscriminating admiration and obedience. To the miseries which so large a portion of them are doomed to suffer under it, no false certificates, no sophisms, can render them insensible. But, though incapable of being deceived as to the existence of the effects, they are not the less completely deceived as to the cause. Whatever they suffer under the system, they ascribe to the nature of things: whatever they escape from suffering, the escape from is attributed to the system itself, and to its matchless excellence.

In Blackstone they see their only guide, their only oracle: and from the voice of this

oracle, delivering itself under the influence of constant bribery, they hear the faultless excellence of the system proclaimed and trumpeted forth at every page.

In history, is there any example of an insurrection, or (since the infancy of the Roman commonwealth) so much as the least disposition to insurrection, produced in the great mass of the people by the contemplation of any defects in the system of procedure? So flagrantly defective as that system has in general been; so much more than even the system, the defects of which are here endeavoured to be exposed to view.

The following are the reasons for the condemnatory point of view in which the conduct of the fraternity has here all along been placed.

It being their interest to secure the continuance of the whole body of the mischief, in its utmost magnitude; and this interest being universally understood, or rather (more than understood) felt; it is impossible, in the nature of men and things, that they should concur willingly in the giving up of any the smallest part of it: that they should forbear opposing every remedial measure with all their might: that they should give up any the smallest part of it without being forced and compelled to do so, viz. by the clamour and pressure of the thinking part of the people, in and out of parliament; or that the people should be brought to apply any such pressure, without a clear and thorough view and conviction of the depravity of the system under which they are suffering.

Be the course of a man's conduct ever so

opposite to that of his duty, ever so pernicious to the public interest; so long as no disturbance of ease nor loss of reputation to himself is among the effects of his perseverance, his perseverance is among those things of which the public may be sufficiently assured.

If, acting in a state of uniform opposition to every end of justice, and to the interest and welfare of the rest of the community, they receive the same tokens of affection and veneration that would be worthily bestowed on them if the line of their conduct were directly opposite; no expectation could be more idle than that of their changing their conduct, and ceasing to oppose the changes that would be necessary to render the course of judicature conducive to the ends of justice. Every observation, therefore, that can contribute to place their system, and their conduct under it, in its true and proper light, to expose it to that odium which is so justly due to it, is a means to an end; a necessary means to one of the most beneficial ends that human virtue seconded by human wisdom can propose to itself.

To bring to light a violation of duty on the part of a set of public men, and at the same time to abstain from every observation, the tendency of which is to deprive them of any share of that respect which the public has been in the habit of manifesting towards them, are courses of action absolutely and irreconcileably incompatible. An option must be made: the mischief must be left in its full force, or a line of argument must be entered upon, having for its tendency the eventually divesting them of a

correspondent portion of this misplaced and ill deserved respect.

In doing the mischief which, in the exercise of the power attached to your offices, you are in the habit of doing, and which, by taking a different course, it would be in your power to save yourselves from doing, either you know what you are about, or you do not: if yes, you are deficient in probity, if not, in understanding. This is the dilemma, which he who brings to view pernicious practice in a public man, or set of public men, is continually and unavoidably pressing them with: and this dilemma he must either continue to press them with, or give up his enterprize.

As between want of probity and want of understanding; the higher the degree of intellectual force demanded by, and necessarily exercised in, any situation, public or private, the stronger the assurance that it is not on *that* side of the mental frame that the failure is to be found. Although the profession here in question affords a remarkable proof, how easy it is for sinister interest to reconcile to the grossest absurdity, and bring down to the convenient standard, the strongest and most strenuously exercised minds. Be the absurdity ever so gross,—make it a man's interest not to see it,—as often as it presents itself he will shut his eyes; as often as it is spoken of he will shut his ears: and in neither of these operations is there much difficulty.

This notion, about the duty of abstaining from everything that can tend to diminish the respect paid to the possessors of high offices, and judicial offices in particular,—observe to what it leads:

It leads to this: that not only all present abuses are to continue without remedy, but all future ones are to go on accumulating, and accumulating without end. For where is the species or degree of transgression in which a man will not indulge himself, if, while continuing thus to indulge himself, he stands assured that he will not only be safe against punishment or dismissal, but continue in the enjoyment of as much respect, as if, by the directly opposite course, he had manifested himself in ever so high a degree a benefactor to mankind?

It is a notion invented by malefactors: by such as operate, upon the largest scale, for freeing themselves from that faint check which it is in the nature of public opinion to apply to a mal-practice, in those places in which mal-practice, if it has not that check, has none.

In this country, as often as mention is made of the judicial establishment (meaning the judges), loud and incessant are the boasts made on the score of purity. Wherein consists this purity? What is the impurity, of which the existence is meant to be denied?

What, in the mean time, in respect of *purity* and *impurity*, (or, to use its other appellation, *corruption*), will be found to be the plain and real truth?

Of corruption in that sort of shape in which, in this country, (thanks to the publicity of the *judicial* procedure) it is not possible, and in which, were it possible, it would be to such a *degree* unsafe, that no man in his senses would be guilty of it,—they have not, any of them, ever been known, or so much as suspected, to be guilty. This is the case of common bribery.

Of corruption in that shape in which it consists in pronouncing an undue decision, in favour of this or that individual, or to the prejudice of this or that other, no one of them has ever been convicted; possibly, of late years, (for in the earl of Mansfield's reign it was far otherwise), no one has ever been suspected. But does it follow that no such injustice has ever been done? On the contrary, not a court in Westminster Hall, not a day of sitting, in which injustice in this shape may not have been abundant.

What is not known of any one of them, is, that, in any one given individual instance, corruption in this, any more than in that other shape, was ever committed. But what is known of every one of them, (at least in so far as future conduct can be known from past habits, and discourses, and connections), is, that there is not one of them on whose conscience that facility which an English judge possesses of deciding a litigated point one way or other as is most agreeable to him, ever appeared to sit heavy; and that there is not one of them to whom the only possible *remedies* to that perennial fountain of corruption, viz. the conversion of unwritten into written law, and the substitution of natural to technical procedure, would not be objects of abhorrence.

The *power* of giving loose to all such partialities, is dear to them as their life's blood: and is credit to be given to them or to their eulogists, when they protest that the idea of making any *use* of that same power never so much as entered into their thoughts? On no account will they endure to part with the *means;* and can any

credit be due to their protestations, when they protest that they abhor the idea of applying those means to their *end?* to the only end in respect of which they can be of any use?

Of corruption in a judge, what and where is the mischief? In what shape can the mischief shew itself? if it be not in the production, the known and wilful production, of one or more of the evils correspondent and opposite to the several ends of justice? But, that to a most enormous amount all these evils are actually and constantly produced,—all produced by every one of these servants of the public, and in every individual cause that comes before them without exception,—is matter of notoriety, and has been and will be brought to view over and over again in the course of these pages. That, of all persons in the world, the authors of these evils are those to whom it is least possible that the existence of them should be unknown, is surely manifest enough.

What is known of them is, that, by all of them more or less, (though in much the largest proportion by the highest among them in power and influence), profit in various shapes is derived from all these evils: profit, the quantum of which keeps pace with the quantity of the evils.

Is this corruption, or is it not? If it be not corruption, surely it is something equally bad. If it be corruption, wherein consists their boasted purity? That, in any hazardous and retail way, they are not known to practise corruption; but that, in the safe and wholesale way, they do practise it, and are universally known to practise it.

Of corruption in a judge is the mischief (not to speak of guilt,—for, when separate from that of mischief, the question of guilt is here an idle question)—of corruption in a judge is the mischief done away—is it so much as lessened—by the circumstance that in the commission of it he stands secured, not only against punishment, but against shame? Surely, by such a circumstance, the mischief (far from being lessened) cannot but be in an enormous degree increased.

In the shape of partiality, favourable and unfavourable, suppose it the wish and intention of a man in the sort of office in question, to be guilty of corruption every day in his life. With the exception of the security afforded by publicity, and the feeble and scanty application of jury trial, nothing more proper or effectual could a man set about doing, than to continue in their present state the rule of action and the system of procedure: the rule of action without words for the expression of it; the system of procedure of that sort which has the refusal to hear or see the parties for its essential and characteristic principle: a state of things in which there is really no law, and in which that which by a cruel abuse of language is called the law, is no better than one immense and everlasting snare: a field covered on its whole surface with spring guns and man-traps, and without so much as a board to warn the passenger of the destruction to which he is doomed.

If, under the notion of doing justice, that of fulfilling the *collateral* ends (as herein so often distinguished and described) as well as the *direct* ends, be included, it may be asserted on

the fullest examination and with the strictest truth, that in Westminster Hall, from year's end to year's end, in no one of its four courts, in no one of the causes therein (with or without hearing) determined, (for in what is there called judicature, neither seeing the parties nor hearing them is necessary), no, not in so much as a single one of them, is justice ever done.

True it is, that—so far as concerns the *direct* ends of justice,—injustice, however deplorably frequent, and although rendered so by the same means, is not thus invariably constant. In that sort of cause in which, quantity being pre-ascertained or agreed on, the question is simply (as in the case of a determinate thing, or things to a determinate value, a horse, a house, or a sum of money)—Shall it belong to plaintiff or to defendant?—in a case of this sort, in which justice would be the frequent result were the mode of trial cross and pile, injustice is not always the result. But in the case where *quantity* is the subject and sole subject of the question,—as when, for instance (transgression being out of dispute) the only question is, what shall be the compensation or what the punishment, what the damages or what the fine; in a case of this complexion, neither in respect of the direct ends of justice is justice ever done.

He by whom compensation is received with reference to, and in consideration of, a wrong sustained, is thereby (*i. e.* by and after the receipt of such compensation), if so it be that the compensation be adequate, put in as good

a plight as he would have been, had the wrong never been done. On one supposition therefore, and on one only, is justice, full and complete justice, rendered to the plaintiff: and that is, where the compensation, the money awarded to him, the damages, as it is called, is, to a certain amount, *excessive*.

But, if in this way justice be rendered to one side, it is only at the expense and by the means of injustice committed to the prejudice of the other side: and if it be true that (for example's sake, and thus as it were in the character of punishment) it is better that compensation should be excessive than defective; if it be better that the shape in which injustice takes place should be that of excessive charge in the name of compensation, and thus excessive loss to the defendant, than in the shape of insufficient receipt in the name of compensation, and thereby undue loss on the side of the plaintiff; still, on whatever side and in whatever shape it falls, injustice is injustice.

Due to the plaintiff on the score of compensation, say 10*l*. Money of his, which, after the receipt of what is allowed him at the charge of the defendant under the name of *costs*, would remain unreimbursed to him, say 20*l*. Instead of the 10*l*. damages, accordingly, say 30*l*. The injustice at the charge of the plaintiff would thus be avoided; but injustice to the same amount at the charge of the defendant would at the same time be done.

Under a system so constructed, to take any course that shall not be pregnant with the grossest and most palpable injustice, will fre-

quently (not to say commonly) be physically impossible.

Not a cause in which injustice is not done: injustice from which everybody profits, and for which nobody is to blame: not merely for which nobody is actually punishable, but for which nobody ought in justice to be punished: for which, in that sense, nobody is blameable. Here we have misrule brought to a system: the absolute perfection of misrule.

With how much less expense of thought, if not of ingenuity, might a system of real perfection, the perfection of good judicature, have been framed,—a system, the very idea of which in the character of a possible system would be scouted as Utopian,—if a tenth part of the reward that has been reaped from injustice, had been attached to the investigation and developement of the dictates of utility and justice.

But my lord such-an-one, or Mr. Justice such-an-one, such honourable men, men who speak at least so nobly,—on every occasion, if you believe them, perfect slaves to justice,—can you impute to them any such horrible disposition as that of a *constans et perpetua voluntas suum cuique non tribuendi?** Can you accuse them, on so much as any one occasion since their ascent to that high station, of doing anything that has presented itself to them in the shape of injustice?

Perhaps not: but consider that it is not by them that the system has been brought to what it is: they take it as they find it. Such as it is, it is of course to them the standard of right

* See Heineccius on the Institutes, chap. 1.

and wrong. No man ought to be wiser than the laws: no judge ought to be more honest than his predecessor. Whether he ought or no, thus much at least is clear enough, that there is nothing to be got by it.

Consider, that, in the judicial department, as in every other, (bating casual irregularities), the farther back you go in history, the more corrupt and profligate men are found. Consider, for example, that in the time of Henry VI., when judges wanted money, they used to fix upon any man that came uppermost, and, converting him into an outlaw, sell what he had, and put the money into their pockets: that the details of the operation were left of course to their clerks: that the persons thus ruined, getting of course from the receivers no redress against the thieves, complained to parliament; and that parliament, by way of setting matters to rights, declared and ordered that things of that sort should not be done in future.* It was a little before this time that lord chancellor

* At present, things are not exactly in that state. When a debtor, unwilling or unable to pay his debts, is proceeded against in a certain way, (by *original*, the phrase is,—do not attempt to understand it), he is converted into an outlaw. The property, instead of being given to his creditors, is given (that is, is said to be given) to the king. A whole host of official men fasten upon it, like crows upon a carcase: the creditors, and after them the debtor, get the bones.* As to the official and other learned members of the legal partnership; instead of getting the whole, as under the arrangement temp. H. 6, they do but come in *pari passu*. So far there is an improvement.—On the other hand, what they devour, they digest at their ease, under the shade of law. No parliament, to say, such things shall not be in future.

* Tidd.

Fortescue wrote his puff direct, his treatise *de laudibus legum Angliæ:* since which time there has been a congenial trial of skill between lawyers and auctioneers: the worse the wine, the more need it has of the bush.

Love of justice, with them, is neither more nor less than the love of those established arrangements under which they have been born and bred, under which they have practised as advocates, and sat as judges. In this sense indeed, their love of justice is strong enough: I suppose they never do anything but what is legal: whatever they do, the fact alone of their doing it, is to my mind conclusive proof of its legality. The lord chief justice of England, would he do anything that were illegal? Would he do anything for which, according to law, he were liable to be punished?

Indeed, should a fancy (for argument's sake) take a chief justice, especially if he had a seat in the cabinet, to do anything illegal, I do not very well see how it would be in his power to compass it. Were the fancy that of going upon the highway, shooting and stripping the first passenger he met, he would stand no better chance, I suppose, than any other highwayman. But as to any mischief done in the exercise of the powers given to him by his office; how any such mischief should have any illegality in it,—in the conception of that point lies the difficulty that presents itself as insuperable. In such case, illegality means nothing, unless it means liability to punishment: and as to punishment,—by whom, and at whose instance, and by means of what procedure, would it be to be administered? By removal?—think of pre-

cedents. By impeachment?—think of precedents; and of the understanding which seems to have been avowed, and to have become universal, on that subject.

If punished, for what, too, should he be punished? For open and wilful violation of the spirit as well as letter of a positive law, on a point in which misconception is impossible? It is every day's practice.*

Lawyer.—But can you, without compunction, nay without horror, reflect on the disrepute, not to say the odium and contempt, that you have been thus labouring to cast upon so many characters hitherto held sacred, upon so many exalted personages, upon.....

Non-Lawyer.—Hold: spare yourself if you please, and at any rate spare me, the enumeration: the Red Book has done it already to our hands. So far as it may happen to individuals to find themselves concerned, I am as free to confess, as you will be ready to believe, that this part of the fruits that may be expected from my labours (whatever it may amount to) is not the part that I reflect on with most pleasure.

One thing you will allow me: that in no sense of the word *gain* can I have promised to myself the having much to gain from it.

Another thing you will allow me: that they are not so low in power, in dignity, in credit, in everything, as to be, on this or any other occasion, in danger of receiving, in the opinion and at the hands of the public at large, any thing less or worse than justice.

* The case of treble costs.—See chap. 26. *Legislature contemned.*

As to any personal feeling on the part of any such high personages; should anything of that sort be really in question, I will freely own to you the system of arithmetic, which, as long as I remember, I have been in the habit of employing on all political occasions: every individual in the country tells for one; no individual for more than one. From so obscure and weak a hand, should any particle of uneasiness find its way into any learned breast, the assurance of uneasiness far more than equivalent being saved in unlearned breasts by hundreds, will be a sufficient equivalent.

BOOK IX.

ON EXCLUSION OF EVIDENCE.

PART I.

ON THE EXCLUSIONARY SYSTEM IN GENERAL.

CHAPTER I.

EXCLUSION OF EVIDENCE, ITS CONNECTION WITH THE ENDS OF JUSTICE.

THE system of procedure, judicial procedure, the system of adjective law, is a means to an end. That end is, or ought to be, the execution of the commands issued, the fulfilment of the predictions delivered, of the engagements taken, by the system of substantive law: the system composed of all the other branches of the body of law put together.

The law respecting evidence is one branch of that system of adjective law: it therefore ought to be, and everywhere in some degree is, one part of the means directed and applied to

the attainment of that end. In proportion to the steadiness and consistency with which it does act in subservience to that end, is its congruity, its propriety, its fitness, the claim it has to be approved of, and preserved unchanged.

With indisputable propriety may the fulfilment of the predictions delivered by the substantive branch of the law be spoken of as an end of justice. And why not rather as the end? Answer—Because, though the principal, and the only direct end, it is not the only one. Vexation, expense, and delay,—burthens pressing on the parties throughout every step of the course pursued for the attainment of that end,—constitute, in their aggregate, the *price* paid for the benefits they derive from the substantive branch of the law. To these certain evils, vexation, expense, and delay, (burthens infinitely variable in their amount, but in some amount or other unavoidable), add the possible vexation—the vexation which, where it does fall, falls on the defendant's side only,—the vexation which, in case of ultimate misdecision to the prejudice of that side, is produced by undue obligations imposed upon him: obligations of a penal or non-penal nature, according to the nature of the demand, and of the suit instituted in consequence:—the burthen of punishment imposed on him who has transgressed no law; the burthen of satisfaction imposed on him who has borne no part in any damage that has been produced, or at least in any injury that has been done or supposed to be done: the burthen of the obligation correspondent to, and inseparable from, the collation or recognition of some pretended right, which, though claimed by

the plaintiff, and conferred on him or confirmed to him by the judge, is really not his due.

The quantity of vexation, expense, and delay, without which the course necessary to the execution of the article of substantive law in question cannot be pursued with effect,—the price thus necessary to be paid for the chance of obtaining the benefit in question,—does it exceed the value of that benefit, or rather of that chance? In such case the price ought not to be paid: the law ought rather to remain unexecuted. The vexation and expense, without which the evidence necessary to the establishment of the plaintiff's claim cannot be produced, does it exceed the value of that claim; the plaintiff being unable or refusing to make adequate satisfaction for it? In that case the plaintiff's demand ought to remain unsatisfied: in that untoward state of things, (in itself, and laying out of the account the work of interested lawyers and misguided legislators, happily not a frequent one), the best choice left to the legislator, here as elsewhere, is the least of two evils, one or other of which is inevitable. A competition has place between two of the ends of justice: one or other of the contending branches of the public interest must yield: one or other of them must for the moment fall a sacrifice.

By laying a barrow-full of rubbish on a spot on which it ought not to have been laid, (the side of a turnpike road), Titius has incurred a penalty of five shillings. No man was witness to the transaction but Sempronius; and, in the station of writer, Sempronius is gone to make his fortune in the East Indies. Should

Sempronius be forced, if he could be forced, to come back from the East Indies for the chance of subjecting Titius to this penalty? Who would think of subjecting Sempronius to the vexation? Who would think of subjecting Sempronius, or anybody else, to the expense?

Here and there a case may present itself, in which it may be matter of doubt on which side the balance lies; but in general there will be no difficulty: all doubt will be removed by clear and indisputable principles. In each individual instance, to weigh mischief on one side against mischief on the other, where occasion calls for it, will be a task suitable to the station of the judge. To provide powers adequate to the taking of it, and acting in conformity to the result, will in every case be an attention suitable to the station of the legislator: an attention demanded at his hands by the indisputable dictates of justice.

In this instance we see an example of a case in which evidence ought to be excluded: in which (all ends taken together) the exclusion is called for by a due regard for the ends of justice: one case; and it will be found the only one. This is, the case of preponderant inconvenience in the shape of vexation, expense, and delay: inconvenience preponderant over the mischief attached to a sacrifice of the direct ends of justice, the mischief produced by ultimate misdecision to the prejudice of the plaintiff's side; or (what is equivalent to such misdecision) the mischief produced by an instance of the non-execution of some article of the substantive branch of the law; or (what is less frequent) by the imposition of some undue obligation on

an individual standing on the defendant's side of the cause, produced by the want of some evidence, which, had it been forthcoming, would have demonstrated the obligation to be undue.

Wheresoever the case thus described is realized, the exclusion may be pronounced, and, according to the principle of utility ought to be pronounced, proper, legitimate: congruous, conformable, conducive, to the ends (understand always to the aggregate of the ends) of justice.

In every other case, the exclusion (I announce it not as a postulate, but as a proposition to be proved) may be pronounced, ought to be pronounced, improper, illegitimate: incongruous, unconformable, unconducive, repugnant to the ends of justice.

If the above positions be correct, the doctrine of evidence, in so far as concerns the question as between admission and exclusion, will be comprizable in a very narrow compass: in one general rule, with an exception for its limit. The rule will be,—Let in the light of evidence. The exception will be,—Except where the letting in of such light is attended with preponderant collateral inconvenience, in the shape of vexation, expense, and delay.

Let in the light of evidence. The end it leads to, is the direct end of justice, rectitude of decision. The consequence of the exclusion of it is ultimate injustice in respect of that end: if to the prejudice of the plaintiff's side (by misdecision or otherwise), failure of justice; if to the prejudice of the defendant's side, misdecision to the prejudice of that side, and consequent undue vexation and ultimate injustice: imposing on him, on the score of punishment or

satisfaction, either the loss of some right, or some burthensome and painful obligation, to which it was not the intention of the substantive branch of the law that he should be subjected.

Let not in the light of evidence: not in every case, more than the light of heaven. Even evidence, even justice itself, like gold, may be bought too dear. It always is bought too dear, if bought at the expense of a preponderant injustice. Grant even that the dictates of justice were paramount to those of utility in its most comprehensive shape,—that the sacrifice of ends to means were an eligible sacrifice,—and that the aphorism, *fiat justitia, ruat cælum,* instead of a rhetorical flourish, were an axiom of moral wisdom: even thus, supposing the choice to be between injustice and injustice, the preferability of the less injustice to the greater would scarcely be contested.

But, in the cases above described, supposing them ever realized, the price paid for justice must, upon the very face of those cases as here described, be acknowledged to be uneconomical and excessive. Of the possibility of their being realized, we have seen already several anticipated exemplifications; we shall see them amply exemplified as we advance.

CHAPTER II.

DISREGARD SHEWN TO THE ENDS OF JUSTICE UNDER THE EXCLUSIONARY SYSTEM.

OF the ends of justice, under their principal divisions, a view has already been given: as likewise a view of the connection that subsists between them on the one hand, and the arrangements capable of being taken for the exclusion of evidence on the other.

But, if this statement be correct,—under all established systems, the practice (for theory there exists nowhere any) will be found to be a tissue of errors and inconsistencies: compared with others, each system infinitely various; compared with itself, each system infinitely inconsistent.

But (it may be said) under all their varieties, these exclusions, thus universal, as you yourself admit, and even proclaim, does not their universality prove the prevalence of one common principle? This principle, then, has it not the universal voice of all mankind, or at least of the most civilized and intelligent among mankind, to sanction it, and attest the reasonableness of it?

Yes, indeed: it has that sort of sanction, its reasonableness is proved by that medium of

proof, by which, till within this century or two, supernatural evidence of various kinds, evidence by duel, by ordeal, was pronounced superior in trustworthiness to all human or other natural evidence.

No, truly: the concord in this case is far from being alike real as in those. In substance, the mode of enquiry was in those instances the same: if between nation and nation there was a difference, it was confined to formalities, to unessential modes; here the arms employed by the combatants were of one sort, there of another sort: here a ring was to be taken out of bubbling, and supposed boiling-hot, water; there a party, supposed to be blindfolded, was to take a walk between two rows of heated, or supposed to be heated, ploughshares. But in the case of the exclusions put upon evidence, the agreement was rather in words than principles. One nation, or rather some one corrupt or lazy lawyer in that nation, called for exclusion on one ground; another lawyer, that is, the lawyer of another nation, called for it on a different ground: by each of these lawyers, the decision pronounced by the other was reprobated. Just as if there appeared in a cause a gang of lying witnesses, all contradicting one another, each giving a different account of the same business: they all agree, it may be said, for they all agree in lying: they are all liars. Look to words only, you may thus make harmony, in all cases, out of the most discordant elements.

In the established systems (for in one respect they will be found not discordant), in the established systems, if non-exclusion be taken for

the general rule, the exceptions must be searched for in very different sources from the only justifiable ones. Yes: in one respect they do agree; and it is this: that in no instance are the exceptions drawn from the source just mentioned. If at every other step the direct ends of justice are contravened, the contravention is gratuitous: at any rate, in no instance has it for its warrant and its cause a regard for any of the other ends of justice, the collateral ends: in no instance have men stopped to inquire whether the inconvenience inseparable from the execution of law, in the shape of vexation, expense, and delay, will or will not be preponderant when compared with the mischief attached to the non-execution or undue execution of that article of substantive law on which the suit has been grounded.

Various as are the exceptions taken in these systems to the rule of admission, they will all of them (unless here and there one should be found dictated by the mere force of blind and unaccountable caprice) be found referable to one or other of two leading terms: *deception*, and *vexation*: anxiety, real or pretended, for the avoidance of deception, and consequent misdecision, on the part of the judge; anxiety, real or pretended, for the avoidance of vexation: anxiety to avoid giving birth to inconvenience in that shape.

Of neither of these fears (supposing that the conduct of the man of law has been governed by it), of neither of these fears can it with propriety be said that it was directed to an improper object. In the first, we see an apprehension pointing to the direct end of justice:

in the other, an apprehension pointing to one of the collateral ends of justice.

But, in so far as fear of deception was the actuating principle, we shall find in every case the measures dictated or supposed to be dictated by a regard for that object, altogether unsuitable, or rather directly repugnant, to the avowed purpose. And again, so far as fear of vexation was the actuating principle, we shall find the measures dictated and produced by that principle equally incompetent. The vexation,—that vexation which was to afford a sufficient reason for the justification of direct injustice, for the contravention of the direct ends of justice,—will be found to be a quantity either evanescent, or purely ideal, or, though real and considerable, balanced and overbalanced by a preponderant advantage inseparably connected with it.

Thus much for the cases which afford room to conceive that reason and utility have in any shape been consulted on the occasion of the exclusions that have been established. But the cases will be but too numerous and various in which the discovery of any the least colour or shadow of reason will be seen to be a problem altogether insolvable by the most penetrating and industrious eye.

In referring to these two heads (deception and vexation) the exclusions put upon evidence by the established systems; what I mean is, not so much to vindicate the considerations which, in the minds of the authors, were actually productive of those several arrangements (a task in many instances by much too difficult for any human mind), as, among the legitimate

ends of justice, to bring to view that one, to which the arrangement in question, supposing it dictated by the ends of justice, bears the most obvious reference. For supposing the objects in question (deception and vexation) to have been really in view, the arrangements, with whatever sort of success, would at any rate have been directed towards the ends of justice: those of which deception, avoidance of deception, was the object, towards the direct ends of justice; those of which vexation, avoidance of vexation, was the object, towards that one of the collateral ends: in principle, the arrangement at any rate correct, howsoever in the application misguided and unfelicitous.

In regard to the exclusions here ranked under the head of vexation, incongruous exclusions put upon evidence under the notion of avoiding to produce vexation; the reality of that object, in the character of a final cause of the arrangement in question, will in many instances appear probable enough, or even indisputable. But howsoever the case may be in respect of humanity, small indeed is the wisdom that can reasonably be inferred from the regard thus paid to one of the ends of justice. Here, as elsewhere, so far as evidence is concerned, everything depends upon proportions. If the avoiding to produce vexation were the only object necessary to be regarded in legislation, no child in leading-strings would be unequal to the task. The result would be, not the putting an exclusion upon evidence in here and there an instance,—not the shutting the door against evidence in the instance in which, by the arrangements in question, it was

shut,—but the shutting the door against all evidence tendered on the side of the plaintiff, in whatever cause; or, to speak strictly, the abolition of the whole system of procedure, the abolition of all coercive laws.

To judge, therefore, whether, in the instance of a lot of evidence excluded on the score of vexation, the exclusion be warranted or unwarranted,—produced by a childish emotion, or by a considerate and manly regard for the ends of justice,—inquiry must be made whether the advantages attached to the act from which the vexation is seen to flow, have or have not been set against it on the opposite scale. Referring to the proper place for the details, to assist the conception of the moment let one example suffice. A witness being called on the other side, and standing in readiness to be examined; that to put a question to him, the answer to which, if true, would have the effect of subjecting him to an obligation (a legal obligation, non-penal or penal), would give birth to vexation in his breast, is not to be doubted. But in that vexation, great or little, is any sufficient reason to be found to warrant his being exempted from the obligation of making answer? By no means. The evil of the vexation, be it ever so great, is more than counterbalanced by the good flowing from the substantive law (coercive as it is), by which the obligation is imposed. By itself the weight is great: but the weight in the other scale greatly overbalances it.

To this case of a spurious exception on the score of vexation, apply now the example above given of a legitimate exception on the same

score, and observe the difference. By deposing to the rubbish, Sempronius, the East India writer, would have given the public the benefit of the five shilling penalty, but he would have retarded, to the amount of one knows not how many thousand pounds, the augmentation of his fortune. Place now on the carpet (instead of the future nabob, the East India writer), a malefactor, who, in consequence of his answers to the questions about the rubbish he is supposed to have seen laid on the road, comes to be convicted of a robbery and murder committed on that same road.

In this case, if the quantity of the vexation be the only object which the eye of the legislator is open to, how much greater the vexation than in the other! But, in the East India writer's case, the benefit of the five shilling penalty is all that there was to set in the scale against the vexation: all the good that the case affords consists in the benefit of the five shilling penalty: whereas, in the malefactor's case, the good is composed of the chance of the benefit of the five shilling penalty, with whatever benefit depends upon so much of the security afforded by the law against robbery and murder, to add to it.

CHAPTER III.

GENERAL VIEW OF THE MISCHIEFS OF THE EXCLUSIONARY SYSTEM.

EVIDENCE is the basis of justice: to exclude evidence is to exclude justice.

On the plaintiff's side, in a suit of a criminal nature; an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to conviction, operates as a licence for the commission of a crime.

In the exclusionary system may therefore be seen a fund of encouragement constantly applied to the production of all imaginable crimes.

On the plaintiff's side, in a suit of a non-criminal nature; an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to the giving effect to a rightful demand, operates as a denial of justice.

In the exclusionary system may thus be seen a fund of encouragement constantly applied to the production of injustice in all its shapes, to the prejudice of the plaintiff's side: to the destruction of all those private rights which it has been the business of the substantive law to

create, and for the efficiency of which it stands pledged.

On the defendant's side, in a suit of a criminal nature; an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence necessary to acquittal, (evidence sufficient for conviction having been delivered on the other side), operates as a licence for inflicting punishment upon the innocent on a false pretence of criminality.

In the exclusionary system may thus be seen a fund of encouragement constantly applied or applicable to the oppression of the innocent, by the infliction of punishment, in all its shapes, on persons in whose instance it is groundless and undue.

On the defendant's side, in a suit of a non-penal nature; an excluding rule, as often as it has the effect of shutting the door against an article of true and unfallacious evidence, necessary to a decision exempting him from the obligation sought by the plaintiff to be imposed upon him, (evidence sufficient for a decision imposing that obligation having been delivered on the other side), operates as a licence for imposing undue obligation in general, a licence to oppression by all imaginable wrongs other than on the score of punishment.

Examples. Exclusion put upon all persons of this or that particular description, includes a licence to commit, in the presence of any number of persons of that description, all imaginable crimes.*

* Exclusion put, in a case of rape, upon the testimony of quakers, includes a licence to the whole army to storm every quakers' meeting-house, and violate the persons of all

In a law which requires two witnesses for conviction, is included a licence to commit, in the presence of one single person of any description, all crimes and offences whatsoever.

This licence we shall find constantly granted by Roman law, and occasionally by English: in the former by jurisprudence, in the latter by statutes.

Consult your lawyer, or your law books: note the description of witnesses (and a most multifarious and extensive list of them you will find), by which, were it not for the exclusionary system, your transgression would be capable of being made apparent, but under which, be your transgression what it may, you are safe.

Such is the invitation, such the encouragement, given by the exclusionary principle to dishonest men of all descriptions; and, *mutatis mutandis*, on either side of the cause.

If either self-conscious injustice, or its chief instruments, mendacity and insincerity, belong to the category of vice; in the technical system in every country to a certain degree, but in England to a most pre-eminent degree, will be found an ever open school of vice; a source of

the female part of the congregation, in the presence of fathers, husbands, and brothers.

This licence is among the many of the same kind actually granted (as will be seen) by English lawyers. Defendants, the soldiers, could not be examined against themselves; co-defendants, they could not be examined against one another. Thus the licence is complete. Hire a witness among them indeed, give him impunity, your witness is a good witness, the interest ceases, and everything is as it should be: but, what happens not unfrequently, none of them will accept your hire; their comrades would cut their throats.

moral corruption, pouring itself forth in a copious and uninterrupted stream throughout the mass of the people. By example, by reward, by compulsion, by every means possible or imaginable, we shall see (every man does see it that does not shut his eyes against it) this most mischievous of all vices propagated under the shelter of the technical system, propagated by the professed and official guardians of the public morals: and, among the instruments of this disastrous husbandry, are to be found some of the most efficient of the evidence-excluding rules.

From the above description of the nature of the mischief, may be deduced the description of the persons interested in the pushing it up to the highest possible pitch: *malâ fide* suitors on both sides, including malefactors of all sorts, their accomplices and well-wishers: men of law, as being the natural allies of malefactors and other *malâ fide* suitors: under the technical system, judges, and other official as well as professional lawyers: professional lawyers under any system.

Exclusion (as will be seen) is one of the grand engines by the help of which corruption has been enabled to gain its ends: and by which arbitrary power, with the *jus nocendi* it enforces, has been acquired; that faculty, the acquisition of which is so delightful to the human heart, whether, on the particular occasion in question, there be or be not a disposition to employ it.

An engine of power, good: but how of arbitrary power? By means of what has been already described under the name of the double-

fountain principle. Exclusion of evidence (barring the few exceptions of which account will be taken) is contrary to reason. But, as often as a judge has recourse to reason, he may be pretty sure of having the opinion of non-lawyers on his side. Establish then the irrational excluding rule, you have two fountains, from the one or the other of which you draw, as on each occasion is agreeable to you. Would you serve the plaintiff? draw from the fountain of reason: Would you serve the defendant? draw from the fountain of the established rule, *stare decisis*. Secure of eulogium either way, the ground of it is at your choice. Adhere to the rule, you have the praise of steadiness, and superior probity: depart from it, you have the praise of liberality, and superior wisdom. Adhere to it, you have the rigorists for your applauders; depart from it, you have for the same purpose the liberalists.

If it be in the nature of the exclusionary rules to save the judge from deception oftener than it leads him into it, all this mischief may be found to be made amends for, and outweighed. Whether it be in the nature of such an arrangement to be productive of any such advantage, is a question that will be considered in its place.

CHAPTER IV.

DICTA OF JUDGES ON THE EXCLUSIONARY SYSTEM.

IT may be a spectacle not altogether uninteresting to the reader, to see a picture of the exclusionary system drawn by the hands of titled and official professors: especially should it happen to be a matter of interest to him to consider, that, were the entire system of jurisprudential law to be represented in the character of Hercules, this member of it might be considered as his foot: *ex pede Herculem*. From this one limb, no very inadequate conception may be formed of the beauty and proportion of the whole. He to whom it may be a matter of interest or curiosity to contemplate it in that character, need not fear to find himself in any such perplexity as the employer to whom the architect presented a brick as a sample of a house.

In the few specimens, which the reader will now be enlightened with, of the wisdom of English sages, he will see at one and the same time how impossible it is to know how anything is, and how certain it is that everything is as it should be. He will see at one view a specimen

of the discernment, the security, and the consistency, which shine forth with perpetual and undiminished lustre from those exalted stations: and (as in the case of the royal sun of the seventeenth century) he may propound to himself for meditation, or to his neighbour for debate,—of which of this cluster of virtues is the splendour most conspicuous.

I. Peake, 152. Lord Kenyon, c. j. "All questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been *matured by the wisdom of ages*, and are now *revered* from their *antiquity* and the *good sense* in which they are founded: they are *not rules depending on technical refinements*, but upon *good sense;* and *the preservation of them is the first duty of judges*." 3 Term Rep. p. 707.

II. Peake, 159. The same lord Kenyon, c. j. "I premise with mentioning what was said by lord Mansfield on this subject, that the old cases, upon the competency of witnesses, [*i. e.* upon the question whether they shall be admitted or not admitted], have gone upon *very subtle grounds*."

III. Ashhurst, j. "There is *so great a contradiction* in decisions respecting the boundaries of evidence, that I rather choose to give my opinion on the particular circumstances of the case, than to lay down any general rule on the subject." 3 Term Rep. p. 27.

IV. Buller, j. "This case involves in it the question which has been so repeatedly agitated in courts of law, what objections go to the *credit*, and what to the *competency*, of the witness:"

[what objections have the effect of excluding the witness, and what objections have no effect at all]; than which *no question is more perplexed.*" Ib. on the same occasion.

5. Grose, j. "The distinction between *competency* and *credit* is *by no means accurately settled:* in many of the books, the shade between them is so light that the boundaries of either can hardly be perceived: [*i. e.* that it can hardly be known whether the witness is to be admitted or excluded.] But in all the books which treat of evidence there are certain *technical* rules laid down which are *highly beneficial* to the public, and ought not to be departed from."* 4 Term Rep. p. 268. anno 1788.

6. Speaking of the question, whether, in a criminal cause, the testimony of a proposed

* *Reader.*—Public?—beneficial to the public? technical rules beneficial to the public? Somehow or other, is there not something of an erratum here?

Compiler.—No erratum at all. In jurisprudence everything is right, when aright interpreted. When that which has been said comes to be interpreted (or in his phrase *construed*), various and numberless are the circumstances to be taken into the account: amongst others, the subject matter, the occasion and the place.

If, at Surgeons' Hall, occasion happening to make mention of a certain disease, the learned professors were to speak of it as beneficial, highly beneficial to the public, could any doubt be entertained what public was intended?

I beg pardon of these professors, in that seat of real learning, for a comparison, which, if not aright interpreted, would to them be so full of injury. The master plague, which is at once their enemy and their friend, is combated by them with degrees of success, varying of course with the skill of the curator, and the idiosyncracy of the afflicted: but, whatever else may happen to be wanting, zeal, at the least, is never wanting: by them the disease was not created, by them it is not fostered; who among them was ever heard to eulogize it?

Who is the lawyer's neighbour? Answer,—the lawyer.

witness, having an interest, which may be affected by his testimony, in a future contingent civil cause relative to the same transaction, shall be admitted;—" The cases on this point," says Mr Peake, " are *so contradictory that it is impossible to attempt to reconcile them.*" Thus far the institutionalist. In such provoking colours does the absurdity of this learning sometimes shew itself, that the most wary and devoted votaries of the jurisprudential Themis are sometimes off their guard.

Observe now what follows in the preface (which is always the last part printed) of the same really useful and instructive treatise, in comparison of which the performances of the two titled institutionalists sound like the drivelings of an old woman in her dotage.

7. Peake, Preface, v. " The chapter on parol testimony also is in a great measure new: for the rules of evidence in this respect have been so much *altered,* and so much light has been thrown on them by decisions, that comparatively little is to be collected from ancient books that is satisfactory on the subject. It was said by lord Mansfield, (1 Blac. 366.) with that force of expression peculiar to great minds, who exercise the right of thinking for themselves before they assent to the authority of others,—' We do not sit here to take our rules of evidence from Siderfin or Keble.' Rejecting those cases which were not supported by *principles,* that great judge established a *system* for

By what man was the duty to his neighbour ever so fully understood, so assiduously practised?

Who are the lawyer's public? The public composed of lawyers.

his successors to follow; and *competence* and *credibility*, so frequently confounded together, are now *accurately defined* and *well understood*."

Accurately defined and *well understood!* these very objects, in the decisions concerning which, in the declared opinion of one of the noble and learned lord's colleagues, there was "so great a *contradiction*;" and at that same time, in the the opinion of another of those his learned colleagues, a degree of *perplexity* than which a greater is not to be found anywhere. Such is the sort of matter endeavoured to be passed upon mankind for *accurate definition* and *good understanding* by men of law! Thus it is, that, as far as they have their wish, every intellectual object that comes within the sphere of their activity is defined and understood.

Understood? to be what? The answer is already given; given, and by the same hand:— to be (what they are) "so contradictory that it is impossible to attempt to reconcile them." The application of the observation has there indeed its limits: but whether any such, or any other, limits to it were necessary, the reader will soon be enabled to judge.

In those seats of learned wisdom, what should a man do, were his longing ever so anxious, to escape from praise? "We do not sit here to take our rules of evidence from Siderfin or Keble," says lord Mansfield: "and here," says the commentator, "we see the force of expression peculiar to great minds, who exercise the right of thinking for themselves." But, my good lord, if not from the decisions of preceding judges, as reported by any man whom chance has raised up to report them, from whom would

you take your rules? From your own secret determinations, never communicated, and impossible to be conformed to, because impossible to be known? Think for yourselves, and welcome: thinking for yourselves, you think for us: but at least render it possible for us to know what you think, before you ruin us for not having conformed to it.

CHAPTER V.

SPECIES OF EXCLUSION.

A LOT of evidence which one of the parties would wish to see produced, fails of being produced. Whence comes this failure? Is it that it might have been forthcoming, but the law or the judge will not suffer it to be produced? In this case the exclusion put upon it may be said to be *positive*. Is it that it might have been forthcoming, but the law or the judge withholds any of those *aids*, any of those *powers* (coercive or remunerative, but more especially coercive), which in the case of this or that other article of evidence are not refused, which are necessary to its being forthcoming, and for want of which it fails of being so? In this case the exclusion may be said to be negative.

Supposing the exclusion improper, in the former case the injury done is more palpable, but in the other it is not less.

Positive or negative, at whose instance is the exclusion put upon the evidence? If the person whose evidence is in question be a party in the cause, then come the questions—Is it

at his own instance; or at that of a co-party on the same side; or at that of *the* party, or, if several, of *a* party, on the opposite side. If he be an extraneous witness, then come the questions—Is it at the instance of a party on the same side of the cause as that of the party by whom his evidence is or would have been called for; or at the instance of the party, or a party, on the opposite side; or at his own instance; or at that of a third person, a stranger to the cause; or, in each respective case, at the joint instance of two or more such persons? By one person the exclusion may be called for on one ground, by another on another ground: on one ground it may be improper, on another not.

The exclusion put upon the evidence, is it put upon it at all events, or only in certain events? or, what comes to the same thing, are there any events in which it may be taken off? Hence we see another distinction: absolute exclusion, conditional exclusion.

By the wonder-working hand of logic, conditions are changed into limitations, limitations into exceptions. Improper if absolute, the exclusion may, by the conditions, the limitations, the exceptions, be brought within the pale of propriety; by its tendency to save collateral inconvenience, delay, expense, or vexation.

Of possible conditions, the number is infinite. Distinguished from the herd, stand those which respect the existence of other evidence to the same facts.

In some instances, the evidence in question is excluded, *unless* some other evidence is pro-

duced likewise. Exclusion *nisi alia*, or *si non alia* (*probatio*, understood).

The most common as well as important case, is where the other evidence, thus made requisite, is required to be produced on the same side of the cause. Exclusion *nisi alia ex eodem* (*latere*, understood).

Of this case an example is presented by the rule of law which requires two witnesses. Every man is excluded, every man, be he who he may, unless he comes with another in his hand. Two propositions are here assumed: All men are liars, and all judges fools. Without the second, the first (we shall see) would be insufficient.

Another case is, where the evidence thus made requisite is required to have been produced (or at any rate to be about to be produced) on the opposite or adverse side. Exclusion *nisi alia ex opposito*, or *ex adverso*.

To this head may be referred the exclusion put upon counter-evidence, in the case where the primary evidence, by which the demand for it would have been produced, fails itself of being produced. If the evidence supposed to have been prepared against the character of Testis fails of being produced, any evidence that may have been prepared in support of the character of the same witness, will naturally be excluded. And so in the case of *alibi* evidence. Failing, on the other side, the evidence which supposed the man there, you have no need to prove him elsewhere.

In every case of conditional exclusion, a case of absolute exclusion is included. By the condition, the limitation, the exception, the

case is divided into two cases: in one, the evidence in question is not excluded; in the other, it is. To the first of the two, the discussion concerning the propriety of the exclusion is confined.

Where no condition, limitation, or exception, is spoken of, the exclusion must be understood to be absolute.

In other instances, the evidence is excluded, *if* there be other evidence: *not* excluded, *unless* there be other evidence: (understand, of this or that particular description). Exclusion *si alia*.

If the case afford other evidence, and that other evidence sufficient, and this sufficient and admitted evidence not attended with a mass of collateral inconvenience, preponderant over that with which the delivery of the excluded evidence would have come accompanied; the exclusion, it is plain, can do no harm. To this head belongs (as we shall see) one of the two classes of cases in which the exclusion put upon evidence is proper and justifiable.

The party whose interest, according to his conception, would be served by the evidence, insists upon it. The collateral inconvenience with which it would be attended, is not noticed by him, or not regarded by him, or is perhaps the very and only cause, the final cause, of the demand he makes of it. But by the judge it will be regarded, and regarded with other eyes.

To this head will be found referable, kinds of evidence in great masses, against which, with more or less reason, the door is, or has been proposed to be, shut:—1. Inferior makeshift

evidence excluded, or proposed to be excluded, in consideration of ordinary regular evidence from the same source; 2. Ordinary excluded, in expectation of super-ordinary, more satisfactory and persuasive, evidence, from the same or other sources; 3. Where the demand for it is created by some other lot of evidence on the same side or on the opposite side of the cause,—any sort of evidence excluded: viz. in the case where the evidence, by which (had it been produced) the demand would have been created, fails of being produced.

So far as the supposition of better evidence is verified, the inferior would produce the bad effects of irrelevant evidence: so far as the supposition fails of being verified, certain misdecision, as certain as in cases of deception by bad and false evidence, is the result.

PART II.

VIEW OF THE CASES IN WHICH EXCLUSION OF EVIDENCE IS PROPER.

CHAPTER I.

GENERAL VIEW OF THE CASES IN WHICH EXCLUSION IS PROPER.

Of the production of evidence, pecuniary expense is an ordinary vexation, in some shape or other, in some degree or other, an inseparable, consequence. To warrant the production of any lot of evidence, the necessity of it to some one of the other purposes of justice (ultimate decision, when due, on the plaintiff's side, ultimate decision, when due, on the defendant's side) is an indispensable condition. A lot of evidence is proposed to be produced. The advantage proposed from the production, is it imaginary? Is it outweighed by the inconvenience? In either case, exclusion is the result.

The cases, then, in which exclusion may be proper, may be distributed under two grand heads:

I. To the first head may be referred, those in which no mischief at all can result from the exclusion.

If this be the case, it must be either, 1. because the suit itself is of such a nature that no good can come from it; or, 2. because, though the part taken by the party by whom the evidence is called for be necessary to justice, the evidence in question is not necessary to his making it good. The plaintiff being in the right, the evidence is not necessary to the establishment of his demand; or, the defendant being in the right, the evidence in question is not necessary to his defence,—to the saving him from that burden which the demand seeks to throw upon him.

To the first of the two divisions, belong all those cases, in which obtainment of the information sought for is sought for, not in the character of a means, but in the character of an end: where, instead of calling for the evidence for the purpose of the suit, the suit itself is instituted for no other purpose than that of coming at the evidence: coming at the information wanted, by demanding it, and employing the hand of the judge to extract it by force of law, in the character of evidence. The suit in this case is what has been called a feigned suit, or might better be called a sham or fraudulent suit; for the suit itself is real, though the object of it be disguised.

On this occasion, however, if the exclusion be to be justified, it must be understood that

the party (say the plaintiff) has no right, on any score, to the information called for by him on the score of evidence: which is as much as to say, that he could not have obtained it by a suit professedly directed to that end. For if, having a right to it, he obtains it like a corollary in mathematics, in the form of evidence called for on the occasion of another suit, so much the better: the business of two suits is done in one: two birds are killed with one stone. If, in prosecuting for one crime or one wrong, you get evidence that enables you to punish, or compel satisfaction, as for another, so much the better: out of two lots of vexation, expense, and delay, one is saved.

Thus to the man of reason: not so to the man of law. To him it will be downright cheating: cheating him out of that part of the expense which becomes profit in his hands. If, of the evidence which the case affords, there be any material part behind, there wants no other ground for postponing the decision, though the suit be a single one. But if, of the mass of evidence sufficient for warranting a dozen decisions, in allowance or disallowance of so many different demands, the whole be brought forth on the occasion of one demand; the controversy is as ripe for the dozen decisions in this case, as for the single decision in the other. But this sort of arithmetic does not accord with the books of the man of law. The ends of justice only are served by it: the ends of judicature are sacrificed by it.

To the other division belong all those cases in which, howsoever it happens, the information tendered or called for in the character of

evidence is not necessary to justice: it is irrelevant, or, though relevant, useless, because there is enough without it, whether from a different source, or of a better kind from the same source: or whether there be enough without it or no, it is still useless, because sure to be refuted or outweighed by other evidence.*

In all these cases, as in the former, if the evidence in question were produced, the vexation, expense, and delay, attendant on the production of it, would be so much pure mischief, unpaid for by any advantage. There is more or less to put in one scale; there is nothing to put in the other.

II. Thus much for the first principal head. To the other, belong all the cases in which there is more or less to put in each of the two scales: in the one, the mischief from the exclusion of the evidence, (a mischief, in the composition of which, misdecision, or the danger of it, will in general be either the chief or the sole ingredient): in the other, the mischief from the admission of the evidence; a mischief which resolves itself into vexation, expense, and delay, jointly or separately, as already so often mentioned.

In all these cases, we may see work, more or less, for the judge: for the legislator, none: at least if, in the drawing of his first lines, he has wrought with a skilful hand. In every instance there is a question of fact to be tried; in no instance need there be, ought there to be, any question of law. Understand, any *new* question of law, created by the arrangements

* As in the case of an incorrect transcript tendered on one side, the original being to be produced on the other.

here proposed to be made, relative to exclusion and admission: for the question, whether a man has a right to the information on any other score than that of evidence, (evidence in relation to a different suit), is indeed professedly a question of law, but a question supposed to have been already settled, on its proper grounds.

1. First grand and proper head of objection to the admission of the proposed evidence. The information is not really wanted as evidence, and is such as the party has no right to on any other score. Or, though called for under the notion of its serving as evidence, it is not capable of being of any use.

Questions for the consideration of the judge.

1. Has the party a right to call for the information in question, by a suit on purpose, having that object and no other? A question of law; but supposed to be already settled.

2. The evidence proposed for delivery, is it necessary to justice? Is it relevant? Is either party in want of it? To either party is it capable of being of use? Questions, which are, all of them, questions of fact: questions upon which no light can be thrown by reference to rules of law, deduced or deducible from anything that has been done in any preceding cause.

If the answer to these several questions be in the negative, there is no account to be taken of vexation, expense, and delay. To some amount, inconvenience in all these shapes cannot but be attendant on the production of the evidence: but, as to the quantum, it is needless to inquire, since, for the purpose of the exclusion, there is sure to be enough; there is nothing to set against it.

II. Second and last grand and proper head of objection to the admission of the proposed evidence. The delivery of it is attended with collateral inconvenience, in the shape of vexation, expense, and delay, to an amount greater than the advantage derivable from the admission of it; that is, than the mischief, in the shape of danger of misdecision, attendant on the exclusion of it.

Questions for the consideration of the judge.

1. Amount of the mischief of misdecision: (or, what comes to the same thing, failure of justice for want of decision). This depends upon the nature and importance of the cause: its nature, whether criminal or non-criminal; its importance,—if criminal, measured, on the side of the public by the magnitude of the mischief, on the side of the defendant by the magnitude of the punishment; if non-criminal, measured on both sides by the value of the benefit and burthen at stake, taking into account the circumstances influencing sensibility on both sides.* This will be at any rate a question of fact, including or not including questions of law, according as the legislator has done or left undone, done well or ill, the duty of giving a complete catalogue and set of definitions of the several crimes, with their respective punishments, of the several sorts of rights, with the several modes of satisfaction attached to infringement in each case. But, be there ever so much of law, it will be a sort of law the demand for which is to be set down to other accounts, and not to this.

* "Introduction to Morals and Legislation." Dumont's "Traités de Législation."

2. Amount of the danger of misdecision; *i.e.* of the probability of misdecision, considered as liable to result from the exclusion proposed to be put upon the evidence: this will at any rate be a pure question of fact.

Under each of these several heads, five propositions have presented themselves as true.

1. That, on each of the grounds indicated by these heads, cases may arise in which, whatever mischief may result from exclusion, a greater mischief may arise from non-exclusion: a mischief, viz. in the shape of the vexation, expense, and delay, to which, separately or in conjunction, it may happen to be inseparable from the admission of the evidence.

2. That, between the cases in which the quantities on the one side are the greater, and the cases in which the quantities on the other side are the greater, the separation is not in general (if indeed in any instance) so clear, as to be capable of serving with advantage as a foundation for any general rules.

3. That therefore it is in all these cases incumbent on the legislative authority to leave, or rather to place, in the hands of the judicial, such a latitude of discretionary power, as shall enable it to form the estimate on both sides, and thence to draw the balance in each individual instance, on the occasion of each individual suit.

4. That, inasmuch as on these grounds general rules cannot to any good purpose be laid down in the way of statute law, by the legislature itself,—by the only authority avowedly and directly competent, at any given point of time, and of its own motion, and by its own

authority, to lay down general rules; much less can any such rules be laid down, to any good purpose, in the way of jurisprudential law: by a man exercising, under the mask of the judge, the authority of the legislator; professing obedience, when he is exercising power; pretending to find ready-made, made already by an imaginary being, the law, the very law which he himself is making at the time.

5. That, to obviate this propensity to do by bad means that which on this occasion ought not to be done by any even the best means, the legislator ought not to content himself, on this occasion, either with simply abstaining from tying up the hands of the judge, or even with committing to his hands the requisite latitude of discretion in express terms; but that it will be further necessary expressly to declare, that in no instance shall the judge, on forming his decision for the admission or exclusion of the evidence in that individual cause, make or admit of any reference to what may have been done by any other judge, or even by himself, in any preceding cause: any more than a jury does, in giving damages for a trespass against person or goods: for that, in these cases, the path of precedent is the path of constant error.

Of the absence of the discretionary power here contended for, what is the consequence? That the chances against right decision will be all along as infinity to one; in a word, that the decision pronounced will be almost always wrong and mischievous. The ground of decision in each case will be, not the circumstances of that individual case, not the proportions between the quantities in that case, but the

circumstances of, the proportions between, the quantities in some other case: some other case, in which they have but one chance against an infinity of chances for not being different from what they are in the case in hand.

In a word, in a case of this description, the looking to precedent for a rule would be exactly as incongruous and mischievous as if, on an account between A and B, the balance were to be deduced, not from a comparison of the sum of the items on one side with the sum of the items on the other, but by copying the balance of a former account, in which the items, as well as the persons, were all different: an account between C and D.

In other words, and those more familiar to English ears; the question as between admission of the evidence on one hand, and exclusion on the ground of vexation, expense, and delay (jointly or separately), on the other, ought in every instance to be treated as a question of fact, in no instance as a question of law: and accordingly it should be the special care of the legislator, by apt prohibitory words, to make sure, as far as it depends upon him, that no question of law shall ever be made of it.

CHAPTER II.

EXCLUSION ON THE GROUND OF VEXATION, IN WHAT CASES PROPER.

SECTION I.—*Modifications of which vexation, considered as a ground for excluding evidence, is susceptible.*

THE idea of vexation, judicial vexation, is a most extensive one: punishment itself, punishment in all its modifications, is but a modification of it.

Vexation is evil, any evil, produced by the hand of law: if with a *direct* intention (ultimate or not ultimate) the evil comes under the name of punishment: if not with a direct intention, whether with or without an *indirect* intention, (which is as much as to say, with or without a prospect of this result, in the character of a consequence of the act of power exercised), it then comes under the notion, not of punishment, but of vexation.

From the acts done, with or without necessity, in a course of judicial procedure; and in particular from the acts done for the purpose of the obtainment and delivery of evidence; vexation (it will be seen) is liable to be produced in

the breasts of persons of various descriptions, implicated habitually or occasionally in the juridical transactions:—1. Parties; 2. Witnesses; 3. Third persons; 4. The public at large; 5. Professional lawyers, in the character of assistants to the parties; 6. Judges, and the official lawyers under them.

As to the vexation considered as liable to fall upon the parties in the mere character of parties, it belongs not to the present purpose. But a party, whether at his own instance, or at that of an adversary or a co-party, is liable to be received in the character of a witness: received to give information relative to the matters of fact in question, just as it might happen to an extraneous witness to do. It is in this quality, and this alone, that any vexation to which it may happen to him to stand exposed, is to the purpose here.

I. Of vexation by reason of *attendance*, the evil will not, in a direct way, naturally fall on any other person than the proposed witness.

In the character of a ground of exclusion, it therefore has no place, if, notwithstanding the vexation, the proposed witness, by his own consent freely and fairly obtained, delivers, or is ready to deliver, such his testimony.

No more has it, in the opinion of the judge, if a compensation, such as in the opinion of the judge is an adequate one, be tendered to him: and in this case there is nothing which should render the compensation incapable of being rightly estimated, more than in a multitude of other cases in which such estimation is performed in every day's practice.

In a remote way, it may however happen that

the evil of vexation by reason of attendance shall fall on persons other than the proposed witness.

One example is, when, in consequence of the evidence of the proposed witness, it becomes necessary to the party against whom such evidence makes, to oppose it by counter-evidence, such as otherwise would not have been produced. In this case, to any vexation pressing on the proposed witness, must be added the vexation attached to the delivery of such counter-evidence: which vexation (it being supposed to be of that sort which attaches on attendance) will, if uncompensated, rest on the shoulders of the counter-witness; if compensated, (viz. at the expense of the counter-party), upon those of the counter-party at whose expense it is compensated.

Another possible example is this:—over and above any vexation pressing upon the proposed attendant witness himself by reason of his attendance, some vexation (some positive loss, for example, or loss of an opportunity of gain) may befall some third person, by reason of some connection which his interest has with the attendance of the proposed witness at another place. An inconvenience of this sort will, to the extent of it, form as substantial an objection to the delivery of the evidence, as if the proposed witness were himself the individual suffering under it. But, in this case, the difficulty of proof, where the mischief exists, will naturally be more considerable; as likewise the danger of deception by fallacious evidence, where the evil has no real existence.

In a mass of vexation produced by reason of attendance, four branches will in almost every in-

stance be distinguishable: four branches, producible respectively by the four following causes:

1. Journey *out*, to the seat of judicature: viz. from the spot or spots at which, had it not been for the obligation of the attendance, the witness would, during the length of time consumed by the attendance, have been stationed. Of this branch of the vexation, the weight is of course variable *ad infinitum:* having no other limits than those of the globe of the earth itself. Where the distance is considerable, this branch of the vexation will naturally be accompanied with the obligation of pecuniary disbursement: of which elsewhere, under the separate head of *expense.*

2. Attendance in court, (*i. e.* in the presence of the judge by whom the evidence is received), during, or for the purpose of, the delivery of the evidence. If, the witness being sick in bed, the judge, for the purpose of receiving his testimony, visits him at his bed-side, his chamber becomes thereby, to this purpose, a court of justice.

3. Demurrage. Attendance in the neighbourhood of the court, for a length of time frequently uncertain; hours, days, or even weeks: that he may be in readiness to pay his attendance in court, when the time comes for the delivery of his evidence.

4. Journey *home*, or from the seat of judicature: viz. to the spot, which, had it not been for the fulfilling of the obligation thus imposed on him, he would at that time have occupied.

II. Vexation by reason of *disclosure,* may fall to the charge of any person or persons to whom it may happen to sustain inconvenience in any

shape from the disclosure of any matter of fact capable of being disclosed by delivery of evidence; which is as much as to say, any sort of fact whatsoever.

These persons may be,—1. The proposed witness himself, or persons specially connected with him, whether in the way of self-regarding interest or of sympathy; 2. Other individuals at large; 3. The public at large: including the members of the governing body, considered in respect of such their public capacity.

For the different shapes in which vexation, in the case of an individual (the proposed witness, or any other), may assume, look to the shapes in which injury may display itself, corresponding to the possessions in respect to which injury may befall him; viz. person, property, reputation, condition in life.*

Facts, from the disclosure of which it may happen to the public at large, or to government, in respect of the public interest, to receive harm, may be comprised under the general denomination of *state secrets*.

For the respects in which it may happen to the public at large to experience vexation from this source, consult the catalogue of public offences.†

In respect of that branch of the vexation by reason of attendance which consists of attendance *in court*, the witness has as many co-sufferers as there are persons of other descriptions on whom the same duty is imposed: the aggregate

* "Introduction to Morals and Legislation."—Dumont's "Traités de Legislation."

† "Introduction," ut supra. Dumont, ut supra.

mass increases, consequently, with the number of these persons.

Among these persons must be distinguished, 1. The professional assistants so attending for the several parties: 2. The judge or judges so attending, with his or their official subordinates.

Section II.—*Vexation to the witness, or to persons at large, in so far as affected by his testimony, how far a proper ground of exclusion.*

Where the vexation, in all shapes taken together, that would result from the delivery of the evidence in question, constitutes a greater evil than the evil that would result for want of the evidence, the evidence in question ought not to be delivered. In the opposite case, it ought to be delivered, and, if not about to be delivered without compulsion, compelled.

To determine the preponderance, as between the evil (the vexation) by delivery of the evidence, and the evil (injustice, or danger of injustice) for want of the evidence, belongs of course to the legislator: in so far as, in the situation in which he acts, it lies within his power to make such an estimate as shall prove a just one in all individual cases. *Optimus legislator qui minimum judici relinquit.*

In so far as it lies not within the power of the legislator to form any such estimate, he ought to invest the judge with the power of forming an estimate for that purpose in each individual case.

So little can be done in this way with pro-

priety by general rules, that the first and fundamental rule should be that which gives the requisite latitude of power to the judge: in relation to which, the limitations, if any, which it may be thought proper to apply to that power, (*i. e.* where the legislator thinks fit to take the determination upon himself), will come in afterwards as exceptions.

If the suit itself is instituted for no other purpose than that of procuring the disclosure, (the disclosure not being intended to be made use of as evidence in any other suit), there is not, in fact, any demand for the disclosure in the character of evidence. There is no real suit, at least no justly-grounded suit, for the purpose of which the disclosure is called for, to any such intent as that of its serving in the way of evidence. The suit is a feigned suit; an attempt to impose unlawful compulsion upon the witness, making the judge the instrument of it: making him lend his power in this way to a purpose to which it was not intended, either by himself or by the legislator, that it should be made subservient. In this case, the vexation, whatever it be, has no benefit to weigh against it in the scale; no such benefit, as the power of the law, applied in the way of judicial procedure, was intended to produce.

Let the compulsory process which the judge has the power of applying to a proposed witness for the extraction of his testimony, be the sort of torture applied to produce the pretence of unanimity in an English petty jury; viz. keeping him in a state of imprisonment, without meat or drink, and so forth. Let the fact, the disclosure of which is thus endeavoured to be

obtained, be a secret in trade: understood or not understood in that character by the proposed witness; possessed by some other person, a manufacturer, and constituting his only source, and that an ample source, of livelihood. Were the disclosure compelled, and compelled by this means, here would be two persons, with a distinct injury inflicted upon each: on the manufacturer, wrongful interception of pecuniary gain, equivalent to wrongful imposition of pecuniary loss: on the witness, unlawful compulsion, by fear of corporally afflictive imprisonment. Just as if the plaintiff had got the witness into a room, and there kept him locked up without food and so forth, till he discovered what was wanted.

Such would be the consequence, if, in lending his sanction to contracts, (thereby adopting them, and converting them into so many particular laws), the legislator were to include *wagers;* omitting to make an exception in respect of wagers having for their object the giving effect and impunity to the sort of injury just above described.

Two leading cautions present themselves as proper to be submitted to the legislator: the first tending to enlarge the sphere of exclusion on this ground, the other to contract it.

I. Fancy not, that, by the regard due to justice, you are bound to lay down any such unlimited rule, as that, on every occasion, every man has a right to the testimony of every other man, without regard to consequences. *Fiat justitia, ruat cœlum*, might lead you to this, if, as they are but too apt to be, the flourishes of orators were to be taken for inviolable rules.

Observe one consequence: all secrets then are at an end. From all those weaknesses, the mischief of which results rather from divulgation than from commission, malignity or idle curiosity tears the veil: the absolutely immaculate, if such there be in the world, excepted, all reputation is at an end. All that ill-humour, which, had it not been dragged forth into the light and air, would, like embers under ashes, have died away in the bosom in which it was kindled, died away without further consequences,—all this magazine of malignant combustibles, being dragged forth into the light, blazes out and kindles into quarrels.

From this source of unfathomable mischief, states are no more secure than individuals. All cabinets, all war-offices, are laid open: the most vulnerable part of each weaker state laid open to each stronger state which, whether in a state of actual or only premeditated hostility, lies in wait to take advantage of it.

Mischief enough without doubt: but by what means producible? Oh, for the means, nothing can be more simple. They have been invented; they have been practised: nor yet altogether without success. Lay a wager. Would you know the sex of this or that person?* Would

* Vexation in respect of condition in life.

The history of the illustrious and most extraordinary lady who for the greater part of her life appeared in a male character, and was known by the name of the Chevalier d'Eon, affords a real example to this purpose. In the city of London, different sets of persons laid wagers on the subject of her sex: one of these wagers came to a trial in the Court of King's Bench; and on the occasion of that trial the lady

you know the use or the uses that he or she has made of it? * Would you know to what happy exertion of invention your too successful rival owes his present opulence? † Would you, for the benefit of your liberal employer on the other side of the frontier line, know in what part of it the magazines of your own state are empty, in what other quarter such as are full may be fired to most advantage? ‡ Here are your means. You and an associate of yours lay a wager: one, that the matter in question lies or lay in one way; the other, that it lies or lay in the opposite way. To determine this wager, you call in as witnesses all persons whose situation and connection have placed them in a way to know. In a word, you take in reality that sort of course which in England the lord high chancellor forces you and your adversary to say you had taken (though it is no such thing) on pain of seeing justice denied to that one of you to whom it is due.

herself was summoned to give her evidence. In this scandalous attempt, the vice of gaming was added to the private offence attempted, and, by the very attempt, committed in some sort, by this indecent and barbarous impertinence. Had she appeared, the injury would have been a modification of the offence termed in the English law false imprisonment. Whether she appeared or no, it would, in a comprehensive system of penal law, embracing the whole catalogue of injurious acts, have come at any rate under the denomination of a *simple personal injury*.—See Dumont's *Traités de Legislation*.

* Vexation in respect of reputation.

† Vexation in respect of property.

‡ Vexation to government, and the public at large: vexation having the effect of treason, to the destruction of the state.

II. The opposite caution will not require many more words.

On the score of vexation, do not set down on the side of mischief (unless on the side of advantage you set down a sum much greater), the certain or contingent result from any disclosure by which it may happen to the witness, or any body else, to be subjected (whether in the way of satisfaction or even of punishment) to any legal obligation: or (what is the same thing in other words) by which the law may come to receive its execution: by which the predictions and engagements taken by the substantive branch of the law, may come to be fulfilled.

Be the amount what it may, all such vexation is overbalanced. An assumption to that effect must in every case be made. If the vexation be not overbalanced, the fault lies in the substantive branch of the law; in that part of the law by which the obligation is imposed: it is to that branch of the law, and that alone, that the remedy should be applied. The prediction made by the substantive branch of the law should be recalled, not disfulfilled; the engagement taken by it dissolved, not violated.

To establish as a sufficient reason for the exclusion of the evidence, any vexation liable to result from it in this shape, is exactly as unreasonable as in an account current it would be to set down on either side a debt already paid and overpaid.

The tendency of the evidence, is it to cause some other debt to be paid, which otherwise might not have been paid, or of which payment might not otherwise be obtained so cheaply or so speedily? So much the better. Is it to cause

some other offence to be punished, which otherwise might never have been punished, or not so cheaply or so soon? So much the better. In both cases, justice is done in two causes, at the expense of one.

Upon the whole, then, let it be understood that, whenever the vexation that might be produced by the delivery or receipt of the evidence in question is stated as affording an adequate reason for the exclusion of it, (*i. e.* as outweighing the mischief that would result from the exclusion of it, viz. the misdecision), the vexation must be understood to be pure, and not having any such counterbalance to it as above-mentioned.

Yet it is in the case where it is thus overbalanced, that English lawyers make it a matter of pride and glory to carry it to account. On the other hand, where it has nothing at all to balance it, how often shall we not see it left out of the account altogether, as if no such mischief were produced.

Take for a feigned case, one that till the other day was in part a true one. A catholic priest, saying mass, that is, discharging the indisputable duties of his office, in England, is liable to be hanged. Delivering his testimony on a dispute about an affair of a few shillings, in which he has no concern, questions are put to him, the answers to which, if true, will, with a force sufficient for conviction, prove him to have committed the act thus converted into a crime. The vexation that would thus befall him, does it constitute a sufficient reason for stopping the mouth either of the witness or his examiner? By no means. The law which attaches this penalty to the per-

formance of that religious duty, so long as it continues on the statute-book, must, to this as well as every other purpose, be taken for a good law; and fit and proper to be executed, as well upon the ground of this as of any other evidence. The law shall be as bad a one as it pleases the reader to suppose it. But in whose mouth does it lie to call it so, and to seek to defeat it in this way? In the mouth of the legislator? But in his hands is the power of doing away the mischief of the law, not only in this chance and solitary instance, but in all instances, and for ever. How inconsistent and absurd, to do away the mischief in retail, and, in the very self-same shape, leave it to remain in gross! In the mouth of the legislator? He contradicts himself. In the mouth of the judge? He contradicts the legislator, usurps his power, puts himself into his place.

Suppose that,—instead of applying the remedy to the really peccant part, the substantive branch of the law,—the legislator were to be inconsistent enough to determine upon applying it, and in the way here in question, to the adjective branch: applying it in the shape of an evidence-excluding rule. What shall be the extent of the rule? Particular, or general? Shall it be particular, and stand thus,—A catholic priest, if called in as a witness in a cause in which he is not a party, shall not be compelled to make answer to any questions, the answers to which, if true, would prove him to be such? By the supposition, this persecution ought to be abolished; what does the rule towards the abolition of it?

Shall the exclusion, though made to no other

end than that of serving as a remedy against the particular sort of tyranny here in question, be general? and accordingly, instead of a catholic priest, shall it say a *person;* and instead of the words *to be such*, say, to have been guilty of any offence? What a price would here be paid for the benefit of this remedy! The whole fabric of the law weakened, with all the securities that rest upon it; and the protection to the innocent religionist no better on this plan than on the foregoing one.

Instead of being the work of the legislature, suppose the extension to be the work of the judicial authority: on the occasion of some individual suit, the judge finding or making a pretence for stopping the disclosures, by an individual decision made on the occasion of that individual suit; and on the next occasion of the like kind another judge making either out of the decision itself, or out of something of a general nature supposed to have been said on that individual occasion, a general rule. Of the additional mischief, intimation has just been given. Insubordination, contempt, usurpation; the confidence of the subject in the legislator shaken; disobedience preached by example, by the example of those whose employment, profession, and peculiar duty it is, to exact obedience from everybody else. *

* Quære, on this and every such occasion—How much more mischievous has the offence been, in the case where, after the commission of it, the proof of it is brought out in that indirect and casual way, than if brought out in any of the more common modes? What alteration is made in the past mischief of an offence, by the subsequent incident (whatever it be) by which the commission of that same offence

To the vexation attached, as above, to the delivery of the testimony, when the will, the intention, to deliver it, has been formed, must be added for consideration the vexation that may come to be attached to the coercive arrangements which it may be necessary to take for the purpose of *causing* the will, the intention, to be formed. To this head belong, in the case of personal evidence, search for the person of the proposed witness: entry, with or without force, into the house, land, ship, or other receptacle, for that purpose: arrestation, detinue, conveyance, commitment, alimentation. In the case of real and written evidence, entry, as before; search, as before; examination, seizure; detinue, conveyance, and in some cases, where the source of evidence is a living animal, alimentation, as before. In the case of written evidence, examination of books and papers, making of transcripts, extracts, translations, abstracts.

In regard to vexation of this casual and multifarious description, two propositions present themselves as expressive of the line of propriety on this ground.

1. In forming a comparative estimate, as between the mischief of admission and the mischief of exclusion, for the purpose of determining whether the evidence shall be received or excluded,—so much of the vexation (in whatsoever shape or shapes it presents itself) ought to be taken into account, as will take place

is brought to light? If none at all, then why is it, to what good end is it, that an offence shall, if brought to light by one incident, be punished with death,—if by another incident, go unpunished altogether?

notwithstanding any inclination on the part of the witness (including, in case of real or written evidence, the person on whom the production of the source of evidence depends) to yield the evidence.

2. But in this account no vexation ought to be included, the necessity for which is produced by the repugnance of the proposed witness. He himself being the author of it, be it ever so heavy, the weight of it can afford no just reason for depriving the party of the benefit of the evidence, of the legal service which is his due.

As to the provision which it may be necessary and proper to make for the forthcomingness of the evidence, considered under its several modifications, as above, and in the several cases of difficulty that may arise; it belongs rather to the subject of procedure at large, than to the subject of evidence. The field would be much too wide a one to be inclosed within the limits of the subject now in hand.

On this part of the ground, the utmost that can be done is to give principles. Propositions fit to appear *in terminis*, though it were not in the character of laws, but of mere instructions, could not be given without giving also *in terminis* the laws (substantive as well as adjective) in modification of which they would have to operate.

SECTION III.—*Vexation to the judge, or to any of his subordinates, how far a proper ground of exclusion.*

The sort of vexation here in question is that and that alone, against which exclusion of this or that mass of evidence is capable of operating as a remedy. The vexation will therefore be of that sort, and that sort only, which is producible by excess in respect of the quantity of evidence which it has been made incumbent on him to receive, and turn in his thoughts, to serve as a ground for the decision he is called upon to pronounce: in a word, vexation having *excess of evidence* for its cause.

Flowing from this source, vexation to the judge has a claim to regard on a double account:—1. in respect of the feelings of the individual; and 2. in respect of the consequence of it to the cause.

On his own account, and looking no further, the feelings of the judge have exactly the same claim, neither stronger nor weaker, to be considered, as those of any other individual in the state.

Considering the matter in this single and abstract point of view, it may seem difficult to comprehend how it should happen that, if the evidence in question be material, a lot of vexation thus narrow in extent should ever swell to such a pitch as to form a ground sufficient in point of reason and utility for the exclusion of it.

Difficult, yes; but not impossible: especially under English law; especially considering among how large a number of persons it may

happen to the judicial power to be shared; say a dozen occasional judges (jurymen), and one permanent one, with from two or three to half-a-dozen or more subordinate judicial officers. They have all been shut up together for twenty-four hours, a case that has sometimes happened: value at stake, perhaps a hundred thousand pounds, perhaps not a hundredth part as many pence.

But (besides that, in this sense of the word *material*, there are degrees of materiality) what may happen is, that the information proffered in the character of evidence may be irrelevant altogether; of which case afterwards. In this case there can be no difficulty.

The service of the judge is in some instances voluntary, in others, compulsory. If voluntary, he derives from the office, in some shape or other, what in his own judgment (which is the only competent one) is a sufficient recompense. But even in this case, vexation, labour, attendance, should not be imposed upon him to no use: much less where the service is compulsory, as in the case of juries, and several other cases.*

* The judge being considered as the sort of person on whose shoulders the labour and other vexation attendant on the delivery of evidence rests, the situation he may be in admits of an ulterior distinction of great practical importance.

Distinct from the vexation, the unbalanced mental suffering, which in each individual instance may or may not be the consequence of the labour thus bestowed, there is one accompaniment which is altogether inseparable from it, viz. the consumption of time: the quantity of time occupied in the bestowing of such labour.

There are classes of judges, to the aggregate quantity of whose time, applicable to this purpose, there is no natural

What applies, as above, to the principal, applies, and for the same reason, to all subordinates.

and absolute limit. In this case are all judges but those who judge *en dernier resort*. In this way, as in all others, whatever quantity of natural business there may be to be done, judges in sufficient number may naturally be found for doing it. If, at the same time that there are not fit persons enough ready to take upon themselves the duty without pecuniary retribution, pecuniary retribution cannot be found in sufficient quantity to afford to the number needed an adequate inducement; in such case there exists a limit to the quantity of time applicable to the purpose in question, on the part of these subordinate classes of judges.

There is one class of judges, to the aggregate quantity of whose time there is a certain limit. In this case are, in every country, the judge, or bench of judges, to whom it belongs to judge *en dernier resort*. Of the four-and-twenty hours in each day, there is a certain proportion which (bating accidents) it may be, physically speaking, in the power of the judge to bestow upon this or any other species of labour: beyond this, the application of any additional quantity of time is not merely inconvenient, but physically impossible.

In either of two ways, the quantity of time applicable on the part of this court of *dernier resort*, is, physically speaking, susceptible of extension. One is, if two or more such supreme courts be instituted, each competent to all cases: the other is, if two or more such supreme courts be instituted, one competent to judge *en dernier resort* in one sort of case, another in another sort of case, as in the courts subordinate to them. But the first sort of arrangement leads directly to contradiction, to dissension, to civil war, to the dissolution of the government: the other keeps perpetually alive, at least, an imminent danger of those same calamities. Geographical lines of jurisdiction are drawn with ease and precision enough: metaphysical, logical, not without the greatest difficulty. As between subordinate and subordinate, where there is one superior to decide, the difficulty is not felt. But as between two co-equal courts, as above supposed, if a difference of opinion or will obtains, and neither will yield, this case resolves itself into the foregoing one: into the case just described, with its ruinous results.

But in this way, when the quantity of the vexation swells to a certain pitch, the connection is most intimate between the personal interest of the judge, and the interest of the public at large, through the medium of the parties, or rather of such one of them as happens to have right on his side.

From an overload of evidence, comes perplexity: from perplexity, misdecision: if the perplexity be at its maximum, an even chance of it. Probably in every system, certainly under the English, the instances have been but too numerous, in which (not to say misdecision) decision which to many impartial minds has presented itself as erroneous, has been traced up to this source.*

In the constitutions of most states, there is, to this purpose, no difficulty. In whatever hands the supreme authority resides, the judicial authority *en dernier resort* is lodged, in effect: along with (to take the current division) the supreme executive, and the supreme legislative. In the constitutions of most states, this supreme authority rests in the hands of a single person, a monarch: and whatsoever may in other respects be the disadvantage attendant on that species of constitution, as to the point here in question there is at any rate no difficulty, no danger. For this, as for all other purposes, he has time sufficient at his command. The quantity of his own personal time is limited, like that of every other man: but the quantity of other persons' time, capable, upon occasion, of being applied by him to the termination of these or any other disputes, is without stint.

Under a mixed constitution, the difficulty may be altogether a distressing one. Delay increasing *ad infinitum*: injustice triumphing, impunity certain: law trodden under foot: power intended to be subordinate, converted into despotic and supreme. But the solution belongs not to this place; it belongs to the head of constitutional law; and, till the constitution of the government be given, every attempt would be premature.

* Douglas Cause.

When the hearing of a cause has been drawn out to a length regarded as excessive, the principal matter and cause of the excess has generally consisted of the evidence.*

In causes of certain descriptions, to such a pitch has the mischief swelled, as to be regarded as a subject of general horror to persons whose situation in the state has threatened them with this species of forced service.†

Much, in this case, will depend upon the modification given in respect of time to this species of service: whether *de die in diem* (with or without intervals of repose), or the whole to be executed within the compass of one sitting, and thence, occasionally,‡ towards the close of it, in a state of imprisonment and slow torture.

The personal suffering of the judge is not much in danger of passing unheeded, nor even unremedied, by the judge: at least by such person or persons on whom, in that commanding station, the duration of each attendance depends. Nor yet has it the less claim to the legislator's care: since to whatever relief it happens to be assumed or granted in these cases by the subordinate, without the observation of the superior, it may happen to be either insufficient or excessive.

But under the system of payment by fees, (that is, under the regular part of the existing system of procedure in most countries), vexation to the judge is apt to have an ulterior and much more important claim to notice. Under this system, vexation to judges and their sub-

* Hastings Cause.

† 1. Election Committees. 2. Wellesley's Case.

ordinates is expense to suitors: changing its shape, it transfers its seat at the same time to other shoulders. The quantity given, on what individual it falls, is to the public (that is, to the aggregate composed of all individuals) a matter of indifference. The misfortune is, that, when the seat and shape of vexation is thus changed, the quantity of it tends to increase with a velocity plainly infinite. In this tendency, the final cause of the technical system has already been brought to view. On these terms, vexation, instead of being shrunk from, is courted: the crown of martyrdom graces the peruke of the judge.

Men of the class of professional lawyers (assistants to the parties) being, under all their varieties and sub-varieties, men; vexation weighs as heavy on their shoulders as on any other.

But vexation to the lawyer is expense to the suitor. Under the fee system, this transformation is undergone by that portion of the vexation which in the first instance alights on the shoulders of the judge: under every system, by that portion which alights upon the shoulders of the professional lawyer, the frequently indispensable and naturally treacherous assistant of the parties. But, under the fee system, the two avalanches, being connected from the first, roll on and accumulate together: pursuing the same object, co-operating, without any need of concert, from the beginning of the game to the end, the lawyers of both classes keep playing into each other's hands. At the card-table, signs and tokens are necessary between the ostensible partners and the latent ones behind

their backs: no such dangerous intercourse is necessary amongst the partners in the lottery of procedure.

Under any system of payment, pecuniary or non-pecuniary, by which the interest of the functionary were not placed in a state of opposition to his duty, the zeal by which the martyr to professional duty will never cease to be instigated to heap thorns upon thorns on his self-devoted head, will find a constant moderator in the probity, the honour, and the indolence of the judge: under the fee system it finds ostensible checks, of which the efficiency is destroyed, by spurs, not the less sensible for being invisible.

Such being the mischiefs of which vexation from the delivery of evidence is composed, or of which it is liable to be productive; such the mischiefs to which exclusion of the evidence presents itself as a remedy; does not the nature of things ever admit any cheaper remedy? This will be the subject of enquiry in a separate chapter;* in which, in this point of view, the three kindred diseases, vexation, expense, and delay, all considered as attached to evidence, are considered together. In the case of these political, as in the case of physiological diseases, to find the best remedy we must understand the causes.

SECTION IV. — *Arrangements of English law connected with this subject.*

Towards this subject what is the aspect of English law? The answer may be contained

* Infrà, Chap. 7. *Remedies succedaneous to exclusion.*

in a line or two, or require a volume. What on this ground has been done by English law? By design, nothing: but by accident, and without thought, much more than can here be brought to view.

By design, by design towards such an end, how should anything have been done? On this subject, had anything been done, it would have belonged to the system of procedure: and, except here and there in patches, the system of procedure has never been the work of the legislator. What has been done, has been the work of the judicial authority. But to avert vexation is one of the ends of justice; and the ends of judicature, instead of coinciding, have been at variance with those ends. Vexation is inseparably connected with expense: and the ends of judicature have been not to save, but (for the sake, and in proportion to the amount, of the profit obtainable from it) to embrace every occasion for the augmentation of, expense.

Under the head, for example, of vexation to individuals (whether strangers or parties) in the character of witnesses; ordinary vexation, in respect of journies to and from, attendance and demurrage: What on this head has been done?

By design, as already observed, nothing: by accident, more or less: here one thing, there another.

What in this way has been done at all, has been done by the limits, the topographical limits, that have taken place in regard to fields of judicature. But, in the tracing out these limits, nothing of design has had any share: boundaries have formed themselves here, as boundaries formed themselves after the deluge: as

shores grew up against seas. May it happen to a man to have so many miles to travel for the delivery of his evidence, or only so many miles? It depends upon the local jurisdiction of the court: and thence upon the court in which the cause originated, or in which it is to be tried. Did it originate in Westminster Hall, three hundred and upwards may be the number of miles. In a court of quarter sessions, for the county of Rutland for example, not so many as twenty miles.

Three hundred and upwards, or only twenty, if the delivery of the evidence be altogether free as well as voluntary, there is no vexation in the case: if obligatory, then it is that vexation mixes with it. Delivery of testimony, is it obligatory? Yes and no: yes in a hundred cases; no in a hundred others. To give a picture of the law on this one head, that is, of the clouds of uncertainty in which it is involved, would require a volume. 1. In causes non-criminal, obligatory at one stage, unobligatory at another: obligatory, if the persons capable of yielding testimony are known; unobligatory for want of their being known. 2. In criminal causes;—in felonies, obligatory: obligatory as well at the first stage as afterwards. 3. In misdemeanours, if prosecuted by indictment,—obligatory, if known, and living within the jurisdiction of the court, (unless, to avoid the vexation, their device be to travel a few miles, or as many steps, to escape from it); unobligatory, for want of their being known, unless some justice of the peace, under the spur of that zeal which has become a monopoly in the hands of unlearned judges, acting by custom, without (which is as much as

to say against) law, has, by the terrors of undefined and uncognizable authority, contrived to wring the secret from the reluctant breast. 4. In the same misdemeanours, if prosecuted by information—— but here, however abruptly, the theme must end. 5. Then again comes the Tweed. Think you that a judge, standing on one side of that river, speaking to a witness on the other, could command his evidence? No more than if it were the Styx. 6. Is it again for plaintiff, or for defendant, that a man's testimony is needed? Here comes another ocean of distinctions and deficiencies. Fancy not, that, because a man's evidence is necessary to save your life from unjust punishment, you can have (unless it be here and there by accident) any better security for it than that humanity, which, if it be to be found in individual bosoms, is not to be found in the bosom of the law.*

The best method of supplying all these deficiencies, belongs to the science of judicial procedure at large. In the existing system, how was it possible they should have been supplied? To have supplied them, the objects of its regard must have been the ends of justice.

On the score of the vexation of which the disclosure would be productive to the individual whose condition in life was the subject of inquiry; the party calling for the disclosure having no other interest in it than what he had taken upon himself to give to himself by laying a wager, and when consequently there is no gain to justice, to outweigh the vexation thus

* See Hawkins, iv. 448.

produced; the court of King's Bench, with indisputable propriety, forbad the extraction of the evidence.

On the score of vexation to the public at large, by the disclosure of facts comprizable under the denomination of secrets of state, no decision appears to have been ever pronounced. Why? Because no known case ever presented itself, in which a decision to that effect was called for on that ground. In this instance, as in every other, it depends upon chance to open the mouth of jurisprudence.*

* As to the courts of judicature, should it happen to any one of them ever to be called upon to speak upon that ground, it would pretend, as usual, to declare the law; it would in fact have law to make. On this occasion, as on every other, with a leaf taken out of lord Mansfield's book, it need never be at a loss.

Whatever it would be contrary to "*sound policy*" to do, ought not to be done. Such was the law which, on one occasion, the learned lord, with the mute concurrence of his three colleagues, took upon him to make. But can there be anything so contrary to sound policy, as that, by such authority, laws of such latitude, laws involving an uncontrolled dispensing power exercisable over all other laws, should be suffered to be made? In one scale weigh the benefit, in the other weigh the price. More law, law covering a greater extent in the field of legislation, is thus made by a single judge, in a quarter of a minute, and at the expense of a couple of words, than the legislature would make in a century, by statutes upon statutes, after committees upon committees.

[Mr Bentham seems to have overlooked one remarkable case, in which a witness was forbidden to disclose something which the judge thought proper to consider, or to pretend to consider, as a state secret. I allude to the case of Plunkett *v.* Cobbett, in which lord Ellenborough refused to suffer a witness, who was a member of parliament, to be examined concerning words spoken in parliament: and this by reason of his duty, and in particular of his oath, by

In both houses of parliament, exclusions are, in every day's practice, put, on this ground, upon communications that otherwise would be made.

Where the vexation in question is outweighed, outweighed by the profit to justice attendant on the execution given to some article or other of the substantive branch of the law; in this case, the exclusion put upon evidence, the allowance given to the plea of vexation in the character of a ground or justificative cause of such exclusion, will be found under the head of cases where exclusion on the score of vexation is improper, and the allowance ranked among the errors by which English jurisprudence is defiled.

which he was bound not to reveal the counsels of the nation. *Phillipps on Evidence*, i. 274.

To support this inference, the two following falsehoods must have been taken for true: 1. That words spoken in parliament were state secrets; 2. That in no case ought state secrets to be revealed. *Editor.*]

CHAPTER III.

EXCLUSION ON THE GROUND OF EXPENSE, IN WHAT CASES PROPER.

OF the category of expense, though the mischief of it be but a modification of that of vexation, a separate consideration requires to be made.

There are but two cases in which expense, expense attendant on the delivery of evidence, is capable of forming a rational and legitimate ground for the exclusion of that same evidence.

One is the case in which, not being defrayed by the party by whom it is called for, it must, if delivered at all, (which is as much as to say not excluded), fall without compensation upon some third person. The other is, where, though it were to fall upon that one of the parties who is in the wrong, the quantity of vexation attendant on it in his instance would be too great to be defensible on the score of punishment.

In each of these cases, supposing them really exemplified, the propriety of the exclusion presents itself as unquestionable.

The load of rubbish has been improperly deposited as before. Penalty five shillings. For the mere purpose of levying this penalty, would

you put an innocent bystander to an expense of two voyages between London and the East Indies? Would you even subject the delinquent himself to any such expense?

All reason therefore for exclusion on the ground of expense is taken away, all reason and all pretence, when any person, who conceives himself to have need of the evidence, takes upon himself the expense.

But evidence, and evidence the delivery of which would be attended with considerable expense, exists on both sides. On one side, there exists ability as well as desire to defray the expense of his own evidence: on the other side, there exists inclination only, ability not. What in this case is to be done?

The knot is a Gordian one: what presents itself as capable of being done towards untying or cutting it, will be found under another head.*

Expense is to be considered at two periods. 1. When the disbursement is to be made, or at any rate undertaken for. 2. At the conclusion of the cause, when the time comes for definitive justice to be done.

Even though, in the rubbish case, the expense of fetching over the witness from the East Indies should have been defrayed by the plaintiff in the first instance; would you, in case of conviction, saddle the defendant, guilty as he is, with the burthen of reimbursing this expense? No, verily, if guided by the rules of humanity and

* In case of pecuniary inability of defendant to produce his evidence,—power to plaintiff to call for a decision notwithstanding, on condition of defraying the expense of defendant's evidence. Defendant punishable, in case of *malâ fide* invocation. See Chap. 7. *Remedies succedaneous to exclusion.*

rational justice: Yes, if guided by principles such as those of English law. Whether a man shall have his costs or not, whether the party who prevails shall receive reimbursement at the expense of the loser, depends upon a thousand capricious and inconsistent rules: but it is only in here and there an instance, that this reimbursement is refused on the ground of the excess of the burthen imposed on the loser, in comparison of the value of the benefit pursued.

It remains to bring to view what has been done by English law under this head.

As it is with vexation at large, so is it with that particular modification of it which is produced by forced expense. By the same causes, by the same accidents, by which bounds have been set to the vexation by reason of attendance, bounds are also set to the expense: I speak of the expense of journeys to and from, and demurrage in the neighbourhood of, the seat of judicature: items which, when added to the fees of the persons employed in the collection of the evidence, compose in general, wherever the evidence is delivered *vivâ voce*, the whole, or nearly the whole, of the expense attending it.

By these bounds, the bounds by which the territorial field of jurisdiction of the court stands limited, limits are thus far set to the expense to which the party or any other person shall be subjected by reason of the expense of the journey, in the instance of any one witness. From beyond these bounds, no man can for that purpose be obliged to come: and therefore, unless by the consent of a willing witness, no mass of expense exceeding the expense of such longest

journey, can be imposed upon any one who is not disposed to bear it. Every witness, and thence the testimony of every witness, who, were his testimony to be delivered, would have to come from the greater distance, stands negatively excluded: *i. e.* it is not compellable.

Thus much then is done, is actually done, though without design, in English law, (viz. by general arrangements), towards the limitation of the expense of evidence.

But in no instance is any exclusion put upon a lot of evidence, on the mere ground of the inordinateness of expense; understand, of the mass of expense of which the delivery of the evidence would be productive in that individual cause.

In the first instance, each party bears of course the burthen of that part of the aggregate mass of expense, which consists in the money disbursed by himself, on the occasion of whatever steps he takes in the institution and prosecution of his own claim; (claim, on the part of the plaintiff, to see the obligation imposed upon the defendant,—on the part of the defendant, to see himself exonerated from it). When the cause has received its ultimate decision in any court, then comes the question, whether, by him who in that court has gained the cause, anything, and what, shall be received from the losing party, on the score of satisfaction for the disbursements made by him?

Deficiency, inconsistency, uncertainty, all at the highest pitch, are the result of those learned labours, the picture of which fills a volume of near seven hundred pages.

To a set of arrangements on such a subject,

would it be possible to give the opposite qualities? In so large a compass, scarcely; in a twentieth part of it, with ease.

In regard to the plaintiff, one question is, whether he be king or no: for, if the suit be called a criminal one, the plaintiff is king, whatever else he may be. In this case, the answer is clear. Be the suit ever so unjust, and the expense which the innocent defendant has been put to in defending himself against it ever so heavy, he receives no indemnity: for the power of heaping oppression in this way on innocent men in the character of defendants, is among the king's prerogatives. Therefore, to prove that an innocent defendant ought to be thus oppressed, you want no other postulate, than that John-a-Nokes is king: than which nothing is more easy: after which, you may write Q. E. D.

The rule is indeed scrawled over by exceptions: yet not so, but that the ground predominates.

Again. Be the delinquency of the defendant ever so enormous, the expense of prosecution ever so great, reimbursement is not to be thought of. Why not? Because, to receive money under the name of costs is "beneath the royal dignity."* Call it costs, he disdains to receive

* The iniquity of this rule has forced the judges to take upon themselves the responsibility of allowing to the prosecutor a sum of money under the name of expenses: this however they do or leave undone as they please: consequently the most frivolous reasons frequently suffice for leaving it undone. It is asserted in the eighty-fourth number of the Edinburgh Review, p. 403, that, in a recent case, a judge refused to allow the prosecutor his expenses, because one of the witnesses for the prosecution offended him by his demeanour. *Editor.*

it back, though he is so much out of pocket: that is, the law servants of the real king disdain to see either their royal master receive it, or the John-a-Nokes, who really disbursed the money, and whom they have set a strutting under the king's name. Call it costs, he disdains receiving it, though it be a hundred pounds (it is frequently much more): call it a fine, he is ready to pocket it, though it be a shilling: the elephant disdains the cannon, but is ready to pick up the pin. Rendered splendid by this its destination, many a shilling, bating official clipping, finds its way, and by itself, into the real and royal privy purse.*

Indications may be found to shew that, in England, lawyers have had it in their heads to set bounds to the excess of vexation and expense. In their heads, at times, yes: in their hearts, scarce ever. Bounds to the excess of vexation and expense from all causes put together, natural and factitious, yes: not to this, an article of natural expense, taken by itself.

Under the direction of lawyers, statute law has, in some instances, interposed in some such view: but how? By refusing, to the party injured, the reimbursement of his share of the costs

* The following is another exception to the reimbursement of expenses:—

"When a party," says Phillipps,* "after obtaining leave by consent, examines witnesses abroad on depositions, he will not be entitled to any allowance, in the taxation of costs, for the expense of taking the depositions, although he may proceed in the action.† The same rule prevails in the Court of Chancery: if a party applies to that court for a commission to examine witnesses, he must pay the expenses."

* Vol. i. p. 14.

† "Stephens *v.* Crichton, 2 East, 259. Taylor *v.* Roy. Ex. Ass. Comp. 8 East, 393."

of suit; and thereby doing much more than refusing him any redress at all for the injury, where the value of the injury is judged not to exceed a certain amount. And what amount? A sum, which, if annual, would have constituted an independent provision for a parliamentary elector.

But, in this case, no separate account is taken of that part of the expense which is occasioned by the production of evidence; not to speak of what may have been occasioned by the production of this or that particular article of evidence.

In the equity courts, jurisprudential law has explained itself in the same way. For any sum below a certain amount, no redress is given in these courts. Why? Because it would be beneath their dignity. And to what amount? 10*l.*; a sum, in those days, equal at least to the expense of two years' subsistence of an average individual of any of those classes of which nine-tenths of the body of the people are composed. Outlawry was thus pronounced upon the great body of the people. Outlawry: and to what end? To maintain the dignity of the judge! The dignity of an equity judge consists, in what? In refusing to do justice. Dignity, forsooth? What has dignity to do in this case? The fees on the less valuable, would they have been worth less than the fees to the same amount on the more valuable, cause? Would Vespasian had found them beneath his dignity? But pride, in these instances, blinded the eyes of avarice. Humanity? No such motive was so much as dreamed of.

At common law, to a cause in which it is settled that either nothing shall be given to the plaintiff, or, if anything, one shilling, a more

than ordinary degree of importance is not unfrequently ascribed: and the question in dispute argued with great ceremony. So different, on the head of dignity, are the notions that prevail on the one side, and on the other side, of a twelve foot passage.

Suppose any reason, grounded in utility, for the denial of justice in all pecuniary demands under 10*l.*, and conceive what a character you are giving of an equity suit! Think of the virulence of that disease, to which, in the judgment of the inoculators, denial of justice, and in a great majority of the cases that would otherwise have occurred, is an eligible remedy!

Along with the vexation, the expense of evidence has, in the same lumping stile, undergone a remedy by exclusion, in another way, viz. by barring it out.*

* A case that happened within these fifty years,* will serve at once to shew the demand for a discretionary remedial power to be exercised by the judge, and the oscitancy of English law.

Action in the King's Bench at Westminster: two of plaintiff's witnesses, a captain and first lieutenant of a French merchantman, brought over from France: these two witnesses, if the affidavit of the real plaintiff (a Frenchman) was to be believed, had been appointed each of them as supercargo to a French East Indiaman, which appointment they had both foregone, and he, as he believed, would have to indemnify them for the loss. Profits, a stated allowance, five per cent on the voyage outward, ditto on the homeward, besides provisions and other advantages. Value of each cargo, say 50,000*l.*: this gives loss to each above 5,000*l.*: to both 10,000*l.*

The appointment, if real, was probably made only to give colour to the demand: for what power was there capable of stopping them? But, if the loss was not really sustained, that

* Thelusson *v.* Staples. 20 G. 3. Dougl. 438, in Hullock, 436.

or a greater might, in that same shape, come to be sustained. The cause was an insurance cause: the value at stake might therefore have been sufficient to cover even so great a loss. But suppose the value at stake no more than a few pounds: shall it be in the power of a man, in the character of plaintiff, to subject his adversary, as it were in a parenthesis, to a loss of 10,000*l.*, in addition to (suppose) 5*l.* the amount of the satisfaction due?

The master, the subordinate judge, by whom all questions concerning costs are determined, and (as it is very fit they should be) without a jury, disallowed this claim of indemnity: but what he did allow was, the expense attached to the voyage and journey and demurrage of these two witnesses to and fro, between France and England.

Reference made by the court (lord Mansfield the chief justice) to a rule spoken of as established, viz. that contingent damages (meaning damages occasioned to a witness by the obligation of delivering his testimony) could not be allowed for: certificate from the master, that such application had frequently been made, and always without success.

The precedent, said lord Mansfield, would be a dangerous one: since thus, with or without collusion with the witnesses, a plaintiff might, on the occasion of the most trifling claim, load his adversary with a burthen to an unlimited and intolerable amount. But even where contingent (*i. e.* consequential) damages are out of the question, how excessive and disproportionate may be the burthen thus imposed in the shape of ordinary charges!

What a dilemma! Injustice by denial of justice for want of evidence; or still worse injustice, by vexation and expense on the score of evidence. Is there no middle course? We shall see.

This dilemma, is it the work of nature? Now and then, and to a certain degree, yes: but much more frequently, and in a much greater degree, the work of learned art: one of the host of mischiefs produced by the rule by which, and especially at the outset of the cause, the parties stand excluded from the presence of the judge.

CHAPTER IV.

EXCLUSION ON THE GROUND OF DELAY, IN WHAT CASES PROPER.

A LOT of evidence being proposed; the delay in question in the character of a ground of exclusion, is that which might in some cases happen to be produced by a determination to give admission to that evidence. The question for decision then is,—of the two mischiefs, the two opposite, and, as it were, rival, mischiefs and injustices, which is the greater? The injustice attached to the misdecision or danger of misdecision that would be produced by the exclusion of the evidence? or the collateral injustice attached to the quantum of delay (of extra delay it must here be understood) that must be incurred, if, antecedently to the decision, that quantity of time be allowed, which is understood to be necessary to the production of the evidence?

Were all the material evidence forthcoming which the case has happened to furnish, a decision might be pronounced to-morrow. But, of this existing and obtainable stock, a part, more or less material, exists at the antipodes. Shall

the decision wait till a correspondence can be had with the antipodes for that purpose?

The cause having but one party on each side; the cause being, in that respect, and in that sense, a simple one; the proposition for the exclusion, if any such proposition come at all, must come either from the party who conceives himself to stand in need of the evidence, (say the plaintiff), or from the opposite party. From the party whose wish it is to see the evidence delivered, no such proposition can come: since he has but to forbear calling for the evidence, and the exclusion thus attaches upon it silently and of course.

If, in this simple case, a demand be made for an exclusion to be put upon the evidence,—a demand having for its ground the delay that would be necessary for the production of it; it is from the opposite side (say the defendant's) that the demand must come. For anything I know, the evidence alleged by the plaintiff to exist, may or may not exist: the effect of it, if produced, may or may not be more or less material, more or less necessary, more or less conclusive. But the case is such, that, if the decision be not passed till the requisite time has been taken for the arrival of the evidence, added to what notice may be to be taken of it, the mischief resulting to us from that delay will be greater than the mischief resulting to the plaintiff from the disallowance of his claim: at any rate, than whatever chance of such miscarriage may be the result of the non-production of that evidence.

Reverse the case, the mischief of the delay will be more sensible. It is the defendant that

applies for the delay, to save the exclusion (the negative sort of exclusion) that, for want of it, would be put upon the evidence he has to produce. No, says the plaintiff: the mischief from this delay would on my side be so great, that, in consideration of it, my petition is that the cause may go on in its natural course: that the delay prayed for may be refused: although of such refusal the sure consequence will be, that an exclusion will thus be put upon the article of evidence.

Again, let the cause be a complex one: complex in respect of its affording divers parties (say five) on a side: and first, say, on the plaintiff's. One plaintiff applies for the delay, as necessary to the delivery of the evidence; the other plaintiff opposes the delay, in other words applies for the exclusion, the evidence not being, in his view of the matter, worth the purchase. To the present purpose, this third case differs from the first only in name. The parties stand on the same side of the cause, but, on this point at any rate, their interests are opposite. The plaintiff, by whom the application for delay is opposed, is to this purpose, as against his co-plaintiff, a defendant.

The two quantities here compared with one another, being both of them in their nature susceptible of variation upon a scale of almost indefinite length,—on the one hand the materiality, the probative force, of the evidence, on the other hand the duration of the delay; the ratio of each to the other is of course susceptible of variation upon a correspondent scale.

If, however, (as will frequently be the case), the evidence in question be indispensably neces-

sary to warrant a decision on that side; the mischief of mere delay, that is, mere postponement of the decision on one side or other, (abstraction made of the contingent mischiefs with which it may happen to it to be pregnant, viz. on the one side deperition of the matter of satisfaction, on the other side deperition of counter-evidence), can seldom be equal to the mischief of the exclusion. From the exclusion of the evidence, results in this case, by the supposition, and that as a necessary consequence, misdecision to the prejudice of that same side: and the mischief resulting from that misdecision, perpetual and irremediable: whereas from delay, considered in respect of that part of its mischief which is certain, no worse effect ensues than the temporary duration of that same mischief, which, in case of exclusion, is perpetual.

In respect of the evidence, the supposed temporary absence of which, produces the demand for the delay; what are the expectations entertained by the plaintiff, (or the defendant, if the delay be prayed for on his side); and what the grounds of them? What assurance has he that the witness cannot now be forthcoming? that he will be forthcoming within any reasonable space of time? that he knows anything about the matter, and that what he knows will, if truly reported by him, operate to the effect alleged, and with a sufficiently persuasive force? All these questions together constitute a sort of incidental cause, collateral indeed to the principal cause, but sometimes not inferior to it in importance, because the main cause itself may altogether turn upon it. All these questions, with others that might be added,

constitute a complex question, a question of fact, which, like any other question of fact, must be tried by the light of its own evidence,—of such evidence as it happens to afford: direct evidence, circumstantial evidence, the evidence of the prosecutor if necessary, the evidence of any other individual as it may happen. The witness (understand, he in whose absence the demand for delay originates) was an inmate of the owner of the goods taken in the way of theft or robbery: he was in the house at the time: he was a lodger in the house of the individual killed, and of whose murder the defendant stands accused: he was in the house at the time, or came in soon afterwards. The question, whether the alleged witness was in a situation that would qualify him to give evidence, is a question of fact, to be tried, like any other question of fact; upon its own evidence. Does the main cause turn upon it? It is a question that requires to be examined into with the same care, and therefore with the assistance of the same securities for trustworthiness, as those which are looked upon as indispensable to the principal cause.

Between delay for the sake of evidence, on the one hand, and exclusion of the evidence for want of the requisite delay, on the other, the connexion will, after all, if carefully and honestly looked into, be found (like so many other of the evils with which the system of procedure is pregnant) in a much greater degree factitious than real. Such will be the result presented by the chapter,* the business of

* Chapter 7.

which is to bring to view the arrangements capable of serving in lieu of absolute exclusion, in the character of remedies to vexation, expense, and delay.*

The strongest case in favour of the exclusion, is where imprisonment, itself tantamount in vexation to a severe punishment, is the lot of the defendant during the continuance of the delay. Here then is punishment, a perfectly distinct and incontestable lot of punishment, inflicted: inflicted, where perhaps it is undue, and, at any rate, before it is proved to be due.

In this case, however, there is an evident medium between the continuance of this perhaps unjust punishment, and exclusion of the evidence, from whence acquittal from all punishment. Bail him, if he can find bail: if he cannot, it will in general be a further presumption of delinquency: if no bail, take other securities for appearance, of which many might be enumerated, if the present were a fit place for it: in default of all such securities, discharge him out of prison, even without security. But liberation from prison is one thing, definitive acquittal is another. Because the plea is sufficient when applied to the one, it follows not that it must be so when applied to the other.

At any rate, the question (it will be seen) turns still upon proportions. The perhaps alto-

* Remedy against deperition of the evidence on the other side,—immediate collection of that same evidence.

Remedy against deperition of the means of satisfaction on the former side,—sequestration, or vadiation in this or that shape, whichsoever, being sufficiently efficient, may be least burthensome.

gether undue or excessive vexation being a determinate quantity, the proportion will depend upon the quantity of the delay. Admitting it to be better that a delinquent should go unpunished, than that a punishment should remain hanging over his head for years; it follows not that the proposition would be true, if, instead of *years*, a man were to say *days* or *weeks*.

All this while, an argument that pleads against the delay, and therefore in favour of the exclusion, ought not to be lost sight of. The evidence, if produced, will tend to conviction: will operate in disfavour of the defendant. A result this, of which the probability at least must be assumed, to justify the delay, with the vexation thus attached to it. But the supposed probability, on what is the persuasion of it grounded? It is on the part of the plaintiff that the evidence is called for: a considerable presumption this, but by no means a conclusive one.

Expecting to see the defendant proved guilty, expecting to find the guilt established by this evidence, he applies accordingly for the delay necessary to the obtainment of this evidence: on this supposition, indeed, it is a matter scarcely to be apprehended that it would be the endeavour or wish of the plaintiff to extend the quantity of delay for the purpose of vexation,—to extend it beyond the exigency of the case; for, the longer the delay continues, the longer the manifest object of the prosecution, the natural wish on the part of the plaintiff, continues unaccomplished.

So much for ordinary probability. But a case neither improbable, nor perhaps altogether with-

out example, is this:—The plaintiff has no expectation that the evidence he applies for will operate to the conviction of the accused: he entertains no such persuasion or suspicion as that the accused is really guilty of the crime: the object, the real object, of the application for delay, is not justice, but vexation: the vexation of an individual, of whose innocence the accuser himself is conscious.

The case is a possible one; though, if examples of it were to be looked for, happily for mankind they would be found (I believe) extremely rare. But the case where, on the part of the plaintiff, an ill-grounded but sincere persuasion of the defendant's guilt, or an exaggerated estimation of it, has been productive of an ill-grounded prosecution, is much less rare.

On the ground of that one of the evils opposite to the ends of justice which we are now considering,—in so far as evidence (*i. e.* an extra quantity of delay, considered as being necessary to the production of it) is the cause of the disease, and exclusion proposable as the cure,—English law, however heedless, is not quite so impotent, as on the ground of either of the two preceding ones.

Delay? Oh yes: of that there is no want: but, for exclusion to be put upon evidence for the avoidance of preponderant delay, no tokens of any provision; no token of so much as a thought.

To the allegations on both sides, in general terms, respecting the general matters of fact on which depend the propriety or impropriety of excluding an article of evidence to save the delay that would be necessary to the produc-

tion of it, the ears of the courts are open. But, as to any tolerable security for the truth of these allegations, on this occasion as on all others learned judges know better than to suffer themselves ever to receive it.

Between every two operations, needful or needless, a determinate length of delay being fixed* by general rules,—a length in most instances too great, in here and there an instance too scanty; where, on the ground of the impracticability of causing the evidence to be forthcoming at the regular time, coupled with the probability of obtaining it at a more distant period of time, a further length of time is or is pretended to be needful, a special application is made to the court for this indulgence. In this case, if the materiality of the article of evidence in question be out of dispute, and yet the demand of the delay be resisted, the consequence of such resistance, if successful, is a virtual exclusion put upon the evidence; and this on the score of delay, *i. e.* of the undue delay that would be the necessary result, if the lot of evidence in question were to be received. It is in this way, and this way alone, that, on the ground of delay, *i. e.* of the mischief that may come to be the result of it, any exclusion can be put upon any article of evidence.

The question here concerned is of the number of those incidental questions, on which the fate of the cause is liable to be completely dependant: as completely as upon any evidence respecting the principal matter in dispute.

* Book VIII. Technical System. Chap. 10. *Sittings at long intervals.*

For the truth, correctness, and completeness, of the evidence on which the decision of this incidental point is founded, there is in every such case exactly the same demand for the best security that can be afforded, (whatever that security may be), as for the correctness and completeness of the evidence respecting the principal matter in dispute.

Note, that, independently of all ultimate loss by deperition of evidence, or of the matter of satisfaction, mere delay may, to a *malâ fide* defendant, be productive of certain gain, at the expense of an injured plaintiff, to an amount to which there is no certain limit. Sum in dispute 10,000*l.*; trial staved off till next assizes, six months distant; interest at five per cent.; sure profit 250*l.*: deducting only the expense of the business thus made, as the reward to the law partnership for their service, the price of the delay thus manufactured.

For grounding an application for delay on the score of the absence of a material witness, forms, every day in use, are given in the books of practice: the testimony of a witness, (a single witness is sufficient), delivered in the affidavit mode. Thus far, nothing particular: learned judges (as above mentioned) never suffering themselves to receive testimony in any but this worst of shapes. But the evidence received in this bad shape is hearsay evidence: supposed declarations, supposed to have been made extrajudicially, and even by persons undesignated, —by the common voucher, the French *On*,— this supposed testimony thus transmitted to the court, through the pen of the affidavit-man's attorney: when the immediate testimony of

these supposed extrajudicially-speaking witnesses, might, for anything that appears, have been obtained; obtained with as little trouble, and without the expense. And, unless opposed on the other side (opposed by testimony, which, so far as the mode of delivery at least is concerned, cannot be of any better complexion), the evidence is conclusive.*

Observe the form stated as being in common use in the King's Bench.† 1. "The deponent (as he is advised and believes) cannot safely proceed to the trial . . . without the testimony of" [the proposed witness]. No averment, even in the way of opinion, in general terms, that he *can* safely proceed *with* such testimony,—that he has any just ground to stand upon.

2. "In consequence of the notice of trial . . . he, this deponent, caused enquiry to be made," &c. (stating [says the form] the nature and result of the inquiry made after the witness, and the time when he is likely to attend).

Here we see hearsay evidence of the second remove: the persons inquired of, if any such there were, not upon oath, not judicially examined, nor even, without examination, judicially deposing: the supposed inquirer again in the same case.

Such is the sort of evidence which, if the

* What if, at what is called the trial, when proof came to be given of the matter of fact principally in question in the cause, other evidence in abundance (immediate *vivâ voce* evidence) being at command,—an advocate were to take upon him to produce, instead of it, this hearsay evidence in the affidavit mode? The thing is impossible: but supposing it done, the judge would suppose him out of his senses, or send him to his horn-book.

† Tidd's Practice, Forms, p. 196.

statement be correct, is habitually received, and (unless victoriously opposed by counter-evidence) habitually acted upon as conclusive, by the King's Bench.

The Common Pleas seems not much more nice. The following extracts are from a learned practiser in that court,* who does not express indeed that it is exclusively, or more frequently, in use in that court, than in the King's Bench.

Here divers particulars respecting the nature and result of the inquiry (as above) are given. . . "He, this deponent, [no intermediate inquirer here] hath been [not said when] to the house of the said P. W. [the proposed witness] and was informed [not said by whom] that he was gone to Norwich, [not said when], and that he, this deponent, hath sent there [not said whom nor when] for the purpose of subpœnaing him; but that the said P. W. is gone from thence, as this deponent hath heard, [not said from whom], and verily believes to be true: and that he, this deponent, cannot get any information where the said P. W. is, but is informed [not said by whom, or when, or where, nor that he so much as believes the information to be true] that he will be at home in two months. . . . ."

Can any danger attend the attempt, successful or unsuccessful, to stave off a just demand for an indefinite length of time, or for ever, by false representations thus conveyed?

The application may, it is true, be opposed: but with what effect? Not a question can the opponent (the plaintiff) put to any one in this chain

* Sellon's Crompton, i. 421.

of witnesses. It may be a complete tissue of lies: and nothing can he do that can contribute to the detection of any one of them. The defendant's attorney being the deponent, his client may have posted persons to give such false answers or statements, (not that it is worth the while); or the like friendly deception may have been put by the attorney upon the defendant, his client.

The least unpromising course seems to be to follow the precedent of the ingenious attorney, who, to combat the forged bond, forged the release. The plaintiff makes a counter-affidavit, saying nothing of the defendant's story, (for, be it ever so false, what can he say of it to any purpose?) but telling a like story of his own, shewing how he has an equally material witness now forthcoming, but whose testimony, were the required delay granted, would be lost.

If to a dishonest defence success may thus be given, defeat to a just demand; so, on the other hand, may defeat be given to a just defence, success to an unjust demand, by the same system of—what shall we say? *inquiry?* where not a question can be put? say at any rate *receipt of evidence*. Affidavit,* "that A B and C D are material witnesses for defendant in this cause, without whose evidence defendant cannot safely proceed to trial, as defendant is advised and verily believes," was held bad; "because the belief seemed to go through the whole, as well to A B and C D being material witnesses, as to the other necessary part of the affidavit, that the party cannot safely make

* Sellon's Crompton, i. 419. Day *v.* Sampson, Bar. 448.

defence without their testimony; the former part, respecting A B and C D being material witnesses, ought to be positively sworn; belief as to it is not sufficient, but as to the latter part it is."

"*Held bad:*"—and certainly not without something like a pretext, at any rate. Possibly, in the way above suggested, evasion was designed: but possibly, and much more probably, not. But to what use pretend to stop up this loop-hole, when so many doors are left wide open in so many other places?

To the materiality of the evidence, "*belief*" not sufficient, "*positive swearing*" necessary. Precious distinction! as if anything could ever be sworn to, howsoever positively, but belief: as if the materiality of an article of evidence were not a matter of opinion; and not only of opinion, but (for so it has been made by lawyers) a matter of law. What an indignation was once manifested at the presumption of a deponent, who took upon him to "swear the law!" Ignorant and presumptuous man! to pretend to know the law!

Held bad: and what was the consequence? Was the cause called on, without the defendant's material, and (if his statement were true) necessary, witness? and was the subjecting him to the obligation of complying with an unjust demand the ultimate result? Let us hope rather, though it is not said, that the badness of the expression was not so fatal but that opportunity was given to amend it: viz. by ulterior affidavits.

But the badness, the real badness, where is it? Not in the suitors, justly and unjustly

suspected of evasion, but in the practice of the court, by which questions are never tried but upon evidence so bad, as to afford to insincerity a perpetual chance of success, without the smallest danger of punishment, or even of shame.

Suppose the maker of this "*bad*" affidavit present in court, answering upon oath, impromptu; instead of having employed, as many days as he thought fit, in studying means of evasion, with his attorney at his elbow. A word or two in the way of question, half a minute in the way of time, and the ambiguity would have vanished.

A case must not be omitted,—a case of prodigious extent in the field of law,—in which no competition takes place between the mischief of delay and the mischief of exclusion; but, the delay (with or without design) taking place, the exclusion follows without remedy; follows by act of law.

It results from the principle of *fixed times* with long intervals. The time for the trial is come: it has been fixed, as it is of course, by a blind rule. A witness, or an article of written evidence, that was to have been produced, fails of being produced. A few days, hours, or minutes more, the evidence would have been produced. But the time is past. It therefore cannot be produced. In the first place, suppose the failure on the plaintiff's side: what is the consequence? Misdecision, to the prejudice of that side. To the plaintiff, loss of the right in respect of punishment: to the malefactor, (whatever may have been his guilt), impunity; temporary or ultimate, according to circumstances.

In this case, the exclusion of the evidence,

that is, the non-forthcomingness of it for want of the delay, may have been designed or undesigned: the work of man, or the work of adverse fortune. But the mischief resulting from it, the misdecision, is the work, exclusively the work, of the man of law: the work of the technical system, with its fixed days and excessive intervals. Considered in respect of its duration, the exclusion may be distinguished into two periods. The first is not the work of the man of law: his is not the blame: accident, or unlicensed misbehaviour, is the cause: but the second is his altogether. A slight evil he sees produced without his participation: this does not satisfy him; but, upon the mere ground of this slight evil, he inflicts another, in all cases a much greater, in some cases an infinitely greater, evil, of the same kind.

At the preappointed time, the evidence is not forthcoming: what, in point of reason and justice, is the practical result? Appoint for the production of it the earliest open day in which, according to probability, it can be forthcoming. No, says the man of law to himself: no purpose of mine will be answered at this rate.

In cases not criminal (*i. e.* where, be the case what it may, the species of suit belongs to that class), if it be on the plaintiff's side that the failure takes place, the mischief is not irreparable. It depends upon him to suffer a nonsuit, and proceed anew, paying costs: whereupon, at the end of six or twelve months from that time, and at the expense of three or four or five score pounds, if the evidence has not

perished in the meantime, he may take another chance.

If it be on the defendant's side, it may perhaps be allowed to him to take such other chance; but it depends not upon himself; and it must be at an increased expense. On the trial in question, the verdict must be against him,—he, in general, paying the costs on both sides,—and, if he obtains the felicity of a new trial, it cannot be till after motion and argument thereupon.

In criminal cases opens a very different scene.

If it be on the defendant's side that the failure takes place, it seems rather difficult to pronounce, in every case, what may be the result. On an application made on the ground in question on that side, power for putting off the cause is not wanting; and in each instance the great probability seems to be, that, the judge being satisfied of the propriety of the application, due time would accordingly be given.

It is where the plaintiff's is the side on which the failure takes place, that the prejudice applies, and the mischief flows in consequence. Breaking out on this side, no mischief is ever to be repaired: and this is called *humanity* and *justice*.

At the preappointed hour, a witness who should have appeared, fails to appear: an article of written evidence which should have been produced, fails of being produced. Had the failure been foreseen, application for time might have been made, and time granted accordingly. The failure not having been foreseen,

not having been foreseeable, no time is to be granted: the omission is fatal: the malefactor triumphs.

Behold here another exemplification of the practice of deciding, and against the merits, on grounds foreign to the merits.

Behold here again the power of pardon thrown out of the window, like medals on a coronation day, to any one that will take it up: to any witness whose testimony is necessary: to the possessor, for the time being, of any piece of paper, the production of which is necessary: to any one who, by fraud or force, discoverable or undiscoverable, will manage so as to keep the man or the piece of paper out of the way for a few minutes.

All this is *in favorem vitæ*. No man's life shall be put twice in jeopardy. Hypocrites! Say, why is man's life ever put once in jeopardy? Did ye ever, could ye ever, give any better reason for your human sacrifices, than used to be given in Mexico, and is now given in New Zealand? "Because it is what we do, and have been used to do, for so many hundred years?"

But the same hypocrisy reigns where there is no life in jeopardy. On the continent, *non bis in idem* is moreover a maxim of Rome-bred law: a maxim made indeed of stretching stuff, like all maxims of all lawyers.

The malefactor in whose instance the witness or the bearer of a paper has fallen sick, or been drowned, or been made drunk, and so forgotten himself, how much less guilty is he than if the man had come to his time? If the chance of triumph must be secured to every malefactor, let it at any rate be a fair chance: let fortune

judge, not fraud in fortune's name. Admit dice and boxes among the furniture of the temple of justice. But let the dice be fair, the boxes fairly handled; no loading or cogging, as at present.

CHAPTER V.

EXCLUSION OF IRRELEVANT EVIDENCE, PROPER.

OF the mischief liable to result from the admission of irrelevant evidence, no separate mention need be made: be it what it may, it is resolvable *in toto* into the mischief producible by vexation, expense, and delay.

The difference between the ground of exclusion in the present case, and in those others, consists in this:—in those three cases, (*i. e.* in every case where the evidence is not irrelevant), there is an option to make, there is a quantity of mischief, a weight in each scale: there is something to lose by the proposed exclusion,—a chance in favour of justice; there is a disadvantage that must be incurred by the proposed exclusion,—a probability in favour of misdecision, or perhaps a certainty. But, in this case, in the case where the information proposed to be delivered in the character of evidence is irrelevant, there is nothing that can be lost by the proposed exclusion: not the least danger of misdecision is incurred by it.

In this case, then, the enquiry is much more simple than in any one of those three others:

there, there are two quantities to weigh, two values to find: here, but one. Suppose the proposed evidence irrelevant, exclusion is the indisputable consequence.

Irrelevant evidence is evidence that bears no efficient relation to the fact which it is brought to prove: evidence which proves nothing: as well might one say, no evidence.

Fit, unquestionably fit, to be excluded. But to what purpose speak of it? Who is there to whom it could occur to propose the admission of any discourse coming under this description? Who is there, whose purpose could in any way be served by it?

To a party, plaintiff or defendant, acting in *bonâ fide*,—believing himself to have right on his side, and seeking nothing but the means of proving it,—there can be but one inducement for the demanding or delivering irrelevant evidence: viz. the belief of its being relevant: add, material and needful, without which the relevancy of it would not help him.

False conceptions on this head are far from being unfrequent: conceptions which, whatever ground there may have been for them in opinion, prove false in the result.

By the force of prejudice, in a weak judgment, in a disorderly imagination, there is no saying what reverie may not be presented in the character of a lot of evidence. If every such supposed or pretended article of information, were liable to be obtruded upon the judge, and in any quantity, at the instance and at the pleasure of either party, and of each party, no power of exclusion on this ground being left to the judge,—it is easy to conceive how com-

pletely, in any cause, the justice of the case might by this means be overwhelmed.

Prosecution for witchcraft: oral evidence in support of the charge. On the part of the defendant, no direct evidence, but the general proposition, the alleged improbability of the fact, in the character of circumstantial evidence.* In reply, on the part of the plaintiff, to prove the probability, Glanville's History of Witchcraft, or any other article of the demonological library, proffered in evidence. Upon this invitation, shall it be the duty of the judge to take up the book on the spot, and, previously to his giving his decision in the cause, to read it from beginning to end? and so on with regard to every other article in that same library? If not, and if he should not think fit to read it, his reason for rejecting it would naturally be founded on some such ground as what is expressed by the above-mentioned clause. In a reasonable mind (he would say) it does not appear to me that the contents of this book are of a nature to contribute anything, or at least anything worth regarding, toward the forming a persuasion affirming the existence of the alleged acts of witchcraft, charged by the plaintiff to have been committed by the defendant.

To a party acting *in malâ fide*, the inducements, constant and casual together, are equally obvious. We have seen the mischiefs liable to result to the party in the right, from excessive loads of matter, relevant or irrelevant, thrown upon the mind of the judge: perplexity, deception, misdecision. We have seen the mischief

* See Book V. CIRCUMSTANTIAL. Chap. 16. *Improbability.*

in the shape of vexation, expense, and delay, capable of being drawn down from the same source upon the party who has right upon his side: so many mischiefs, so many inducements, in the eyes of a malicious and unscrupulous adversary.

The following are natural exemplifications of irrelevant evidence:—

1. Be the suit criminal or non-criminal, evidence against Tertius is relevant or irrelevant as against Reus, according as participation is or is not brought home to him. Will it be so, or not? Sometimes it will not be to be known, till the whole of it has been gone through: sometimes the fact of the participation may be proved or disproved in the first instance. The line of conduct by which a burthen, a legal obligation, criminal or non-criminal, is, or ought to be, imposed upon Tertius, is (we shall say) a chain of acts, the connection of which with the conduct of Reus may be proved by some act antecedent to the very first link, subsequent to the last, or in concomitancy with any intermediate one. An example of the first mentioned case, an order; of the next, an act of confirmation; of the last, extrajudicial discourse of a confessorial nature, in the way of conversation, acknowledging participation by any of those modes of behaviour which in a criminal case denominate a man an accessary, whether before the fact or after the fact.

What may have happened is, that, though Reus was in confederacy, all along, with Tertius, and though evidence sufficient for the proof of the confederacy exists, and can be produced, yet the nature of it cannot be understood till

after the part acted by Tertius has been brought to view.

In all these cases, prove participation upon Reus, everything that has been done by Tertius is material: all evidence which contributes to proof of it is relevant. If no such participation be proved, all that was done by Tertius is, with regard to Reus, immaterial; all the evidence of it irrelevant.

If (as in case of an order, or formal act of ratification) it be agreed or established that no proof of participation, no other proof, can be given, than what is distinctly separate from the evidence of the principal course of action; if, at the same time, the proof of the act of participation be short, that of the principal course of action long; the proof, or what is given for proof, of the act of participation, should come first. Why? Because, failing this proof, evidence of the principal course of action falls into the category of irrelevant evidence, and the suit should of course be rid of it.

What has been done by English law in relation to irrelevant evidence, distributes itself naturally under two heads: what has been done for the exclusion of irrelevant matter, and what has been done for the accumulation of it.

First, as to the exclusion of it. In this respect, much depends upon the words in which the evidence is collected.

1. Collected *vivâ voce, coram judice et partibus*, all irrelevant matter, everything that appears to wander from the point, is nipped in the bud.

Accordingly, to the extent in which this mode (including its sub-modifications) is em-

ployed, irrelevancy, in the character of a source of vexation, expense, and delay, is scarce known: exclusion takes place *instanter*, and no mischief is produced on either side. None by the exclusion, because what is excluded is of no use: none by the irrelevant evidence, because, before it has time to produce any mischief, the door is shut against it.

In the following modes of collection, accordingly, the plague of irrelevancy is in a manner unknown: 1. In the natural mode, as employed in causes tried in courts of conscience, and before justices of the peace out of sessions. 2. In the jury trial mode. 3. In preliminary examinations taken before a justice of the peace, or before a coroner. 4. In examinations before committees of inquiry, or commissioners of inquiry.

2. Irrelevant evidence is the peculiar growth of equity. In the language of that country, it is called *scandal and impertinence*. For the designation of matter to which nothing worse can be objected than that it is useless, the word *impertinence* seems to have been employed: when the irrelevancy is aggravated by injuriousness, the word *scandal*.

A consequence inseparable from the modes of collection there in use, is, that in this case the peccant matter, before it is turned out, must be let in. This circumstance we may be pretty well assured was not overlooked, when the mode of collection came to be chosen, in, by, and for, those courts. Nothing could be better adapted to the ends of judicature. Business made by the quantity of peccant matter let in; business made by the discussions relative to

the exclusion of it: business made by admission in the first place; business made by exclusion in the second place.

The mischief swelled to such a height as to be past endurance: the auditory nerves of the judge (of a judge who never heard anything about the matter) were continually wounded by it: it became necessary to apply a preventive remedy. Order that no *answer** be given in without having been signed, and thence manufactured and dressed up, by counsel: order that no interrogations be exhibited for the examination of witnesses, without having received the same security against scandal and impertinence. An additional load of vexation, expense, and delay, laid upon all causes, and the chance of misdecision increased by the sophistication of the evidence, for the adding of a sham security against the irrelevant matter that might come to be introduced in here and there a cause! As if the responsibility of the underling sort of lawyer whom the judge punishes every day without scruple, could receive any material addition from the responsibility of another sort of lawyer, whose situation is too near that of the judge to be exposed to punishment.

Business made by letting in the irrelevancy; business made by tossing it about when in, and throwing it out; business made by stationing a set of porters whose constant employment is to keep it out. Should irrelevancy creep in notwithstanding, does the responsibility amount

* Ready-written deposition of a defendant, as extracted by ready-written allegations and interrogations delivered on the part of the plaintiff.—See Book II. SECURITIES.

to anything? Oh, no: that would be contrary to all rule. It is the lawyer that transgresses; it is the client that is punished for it.

How irrelevancy is shut out, when it is men's wish to shut it out, has been seen already. But what could be more adverse to the ends of judicature?

We come now to speak of the arrangements whereby the accumulation of the same valuable matter is compelled, or otherwise encouraged, in subservience to the same ends.

1. Of one of the consequences of the exclusion put upon the most satisfactory kind of evidence, confessorial evidence, a momentary mention has been already made: the time of the judge consumed, his faculties oppressed, by an inundation of inferior, of hearsay and other extraneous, evidence. First sample of virtually irrelevant evidence artificially and habitually accumulated,—extraneous, *vice* confessorial at large.

2. In this case, and from the rest of the matter belonging to this case, should be distinguished the more particular case where the use of the confessorial evidence is to serve for the authentication of an article of written evidence (contractual, or casual and informal): a sort of evidence extractable from the party; without any additional vexation, expense, or delay; and not without a boundless mass of vexation, expense, and delay, from extraneous sources. Second sample of virtually irrelevant evidence artificially accumulated,—extraneous evidence *vice* confessorial for the purpose of authentication.

In a mass of assertive matter, whatsoever is false without conveying instruction by its fal-

sity, is, on that account, whether relevant or irrelevant, at any rate superfluous and useless. The falsehoods of the thief, or other unlicensed malefactor,—such falsehoods, especially when drawn from him by interrogation, in court or out of court, are pregnant with instruction, useful instruction: the fictions and other falsehoods of the lawyer, relevant or irrelevant, always superfluous and useless, barren of instruction, are pregnant with nothing but confusion and misconception, their intended fruit.

3. Of the nature of that sort of discourse which forms the matter of written pleadings, a slight sketch has been already given: of its inutility; of its repugnancy to the ends of justice; of its subserviency to the ends of judicature. Third sample of virtually irrelevant evidence artificially accumulated,—matter of written pleadings, and more especially of that sort of written pleading which is called *special*.

What! Pleading? the matter so carefully distinguished from evidence? Do you call pleading evidence?

It is, and it is not, evidence. It is not, to any good purpose; it is, to a variety of bad ones. It is not, for the purpose of giving termination, or at least any right termination, to the suit; it is, for the purpose of giving continuance to the suit. It is not, for the purpose of grounding any right decision upon, and in favour of, the merits; it is, for the purpose of grounding wrong decisions on points foreign to the merits. It is not, for the purpose of any decision, subservient to any of the ends of justice, because, being partly irrelevant and partly false, it is known to be unworthy of all regard,

and accordingly no regard is ever paid to it: it is, for the purpose of producing, without compensation, that vexation, expense, and delay, for which a compensation is afforded by genuine evidence: it is, for producing that misdecision, the danger of which constitutes the characteristic mischief of false evidence.

In lawyers' language, it is not evidence; because lawyers have settled with themselves not to give the name of evidence to any assertion, which, in case of mendacity, they are not prepared to punish. It is evidence, because, with the exception of that accidental and adventitious property, viz. that of subjecting the utterer to punishment in case of mendacity, it has all the characters of evidence.

It is not evidence, for the purpose of subjecting to punishment the liar by whom it is delivered; it is evidence, for the purpose of subjecting to pillage the innocent suitor at whose expense it is delivered.

4. Bills in equity may either be included under the last preceding head, or be considered as constituting a separate one.

The matter of them may be considered as part of the matter of written pleading, inasmuch as it takes shelter, along with the rest, under the wing of the mendacity-licence.

It may be considered as a separate article, in virtue of the multifariousness of its contents: in virtue of its containing (over and above the matter of assertion) matter of interrogation, and matter of surplusage,—general matter, which, if the appropriate matter happens to be more or less true, is still irrelevant.

From the rest of the irrelevant matter, which,

whatever might be the consequence of omitting it, never is omitted, may be distinguished one never-omitted portion of scandal and impertinence: impertinence, and that of a scandalous nature, regularly put in by the learned person whom the party is forced to pay for keeping out scandal and impertinence.

Another difference. In the sort of matter that is more apt to be presented by the word *pleading*,—in what at common law goes by that name,—a man puts in, or does not put in, lies, as he sees convenient: at any rate, the obligation of mendacity does not extend to any of the assertions appropriate to the individual suit. In the matter of a bill, one necessary part is appropriate matter, in respect of which matter the learned draughtsman is forced to tell lies, on pain of loss of cause to his client: this part is distinguished by the name of charging part: a chain of assertions, constituting the indispensable foundation of the corresponding chain of questions. What you do not know, and ask to know, (ask of the defendant whom you suppose to know), you must declare that you know, and pretend to tell the court how it is.

5. To the account of the difference in respect of the mode of collecting the evidence, as between common law and equity, must be set down an unknown mass of irrelevant or otherwise redundant matter, in such of the written instruments as have the name of evidence. The commissioner or examiner, the judge *ad hoc*, by whom the evidence is extracted in this shape, is paid according to the quantity. That in this state of things a portion of surplusage should in the aggregate mass of causes be generated, (not to say

in each particular cause), follows as matter of course. It is equally obvious, that the quantity of it lies not within the reach of calculation; varying with individual circumstances, as well as with the idiosyncracy of the individual in each individual cause.

6. Indistinctness is the parent, not only of confusion, but of surplusage. Confusion generates business: surplusage is business ready generated. In the courts called ecclesiastical, the plaintiff's story, true or false, possesses at any rate that species and degree of distinctness which is produced by a division into numbered articles. The principle of distinctness thus infused into the charges, with the indirect questions virtually included in them, extends itself to the answers, and so on to any objections (or, as they are called, *exceptions*) which, on the score of insufficiency, or any other, may come to have been taken to the answer. In equity practice,—after the clouds of confusion that have been raised by an undivided bill, followed by an undivided answer, each with its train of surplusage,—two species of instruments (viz. the list of questions by which, under the name of *interrogatories*, testimony is extracted from extraneous witnesses, and the list of observations by which, under the name of *exceptions*, ulterior responses are called for at the hands of a defendant) have somehow or other been suffered to receive the benefit of this principle. To no lawyer by whom any such articulated instrument was ever drawn,—to no professional lawyer (not to speak of judges), could the distinctness and comparative perspicuity of the instrument thus divided, have ever been a secret: by no such lawyer

could that confusion, which, in the undivided instruments, results from the non-application of that principle, have been unexperienced, have passed unperceived. It would therefore have long ago been applied to every such instrument, had distinctness been among the ends of judicature.

7. Of affidavit evidence, that worst sort of evidence, on which, and which alone, so many causes are tried,—the only sort which a judge of the learned class ever receives for his own use,—mention has been made already. To point out how efficient, in the character of a cause of clearness, the same principle, articulate division, would be in this case, the slightest hint may (after what has been said already) suffice. In the case of a bill in equity, the line that separates question from question forms a sort of indirect principle of division, and thence of distinctness, however inadequate. In an affidavit, even this faint light is wanting. What can be more evident than the utility of affidavit evidence to the ends of judicature?

The confusion that pervades affidavit evidence is still more favourable to evasion; and thence (through the medium of deception) to misdecision; thence to vexation, expense, and delay, through the medium of irrelevancy. But its subserviency to the intermediate ends of technical judicature does not lessen its subserviency to these ultimate ends; nor therefore supersede the mention of it.

When, in a bill in equity, an answer, or a deposition, the adverse party has observed what to him appears to come under the denomination of scandal or impertinence; he applies to the

court, that the obnoxious instrument may be referred to the master, (the subordinate judge of the court), to report whether there be any matter of that description, and if yes, to cause it to be expunged: costs to be paid by the delinquent.

How useful an arrangement, if, in the *equity* (as the phrase is) of this equity practice, some master were employed, or some other connoisseur in scandal and impertinence, to look over the whole of the current mass of "*practical forms*" in this view. Ten volumes of this sort of matter lie before me, all in one modern publication, virtual folios, though nominal octavos.

Impertinence (to speak technically) he might find to constitute the ground of all of them; scandal, an appropriate sort of embroidery, in not a few: more particularly in those copious effusions of technical eloquence called *indictments* and *informations:* more particularly still where the effusion comes under the denomination of a *libel*, or (on that or any other score) comes under the denomination of a state or political offence.

On the occasion of a libel more particularly, *certain* scandal is (or at least used to be) regularly employed to encounter *problematical:* vicious or virtuous, the defendant's life, character, and behaviour, is or was aspersed. Between the two scandals, observe the difference: that which is *certainly* scandal, is uttered under a licence, and the author paid for it: that which may either be scandal or useful truth, is uttered without the licence; and the author, guilty or not guilty, together with an indeterminate train of innocent men in the character of printers and venders, is made to pay for it.

In the mean time, and until the *master* here spoken of shall have received the reference, and made his report, and that report been acted upon, and the expunction effected,—the way might be paved, at any rate, for such a reform, by a constitutional resolve: I mean, among jurymen, but more especially special jurymen, and on the occasion of all those political offences of which the mischievousness is so problematical as it is commonly in the case of state libels:—to lay it down to themselves as an inviolable rule, to pronounce a verdict of not guilty, if, among all these charges so coupled together in the conjunctive, there be a single one, which, (whether capable of proof or not capable) is not fully proved. Of what use is that man's conscience to him, who suffers an attorney-general, or any other lawyer at the bar, with or without the support of an imperious and brow-beating lawyer upon the bench, to force him to commit perjury?

CHAPTER VI.

EXCLUSION OF THE EVIDENCE OF A CATHOLIC PRIEST, RESPECTING THE CONFESSIONS ENTRUSTED TO HIM, PROPER.

Among the cases in which the exclusion of evidence presents itself as expedient, the case of catholic confession possesses a special claim to notice.

In a political state, in which this most extensively adopted modification of the christian religion is established upon a footing either of equality or preference, the necessity of the exclusion demanded on this ground will probably appear too imperious to admit of dispute.

In taking a view of the reasons which plead in favour of it, let us therefore suppose the scene to lie in a country in which the catholic religion is barely tolerated: in which the wish would be to see the number of its votaries decline, but without being accompanied with any intention to aim at its suppression by coercive methods.

Any reasons which plead in favour of the exclusion in this case will, *à fortiori*, serve to justify the maintenance of it, in a country in which this religion is predominant or established.

These reasons seem referable partly to the one, partly to the other, of two of the heads above-mentioned: viz. 1. Evidence (the aggregate mass of evidence) not lessened, and 2. Vexation, preponderant vexation.

1. First reason in favour of the exclusion: mass of evidence not lessened by it.

Suppose it an established, and thence a known rule of procedure, that a catholic priest is not exempted from the obligation of disclosing (if called upon in a judicial way, like any other witness) statements made to him in such his character, by a person appearing before him in the character of a penitent, in the catholic sense: statements of such a nature, as would operate in the character of self-prejudicing (including self-criminative) evidence, if reported by such his confessor, in or for the use of a court of justice.

What would be the consequence?—That, of that quantity of confessorial evidence which is now delivered in secret for a purpose purely religious, a certain proportion (it is impossible to say what, but probably a very considerable one) would not be so delivered: would be kept back, under the apprehension of its being made use of for a judicial purpose. The rule would operate as a prohibition upon all such confessions for the spiritual purpose, as would be applicable to the temporal purpose: and the penalty would be, whatever consequence of a penal or otherwise burthensome nature might be expected to flow from the decision which such testimony would warrant, and would therefore be calculated to draw forth.

So far as the prohibition thus applied had its

natural effect, the effect of preventing the practice; so far, the support afforded to the exclusion by the reason "mass of evidence not lessened," would extend. So far as the prohibition failed of being followed by this effect, the reason operating in support of the exclusion would be to be sought for under another head; *vexation*, preponderant vexation.

Of this vexation, then, what would be the quality and the amount? It would present itself in a variety of shapes.

1. I set out with the supposition, that, in the country in question, the catholic religion was meant to be tolerated. But, with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law: inhibited from the exercise of this essential and indispensable article of their religion: prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment; and so, in the case of inferior misdeeds, combated by inferior punishments.

Such would be the consequence to penitents. To confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution: if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of

this kind, some would stand firm under the persecution, others would sink under it. To the former, supposing arrangements on this head efficient and consistent, it would have the effect of imprisonment: a most severe imprisonment for life. As to those who sunk under it; what proportion of the number would on this occasion be visited by the torments of a wounded conscience, and to what degree of intensity those torments would amount in the instance of each individual, are questions, the answer to which must on this occasion be referred by a non-catholic to the most competent judges amongst catholics: but a species of suffering, the estimation of which does not require any such appropriate and precise information, is the infamy that could not but attach itself to the violation of so important a professional as well as religious duty.

The advantage gained by the coercion, gained in the shape of assistance to justice, would be casual, and even rare: the mischief produced by it, constant and all-extensive. Without reckoning the instances in which it happened to the apprehension to be realized; the alarm itself, intense and all-comprehensive as it would be, would be a most extensive as well as afflictive grievance.

But the vexation pointed to as above would not be the only price that would be to be paid for so inadequate an advantage. The advantages of a temporal nature, which, in the countries in which this religious practice is in use, flow from it at present, would in a great degree be lost: the loss of them would be as extensive

as the good effects of the coercion in the character of an aid to justice.

To form any comparative estimate of the bad and good effects flowing from this institution, belongs not, even in a point of view purely temporal, to the design of this work. The basis of the inquiry is, that this institution is an essential feature of the catholic religion, and that the catholic religion is not to be suppressed by force.

If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice, under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from future misdeeds of the like nature; repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past: such are the well known consequences of the institution; though in a proportion which, besides being everywhere unascertainable, will in every country and in every age be variable, according to the degree and quality of the influence exercised over the people by the religious sanction in that form, and the complexion of the moral part of their character in other respects.

But, without any violation of this part of his religious duty, and even without having succeeded so far as to have produced in the breast of the misdoer any permanent and efficacious repentance, modes are not wanting in which it may be in the power, as it naturally will be in the inclination, of a conscientious and intelligent confessor, to furnish such information as shall

render essential service to the interests of justice. I mean, by ministering to the prevention of such individual misdeeds as, though meditated, are as yet at a stage short of consummation; or of such others as, though as yet not distinctly in contemplation, are in a way to present themselves to the same corrupted mind. Who the misdoer is, the confessor knows better than to disclose; as little will he give any such information as may lead to the arrestation of the delinquent, under circumstances likely to end in his being crushed by the afflictive hand of the law. But, without any such disclosure, he may disclose what shall be sufficient to prevent the consummation of the impending mischief. "At such or such an hour, go not, unless accompanied, to such or such a place: strengthen such or such a door: be careful to keep well fastened such or such a window."

Warnings of this kind, if I understand aright, have not unfrequently been given. Warnings, which might have been given, and would have been given in better times, might (had they been given) have operated as preventives to the most grievous public calamities. At the time of the religious wars in France, more than one of the fanatics, who, with different degrees of success, aimed a murderous hand at the person of the monarch, prepared themselves for the enterprize, according to the histories of the times, by previous confessions, in the course of which the design was more or less disclosed. Without exposing the intended assassin, it might naturally have been in the power of the confessor to have frustrated his flagitious project: without

opportunity, the attempt would not have been made; and, without the attempt, the design would not have afforded evidence sufficient for the purpose of penal justice.

The discussion has been rendered the more particular, for the purpose of giving the clearer view of the essential differences by which this case stands distinguished from another, with which it might be liable to be confounded: I mean the case of those disclosures which may come to be made by an individual, criminal or non-criminal, to a law adviser, in the character of attorney or advocate; a topic which will come to be considered in its place.*

* Vide infrà, Part IV. Vexation, chap. v. sect. 5.

CHAPTER VII.

REMEDIES SUCCEDANEOUS TO THE EXCLUSION OF EVIDENCE.

WE have seen how easily it may happen that the evils opposite to the collateral ends of justice shall be greater than the evils opposite to the direct ends; that the vexation, expense, and delay, produced by the delivery of this or that lot of evidence, shall constitute a greater mass of evil than that of the undue decision or failure of justice that may take place for want of it: and this, even supposing the misdecision to be not merely the accidental or probable, but the necessary, result of the exclusion put upon the evidence. We have seen that, in this case, if there be no other resource, the propriety of the exclusion is a necessary result.

But, how necessary soever, it is manifestly an extreme and a most disastrous remedy. It is sitting down under the disease, to save the unpleasant consequences apprehended from the remedy. It is taking the course the patient would take who should resolve to endure the torment of the stone, in order to save the pain and danger of the operation.

But as, under the pressure of that bodily affliction, a skilful physician will naturally look

out with anxious diligence for whatever milder remedy presents any prospect of relief; so, where vexation, expense, and delay, is the disease, a vigilant and honest legislator will never embrace exclusion and thence misdecision in the character of a remedy, without applying all his industry to the discovery of other remedies that may be applied without contravention of any of the ends of justice.

If the exclusion of evidence be proper and justifiable in any case, it can only be in default, or by reason of the insufficiency, of such milder remedies. The indication therefore of what presents itself in that character, is a task which seems indispensable to the present work.

The following short descriptions may serve, in the first instance, to afford a general conception of the principal arrangements that offer themselves to this view. Explanations, when they appear necessary, will follow. Let it not be regarded as an objection, if a set of arrangements presented here in the character of succedanea to a comparatively narrow abuse, exclusion of evidence, should be found to include the leading features of a system competent to the extirpation of the immense mountain of abuse, of which that inferior hill forms a part. Its utility with reference to that extraneous purpose, neither destroys nor impairs its utility with reference to the direct purpose of this work.

I. Against vexation, expense, and delay, taken together.

1. Anticipative survey of the contents of the budget of evidence on both sides.

2. Tribunals within reach: in which is in-

cluded, limitation of the local extent of judicial districts; thence augmentation, or (according to what has been, or has not been, done before) restoration, or non-reduction, of their number: the county courts, and more especially the hundred courts, of former times in England.

3. Sittings of each uninterrupted. Exemplifications, the different courts of conscience scattered here and there over the face of the country: but more particularly and literally the London police offices. Also, the courts held to so many purposes by justices of peace, acting, not in general sessions, but in voluntary division meetings; or singly, at their own houses.

4. Meeting of the parties *coram judice*, at the outset of every cause, for the purpose of the above-mentioned anticipative survey, as well as for so many other purposes. Exemplifications: practice of the courts of conscience, and of the courts held by justices of the peace, as above.

5. Examination by epistolary correspondence; and, by that means, of persons resident at any magnitude of distance: whether within or without the effectual jurisdiction of the court in question, or the government under which it acts. This, in the case where examination *vivâ voce* is barred by impracticability, physical or prudential.

II. Against expense, exclusively or more particularly.

(6) 1. Power to any party to insist upon the production of any evidence, notwithstanding any preponderancy of expense, on condition of bearing the burthen of it definitively, as well as in the first instance. This includes the defraying

the expense necessary to the production of evidence deemed necessary to the opposite party, in preference to the seeing a decision pronounced in favour of the adversary (say the defendant) on the ground of the inordinateness of such necessary expense.

(7) 2. Advertisement for assistance to justice for the expense of evidence. The need of such assistance to be certified by the judge, if he thinks fit, after hearing what, on the occasion of the anticipative survey, has been said on both sides.

(8) 3. Abolition of taxes upon justice.

III. Against delay.

Against delay, in respect of the contingently consequent deperition of the matter of evidence:—

(9) 1. Prompt collection of forthcoming, without waiting for the unforthcoming, evidence.

Against delay in respect of the contingently consequent deperition of the matter of satisfaction:—

(10) 2. Provisional decision on either side: taking sufficient security for restitution *ad integrum*, in the event of a subsequent production of the as yet unforthcoming evidence.

(11) 3. Provisional sequestration of the matter of satisfaction, without ulterior decision at that time.

IV. Against vexation to the judicial breasts, and consequent delay, in the paramount appellate judicature of the House of Lords: (a very particular case, peculiar to the British constitution).

(12) 1. Application of the principle of the Grenville Act to that upper house of parliament.

After this summary view, let us now descend to particulars.

I. Remedy the first. Anticipative survey of the contents of the budget of evidence: viz. of the contents of it on both sides, and (when there are divers persons on the plaintiff's side, or on the defendant's side, or on both) on all sides.

That vexation, expense, and delay, may be saved, by putting an exclusion upon a lot of evidence, is manifest enough. Be the evidence ever so necessary to right decision, the production of it will always be attended with some portion (be it ever so small) of each of those collateral inconveniences. Exclude the evidence, you exclude right decision, you exclude justice; but, on the other hand, you exclude along with it those collateral, and minor, and (generally speaking) inferior, inconveniences.

Among the advantages resulting from the preparatory operation, one is obvious enough: the *exclusion* which it would, every now and then, enable the judge to put upon evidence that would otherwise have been to be received, —upon evidence deemed irrelevant or superfluous; which is as much as to say, of such a nature, that, by the exclusion of it, no prejudice could come to the ends of justice.

But, on the present occasion, it is not in the character of a means of exclusion that this operation is proposed, but as a means of saving the judge from the necessity of putting exclusion upon evidence: from the necessity of an operation so adverse, or even fatal, to the direct ends of justice, in the case where the lot of evidence which but for that survey would have been to be excluded, was material; and still more, if it was absolutely necessary, to enable the judge to

pronounce such a decision as shall be conformable to those direct and principally-to-be-regarded ends. In this character, the use of the anticipative survey is not quite so obvious as in the other character just mentioned.

1. Under the blind arrangements made, on the ground here in question, by English jurisprudence, (a limited allowance of time for the whole trial, including the production of all the evidence,—a limited allowance of time, for a quantity of business that may be any number of times greater than the whole quantity of the business that can possibly be done in that time); an incident which, for want of such anticipative survey, must every now and then take place, is, that, in the confusion produced by this forced condensation, a quantity of evidence altogether indispensable shall stand excluded; while another mass, which upon the anticipative survey would have been seen to be superfluous, has been admitted. Introduce the anticipative survey, the superfluous evidence is excluded; and, by means of the room thus gained, the indispensable mass of evidence, the evidence necessary to the principal end of justice, is let in.

Of the blind fixation and limitation of the quantity of time allotted for the reception of a mass of evidence, the quantity of which, for the purpose of any general rule, is incapable of being foreknown,—of this imbecility or this fraud, the consequence is, an indiscriminating exclusion of an indeterminable proportion of the whole mass of the evidence which would otherwise have been delivered. Of the prevalence of this blind practice in the English system, an

indication somewhat more in detail has been given in another place.* Rendering the practice on this head completely consistent with the ends of justice, is what could not be done without the abolition of those barricades, and the restitution of natural liberty. But, supposing them to remain, in the proposed anticipative survey may be seen the only remedy by which the venom of that abuse can be mitigated, and the mischief of it reduced.

English home-bred law, as also Rome-bred law (English as well as continental), afford each of them a remarkable exemplification of a blind and indiscriminate exclusion put upon masses of evidence, in nature as well as quantity altogether indeterminate: English home-bred, by means of the limited and unextensible quantity of time allowed in most cases for the reception of the whole mass of evidence; Rome-bred, in consequence of the studied secrecy, by the operation of which the door is shut against all such counter-evidence, or other ulterior evidence, the demand for which would have been created and made known, had the mass of evidence adduced by each party been known in time to the other. These examples, while they bring to view the demand for the anticipative survey here proposed, will serve to shew, at the same time, how exclusion of evidence is liable to be produced, not only without benefit, but without thought: and, while they shew the use of this survey in other respects, will also shew in what it has the effect of preserving from ex-

* Book VIII. TECHNICAL SYSTEM, Chap. ix. *Blind fixation of times.*

clusion evidence which would otherwise have been subjected to that fate.*

The following would be the sort of anticipative survey which I would propose.

Each party, in the presence of the other or others, produces a list of the contents of his budget of proposed evidence: names and descriptions of the proposed witnesses; whence they or their testimony have to come; with the articles of real and written evidence (if any) which they will respectively have to produce, and the particular purposes for which each article of evidence is wanted. Each party, in a word, gives in, for the consideration of the judge and the opposite party or parties, the same sort of information (so far as evidence is concerned) that, under the existing system, each party's attorney puts into the sort of document called a brief, for the instruction of the advocate.

Results of such a survey:—

1. All evidence which (supposing it to be true) will, in the opinion of the judge, be either irrelevant, or unnecessary, or unavailing, discarded beforehand: and the vexation, expense, and delay attached to the production of it, saved.

2. Item, all evidence, from the production of which, though material and even necessary, a preponderant amount of vexation, expense, and delay would be inseparable.

3. In the instance of each article, arrangements taken in concert, for the production of it

* See Part VI. Disguised Exclusions, Chapter iii. *Exclusion put upon indeterminate portions of the matter of evidence.*

in such time and manner as shall be attended with least delay, vexation, and expense.

It is only where the cause labours under a certain degree of complexity, that the demand for this sort of survey can have place. In the great majority of causes, this one meeting would serve for the termination as well as commencement of the cause: as it does in the English courts of conscience.

In some cases, neither the effect nor the substance of the evidence can be anticipated: the effect of an original, for example, from an alleged transcript: and the points to which it is possible for a witness to speak may often be foreknown with certainty, when the effect of his testimony can not reasonably be presumed.

Many are the cases in which the irrelevancy or inutility of one mass of evidence follows with certainty from the omission of another. Discard Titius, all testimonies respecting his character, all evidences which are wanted for no other purpose than to operate in opposition or support of his, become (whether irrelevant or no) useless.

Confront the anticipative survey with special pleading. The information which special pleading gives (or rather professes to give without giving), and in the worst possible mode, and by a chain of communication purposely wire-drawn through a course of months or years,—that, and more, the anticipative survey gives, freely and honestly gives, in the course of a single meeting, commonly in fewer minutes than the other course would consume months. Special pleading brings forward the allegations, carefully keeping back the evidence (if any) from which they are to

receive their support: the anticipative survey brings to view at the same time, the allegations, and either the evidence itself or the sources from whence it is to come. Special pleading, giving (*i. e.* selling) encouragement, reward, to false allegations, to which, exempting them from the punishment provided for allegations recognized in the character of evidence, it has secured the effect of evidence: the anticipative survey, throwing the sunshine of cross-examination upon every syllable that is said—call it allegation, call it evidence.

Meantime, this anticipative survey, what is it? Is it vision, imagination, innovation? Comes it from Formosa? from Utopia? No: not it indeed: nothing is there in the least new in it, but the name. You may see it in every court where Justice is in honour, and at the same time permitted by Power to shew her face. You may see it in every arbitration court: in every police office: in the court of every justice of the peace throughout the kingdom, acting out of the trammels of regular iniquity. You may see it in any court of conscience, as often as the nature of the cause admits of its containing a mass of evidentiary matter complex enough to afford a demand for any such distant scrutiny. You may see it in every counsel's, in every attorney's, brief: with no other difference than between complete, correct, and voluntarily or involuntarily honest, information, on the one hand, and purposely incomplete, purposely incorrect, mutilated, garbled, sophisticated, on the other.

II. Remedy the 2nd. Tribunals within reach.

In other points of view, the importance of this remedy belongs not to the present purpose.

Diminish in idea the importance of the matter in dispute in the cause; increase the distance of the spot from which a witness, or the bearer of an article of real or written evidence (who to this purpose may be called a witness), has to come; increase, in like manner, the number of such witnesses; you may always bring about a state of things in which the vexation, expense, and delay, attached to such conveyance, shall severally or jointly form a mass of collateral inconvenience preponderant over the evil opposite to the direct ends of justice in the case in question; over the evil of misdecision. But wherever this reversal of the more usual and natural proportion takes place, exclusion of the evidence (though misdecision follow) is the result authorized and required by a due regard to the aggregate of the ends of justice. But misdecision, especially when manifest, is a great and glaring evil: it is a lamentable resource. Diminish, on the other hand, the distance of the spot from whence the witness or witnesses have to come, in order to reach the seat of judicature, you may make sure of coming to a state of things in which the aggregate inconvenience of vexation, expense, and delay, by reason of attendance, can never be equal in weight to the evil of misdecision in any the least important cause.

The length to which, in point of prudential and even physical practicability, the application of this remedy can be carried, depends, it is manifest, upon the state of the population. Confront, on this ground, the state of London or Paris, with that of Siberia or the back settlements in America.

In default or aid of *vivâ voce* deposition and examination, comes naturally the epistolary mode, as mentioned elsewhere. Unfortunately, the same causes which render the establishment of tribunals within everybody's reach for *vivâ voce* deposition and mutual examination of the parties impracticable, render the epistolary mode of communication unapt to be generally practicable.

But, in this same state of things, the substitution of professional agents, as under the technical system, would in general be not less impracticable; and, instead of assuaging the inconvenience, would be more apt to aggravate it.

The consequence is, that, in a thinly peopled country, for slight injuries (more precisely as to the degree it is impossible to speak) the nature of things admits not of a remedy. Within the bosom of each family, absolute power in the head; as between a member of one family and that of another, independence and anarchy: such is the state of things, unless in so far as it may be susceptible of relief from the occasional and rare visitations of delegated (yet to this purpose absolute) power from a distance.

In a system of abuse, particular abuses serve sometimes as palliatives, sometimes as covers and apparent justifications, to each other.

In the absence of tribunals within reach, may be seen the most plausible pretence for the expulsion of the parties from the presence of the judge.

Out of British ground, it would be difficult to form an idea of the pitch to which the grievance opposite to the arrangement now proposed has

been raised in England. Value at stake, a few thousands of pounds, or a few shillings; station of the judge in the metropolis; abode of suitors at 350 miles distance.

Even in England, it is comparatively an innovation. In former times, each county, each hundred, had its court; not to speak of minor ones: and if for one sort of cause, why not for another? But the great judges, whose lips were close to the sovereign's ear, stole the sword from his side, and crushed their little rivals at a distance: the metropolitan courts swallowed up the country ones. By these and other devices, personal attendance being rendered intolerable to the parties; admission of substitutes, under the name of attornies, was prayed for, and granted, as an indulgence. Dependants, accomplices, and instruments of the judges, these substitutes became the natural enemies, and (with their confederates the advocates, called serjeants and apprentices) the sure betrayers, of the parties their employers.

To these real grievances, circuit courts added a sham remedy: excess of delay, crowned by excess of precipitation. In each separate cause, six or twelve months consumed in the London offices, in doing worse than nothing; at each one of a given list of county towns, from one to four days employed in a year, in running causes against time: for any given number of causes, each of any given length, exactly at every place the same time.

III. Remedy the 3rd. Sittings uninterrupted.

This remedy corresponds to another article in the list of the devices of the technical system, viz. *fixed times with long intervals;* and

consists in the removal of that abuse. In other respects, the mischievousness of that abuse, the consequent importance of this remedy, are topics that belong not to the present head.*

What belongs to the present head, is to shew how the evil attached to misdecision by reason of exclusion of evidence, and thence to exclusion of evidence, may be removed or lessened by this other means; viz. by filling up the vast gulphs fixed at present between the to-day and the to-morrow, in the chronology of technical judicature.

In Westminster Hall, as everybody knows or is supposed to know, there are exactly four days, and no more, in every year: each day consisting of twenty-eight ordinary days, more or less. Distance between to-day and to-morrow various: minimum, about one month; maximum, more than four calendar months.

In the rest of England, certain northern counties excepted, there are, according to the same chronology, but two days in a year, viz. in the juridical metropolis, the assize town of each county: each such day consisting of two ordinary days, or thereabouts; distance between to-day and to-morrow, half a year.

In three northern counties there is but one such day; the length of it not differing, in any considerable degree, from that of a southern day: distance between to-day and to-morrow, one whole year.

To give a complete and accurate system of juridical chronology would be to give a complete institute of a separate branch of science, form-

* See Book VIII. Chap. x.

ing, as already observed, a twig of that branch of the *flash* language. Illustration only being the object here, the above outline will be sufficiently full and accurate for the present purpose.

Of these great gulphs between day and day, the effect in respect of exclusion of evidence is twofold:—1. to increase the evil of it, when it takes place; 2. and thereby the cogency of the demand for it.

The plaintiff's right rests upon a deed. To-day the original is not, could not have been, forthcoming: to-morrow, at least for anything that is known to the contrary, it will or would be: a transcript, a correct and complete transcript, is forthcoming now. But, the original being in existence, the transcript, not being the best evidence, stands excluded, unless the defendant, by and with the advice of his learned assistants, thinks fit to admit it.

Observe now the difference between natural time, and juridical time.

The juridical to-morrow, is it the natural to-morrow? The delay, taken by itself, is scarce an object to either party: no advantage worth stickling for to a *malâ fide* defendant and his learned accomplices. The expense, though commonly an inferior, would indeed be something of an object more or less (understand the expense of a fresh hearing, with its fresh fees). But, forasmuch as in most cases the costs on both sides fall to the charge of him against whom the decision passes, the costs of the delay thus purchased would fall upon the purchaser: and the amount of the respite being, by the supposition, no more than a natural day, it can

scarce ever happen that the advantage thus to be purchased shall be adequate to the expense. He will, therefore, of course, admit the transcript instead of the original: in other words, not call for the putting upon the original that exclusion which he has a right to call for.

The juridical to-morrow, on the other hand, is it so long to look for as this day six months? In the ordinary state of things, the exclusion of the inferior second-hand evidence will be rigorously exacted. The injured plaintiff excepted, it is the interest of all parties that the application of the excluding rule be exacted without mercy. It is the interest of the malefactor's learned accomplices of all classes; and they have taken care that it shall be his. Costs of to-day's fruitless hearing; so much revenge at any rate. Half a year's interest upon the sum due: or, what comes to the same thing, upon a sum equal to the value of the service (in what shape soever) demanded by the plaintiff, at the charge of the defendant, at the hands of the judge. Half a year's interest upon the sum due: to this amount is the premium which the learned contrivers of the system have taken care to secure, for encouraging men to engage and persevere (in the teeth of conscience) in the defence of a bad cause: a bounty, to the value of which, as any one may see, there are no limits. Add to the above, the chance of saving the principal, by the deperition of the evidence in the course of this juridical day; or the certainty of it by withdrawing the matter of satisfaction, the defendant's property, out of the plaintiff's reach. Add again two other chances, which, in a mass of cases covering a great extent of ground

in the field of law, for the better encouragement of business-making injustice, the same learned wits have been ingenious enough to provide, and happy enough to preserve. In many cases, upon the death of the malefactor, death of the suit, for the benefit of his representatives: upon the death of the party injured, death of the suit, for the benefit of the malefactor himself.

Thus stands the premium in the south of England; and in the northern counties above mentioned, the value of it, as above mentioned, is exactly double.

Thus at common law: but in equity, it sets calculation at defiance.

Thus stand the interests of the defendant, dishonest or honest: thus stand the interests of the defendant's honest or dishonest, but in both cases equally unpunishable and irreproachable, professional assistants and advisers.

But the interest of the injured plaintiff's assistants and advisers, which way do they point? The same way as those of their own client? No: but the same way, and with equal force, as those of his adversary's equally learned professional assistants and advisers.

In this state of things, is it in the nature of man, is it in the nature of the man of law, that the exertions made for the admission should be equally sincere, equally strenuous, with the exertions made for the exclusion, of the evidence?

In equity you have plaintiffs and defendants by dozens, scores, or even hundreds, on a side. Observe the consequence. *Mors Ricardi, vita Roberti:* from the mortality of the suitors, comes

the mortality of the suit. One of the plaintiffs dying, the lawyers kill the suit: then comes a bill of reviver, to raise it like the phœnix from its ashes.*

IV. Remedy the fourth. Meeting of the parties at the outset, in the presence of the judge.

This remedy corresponds to the first and fundamental article in the list of the devices of the technical system, viz. exclusion of the parties from the presence of the judge: and consists in the removal of that abuse. In other points of view, the mischievousness of that abuse, the importance of this remedy, belong not to the present purpose.

What belongs to the present purpose, is simply the importance of this meeting, and at this stage of the cause, to a preceding article in this list of remedies, the proposed anticipative survey of the contents of the budget of evidence on both sides: nor to this operation in respect of every beneficial effect with which it is pregnant, but only in respect of the room it is capable of making for material evidence, by the exclusion of superfluous and less material evidence.

In regard to the matter of fact which constitutes the principal subject-matter in dispute, it may, in the instance of each one of the parties,

* The multiplicity of parties is no fault of equity. There are no more parties than interests; and there ought not to be fewer. When the cause is in this way to a certain degree complex, common law knows not how to deal with it: what is done (if anything be done) must be done by equity. But the greater quantity of natural and inevitable delay is afforded by the case, the greater the barbarity in thus making artificial delays to heap upon it.

have happened, or not have happened, to him, to have been in a situation enabling him to deliver evidence, direct or circumstantial, respecting it. But a matter to which it is scarce possible, in regard to either of them, that he should not be able to speak, in the way of evidence,—and to which, in most cases, he will be better able to speak than any one else,—is the result and particulars of his *information* and *expectations* relative to the quantity and quality of the mass, and of each article in the mass of the evidence which he looks upon himself as able (with the assistance of the arm of justice) to procure.*

Whether the correctness, or the completeness, of the information on this head be considered; whether in each instance the party be considered as honest or dishonest, sincere or insincere; the importance of his presence will still be out of doubt. Honest, his own purpose; dishonest, the purpose of his injured adversary, can never be adequately answered by any person in his stead.

It is from himself, in most instances, that the information will have to come. From any other person, from any professional law-assistant of his, the information thus afforded would in all such instances be upon no better footing than

* The persons and things he looks to as the sources of the evidence he expects to produce, are they at his command? In that case, he is already in a condition fully and determinately to give an inventory of the contents of his side of the budget of evidence. Are they, any of them, in any respect, out of his reach or knowledge? In that case, he stands in need of the arm of justice, to enable him, by means of the investigative process, to hunt out the sources from whence (as far as it exists and is attainable) the evidence, the information he looks for, must be made to flow.

second hand evidence, derived, or pretended to have been derived, from the client: false perhaps in its origin, and without danger to its author of the falsehood; or, if true, truncated or perverted by the negligence or sinister interest of the lawyer through whose lips it would be to be delivered.

From the original source, the breast of the client, all pertinent questions that could be put on the other side would come accompanied with a reasonable expectation of their extracting (true or false) an instructive answer. Directed to the breast of the law-assistant; if, on the part of the client, there were any deficiency in respect of the maximum of honesty and sincerity; all such expectation would in general be vain. Such and so much information as in the conception of the client it would be for his advantage to be handed in to the judge,—such and so much, he would (in so far as it occurred to him) communicate to his professional substitute for that purpose: such and so much as *in* his conception threatened a contrary effect, such and so much, it would be equally his care not to communicate.

In lieu of original *vivâ voce* testimony, conceive the business of the proposed survey managed in the only way in which learned judges will allow themselves to manage by themselves any sort of evidence; by the affidavit testimony of the parties, their respective attornies, or all together. With the outside shew of justice, the learned and venerable personages in question would as usual be delighted; with the inward fruit and effect, they would not, any more than usually, be afflicted.

On this, or any other occasion, affidavits from the defendants, lawyers or non-lawyers, would they be an adequate succedaneum to the presence of the deponents themselves? Yes, if, like the man, the paper could stand up and answer questions, could betray what it would wish to conceal, by blushes, by hesitation, by evasive responsion, by self-detected or otherwise detected mendacity, or by silence.

V. Remedy the fifth. Examination in the epistolary mode.

This remedy has not its counterpart anywhere in the list of the engines of chicane.

The idea of this remedy is, on the contrary, drawn from that fountain, in other respects so rich in abuse, the practice of the courts of technical procedure.

The mode here in question is the mode in which, in equity procedure, evidence is extracted from a defendant, by the *bill*, the *amendments* (if any) to the bill, and the *exceptions* (if any) taken to the answer.

That this mode, if *substituted* to the best mode (examination *vivâ voce per partes et per judicem*) is not so favourable to the ends of justice, as the same mode *subjoined*, where the importance of the cause warrants so great an addition to the delay, vexation, and expense,—subjoined, I say, to that *vivâ voce* mode,—seems to be out of dispute.

But a case has been already mentioned, (and that a case which, in so commercial a country as England, cannot but receive frequent exemplification), in which *vivâ voce* examination will be in general not to be obtained: viz. where, at the time in question, the residence of the proposed witness is within the dominions of some

foreign state. In this case, if no assurance, regarded as sufficient, be given, that the proposed witness will, within a sufficiently short interval, be forthcoming in England, (taking that for the proposed country), in such manner that his testimony shall be delivered in the accustomed mode, (regard being had to the nature of the suit),—the effect of the expatriation is thereby to put an exclusion upon the testimony.

In this same sort of case, it will not unfrequently happen that the proposed witness, though at the time not resident within the jurisdiction of any English court, shall in effect be not the less subject to the power of it; as (for example) in virtue of some property there, which he is unable or unwilling to remove; or in virtue of any other bond of attachment, by which his affections are fastened to the spot.

In this case, give to the party who has need of the testimony the power of extracting the testimony of the proposed witness in this mode, you apply a remedy succedaneous to that of exclusion; you obtain a mass of evidence, which (by reason of the delay attached to the production, or to the chance of the production of it) it might otherwise have been necessary—prudentially, or even physically, necessary—to exclude.

Upon the face of it, this remedy is bad in the way of diet, good in the way of medicine: bad, by reason of the opportunity it allows for mendacity-serving premeditation and instruction, and of its depriving the cause of the circumstantial evidence afforded by deportment: good, viz. in cases where, premeditation being necessary to complete and correct responsion, ex-

amination *vivâ voce* is not of itself sufficient; and in the cases in which, by reason of distance from every judgment seat the power of which is applicable to this purpose, such examination is not to be had.

Pursuing no ends but those of judicature; blind, when not hostile, to all better ends; the English technical system, where it does employ this remedy, employs it in the way of diet, refuses to employ it the way of medicine.

In the room of the mode of examination better adapted (as above) to ordinary use, English equity, within the irregular and comparatively narrow field of its jurisdiction, employs this mode of examination in all cases. In lieu of that preferable mode of examination, where rendered impracticable by distance, it does not indeed reject altogether the assistance of this remedy, but, by useless clogs and conditions, impairs the efficacy of it. The defendant himself being the proposed witness; his own self-regarding testimony being to be extracted by the adversary, in the hope of its having the effect of self-prejudicing testimony; a set of commissioners are to be sent to the antipodes, or found there, to apply to him, in the character of a security for veracity, (by means of the ceremony of an oath), that eventual punishment, to the application of which no such ceremony is (except thus by positive institution) necessary. From the plaintiff, while remaining such, no such testimony is permitted to be obtained: and from an extraneous witness, though in the same cause, testimony (if, in that distant situation, extracted at all) is not allowed to be extracted in that mode; is not allowed to be

extracted but in another, the *vivâ voce* mode, *per judices ad hoc*, appointed on both sides, the parties not present (neither by themselves nor by their advocates): nor in any mode can it at this distance be extracted but by consent of parties on both sides.

Out of the comparatively narrow field of equity jurisdiction, (with the addition of the still narrower fields of Ecclesiastical Court and Admiralty Court jurisdiction), the remedy, except in an extraordinary case presently to be mentioned, is alike unknown for diet and for medicine.

From the superior courts of common law, commissions for taking examinations of witnesses (extraneous witnesses only, not parties in the character of witnesses) have been known to be sent into foreign parts, in imitation of the commissions issued, also, at more early periods, and in more frequent instances, from the courts of equity, as above. But this appears never yet to have been done, but by consent of both parties. Precious remedy! Good against *bonâ fide*, inapplicable against *malâ fide*, litigation! Inapplicable, where the disease cries aloud for remedy; good, where there is no disease, or next to none! But, in this case, the mode of examination, whether better or worse than epistolary, is not epistolary, but *vivâ voce*.

Neither by equity nor by common law is the remedy applied in any other than that class of causes indicated by the denomination of *civil*, synonymous in this case to non-criminal, causes.

Such, according to a rough outline, are the distinctions themselves: *causa patet*, here as elsewhere.

When, to give the suitor a partial relief under the denial of justice produced in the practice of the common law courts by the exclusion of both parties from the presence of the judge, equity came in and proffered her treacherous assistance; it was on condition of paying her retainers to scribble questions instead of speaking them; and thus, instead of prompt and spoken answers, to extract studied answers, manufactured by others of her retainers, to be set to work on the other side. On what occasions was it that these pretended servants of justice were ready and desirous of lending to this purpose their dear-paid services? Not on the few occasions alone in which, on the part of the party in the right, and for the purposes of justice, there was a real need of it; but on all occasions in which, by the sale of their services, there was money to be got: that is, on all occasions whatever, that arose within the limits of that field, which, in the scramble for jurisdiction, had fallen to their share.

VI. Remedy the sixth. Remedy the first applying to expense alone. Power to either party to charge himself with the expense of an article of evidence, to the relief of a party on the other side.

The application of this remedy admits of two diversities. Forget not that, in both, the use of it is to serve in the character of a makeshift provision, the intention of which is to save justice from the danger which she cannot fail of incurring as often as the door is shut against needful evidence.

The first case is where, it being presupposed that the burthen of the evidence on both sides

is to be made to rest on the shoulders of the party in whose disfavour the cause is decided, this burthen (as to such part of it as one of the parties has created) would, when compared to the value in dispute, be too heavy to be thrown on the other of the parties. Value in dispute, say 5*l.*: expense of necessary evidence on the plaintiff's side, say 500*l.*: expense of evidence on the defendant's side, not worth bringing to account. Under the natural arrangement respecting costs in ordinary cases, the plaintiff producing this expensive evidence, would, in case of success, be entitled to throw the burthen upon the defendant. But, rather than that any such disproportionate oppression should be inflicted, much better would it be that this thus inordinately expensive evidence should be excluded; although of such exclusion the consequence by the supposition would be, that, as to the subject-matter of the demand, the 5*l.*, the plaintiff would be without remedy.

But suppose the plaintiff to stand up and say, My honour, my interest, or, if so you will have it, my caprice, is (in a way which I do or do not choose to mention) in such sort concerned in the business, that, rather than not have the business settled, I am content, in the event of my gaining the suit, to remain charged with the burthen of this mass of evidence. The remedy here in question consists in the making it a matter of obligation, or of discretion, on the part of the judge, to accede to a proposition to the above effect.

The remaining case is of a nature not so apt to take place, nor, in respect of the matter of fact, so easy to establish.

The plaintiff having brought his action for the 5*l.*, as before, the defendant stands up and says, I have a good defence, the money is not due. But, to produce the evidence necessary to the proof of this my defence, an expense of not less than 500*l.* would be indispensable: I have or have not the 500*l.*; but, whether I have or no, the hardship of being charged with such an expense would be extreme. A less evil would certainly be the payment of the 5*l.* claimed, though not due: but persuaded as I am that nothing at all is due, even this would be no small hardship on me.

To apply the proposed remedy to this second case, it would be necessary for the plaintiff on his part to stand up and say, (reasons imaginable as before), Rather than not have a decision in my favour on this my demand, I am content to relieve the defendant from this expense, and take it upon myself, enormous as it is, in the first instance. Here is the money: let it be applied to the production of the evidence, in the keeping, and under the direction of the court.

Even here the disproportion is not too great to have been actually exemplified. But, if it appears too great for probability, pare it down till you bring it within the pale.

To preestablish, in relation to the article of evidence in question, every circumstance necessary to give probability and rationality to the offer above exemplified,—the nature and effect of this distant evidence, the trustworthiness of it, the necessity of that expense to the obtaining it, and the assurance of its being obtained by means of that expense,—will be apt to be matter of no ordinary difficulty. But cases

where the necessary expense has been much greater, have been already examined, and, when the expense of a voyage round (or about half round) the world is considered, may easily be conceived: and as to the probable nature and effect, and the trustworthiness, these are points continually exposed to uncertainty, and as continually calling for calculations, which by each suitor, on his own account, are as constantly made: with more or less anxiety, ability, and exactness.

Where the expense of producing the evidence rises to a certain pitch, the resource of epistolary examination will, in most cases, be apt to present itself as being upon the whole the more eligible remedy.

The discussions necessary to the settling of the several points in question, as above, presuppose the establishment of the proposed anticipative survey, and help to exemplify the utility of it. They are no other than such as, in every day's practice, come under discussion between client and attorney. In the place where the scene lies, rests the only difference: in the one case, the client's parlour, or the attorney's office; in the other case, the place of mutual rendezvous, the court of justice.

Technical practice, English or continental, English home-bred or continental Rome-bred, (it is but repetition to say), knows of no such remedies, knows of no such temperaments. The pound of flesh on the one side, or the pound of flesh on the other: such, when the flesh of suitors is concerned, is the alternative given by the man of law. In either case, the man of law makes equally sure of his share.

VII. Remedy the seventh. Remedy the second

against expense alone. Advertisement for pecuniary assistance for defraying the expense of evidence.

If ever there can be a beneficial application of money, it is this. To every man, be he who he may, what is more valuable, what more necessary than justice? What is there that is valuable to a man, and of which the preservation depends not upon justice? By whom can property, reputation, condition in life, life itself be retained; by whom can property, reputation, or condition of life, when ravished, be recovered, without justice?

Gratuitously bestowed, what can be more generously bestowed than assistance given to a man to enable him to call in to his assistance the hand of justice?

Gratuitously, or for a price, what assistance can be more innoxious, more secure against all abuse, than assistance lent to justice; lent under the direction of the judge?

On every occasion on which charity presents a demand, what nation so prompt, so ardent as the English, to pour the balm of relief into the bosom of distress?

The probability of the demand for an inordinately expensive mass of evidence; the nature, materiality, and necessity of the evidence so demanded; the inability of the party to defray the expense; all these points have been established to the satisfaction of the judge, by the anticipative survey. He gives a certificate, and (with it, and on the ground of it) an authority to solicit for this purpose, from the lovers of justice, contributions, to be lodged in the hands of the officers of the court.

The lawyer alone continues to uphold the scarecrow set up so many centuries ago to frighten away from this field the hand of charity. For depriving the indigent of all chance for justice, what has been left undone that could be done? Claims that for indigence, for mere indigence, could not be prosecuted, have been forbidden, as if *in odium spoliati**—are still forbidden—to be sold.

Advertisement for subscriptions? Oh yes: for relief of distress in other shapes, no rule of law forbids it. But for distress (however exquisite) for lack of justice, advertisement would be useless: subscription would be too dangerous. Dangerous? Yes, dangerous: for has not the man of law contrived to convert it into a crime? Charity thus exercising itself, has it not, by the spell of jargon, been stamped with the name of *barretry*, or *maintenance*, or *champerty*, or some other stigma, on pretence of which, charity, or mutually beneficial traffic, may be alike converted into crimes? Perhaps yes; perhaps no: here, as elsewhere, authorities lean one way, authorities lean the other. In waters thus troubled and thus deep, what is the wonder if men choose not to run the risk of being drowned?

Forty years ago this abuse was denounced, in company with a kindred abuse, still more mischievous, because still more extensive.† Forty years hence the denunciation may be

* *In odium spoliatoris* is a common-place expression, employed among equity lawyers, to justify any exertion regarded as extraordinary, for the giving redress against fraud.

† See "Defence of Usury."

repeated, and with as little fruit. For, under the reign of jurisprudence, one generation witnesses the birth of an abuse, three or four more the maturity, and then perhaps comes the death.

As to the buying and selling of legal demands of all sorts, the only objection that could at any time have been made against it, is in this strain: Judges are so weak, so dependent, so cowardly, so corrupt, feudal barons so profligate and so formidable, that, after buying a bad title for the purpose, by his own hands or by that of a retainer of his, a baron (it will frequently happen) will, by bribery or intimidation, engage the judges to give to this bad title the effect of a good one.

Supposing it good for anything, what an argument, to come from learned lips!

Supposing it at that time good for anything, what would it be worth at present? Between the present state of judicature in that respect, and the state of judicature as above delineated, is there any more resemblance than between the present state of judicature in England, and the present state of it in Otaheite? Three or four centuries ago, the benefit had danger mixed with it; therefore, now that the effects of the remedy would be all pure benefit, the proscription put upon it is to continue: such is the logic of jurisprudence.

Not that there ever was, or could have been, a time in which the reason was worth a straw. He who could thus convert a bad bought title into a good one, what should have hindered him from giving the same effect to a bad one of his own making? The purchase-money would have

been so much saved, applicable to the purpose of bribing the judge, or suborning witnesses.

For restoring the indigent to a chance of justice, there is what is called a remedy, in the pauper acts. Like so many others, however, to which men of law have given a permit, it may be set down to the account of sham remedies. What it applies to, is that factitious part of the expense, which ought not to have been imposed upon the most opulent: what it does not apply to, is that part (that here in question included) which presses upon all ranks, being natural and inevitable.

VIII. Remedy the eighth. Abolition of taxes upon justice.

In speaking of this or any other expedient for obtaining pecuniary supplies for the relief of this species of distress, it is impossible to avoid thinking of the factitious loads by which it has everywhere been aggravated. I speak not here of what has been done by the judge for his own profit; but of what has been done by the finance minister for his own use. The subject has elsewhere been treated pretty much at large. See "Protest against Law Taxes".*

Upon evidence itself, the tax does not in every instance bear with any peculiar weight. But, being imposed in the preliminary proceedings rendered necessary to the introduction of evidence, and the subsequent proceedings neces-

* The reader will observe, that this work was written before the late repeal of the stamp duties on law proceedings, which has been justly deemed one of the most meritorious acts of the present enlightened administration. The arguments in the text, however, are general, and apply equally to all nations.—*Editor.*

sary to the giving effect to evidence, the influence is the same as if the tax had been imposed directly upon the evidence.

Like most other taxes, it operates partly as a burthen, partly as a prohibition: as a burthen upon him who stands up for his right, notwithstanding the tax; as a prohibition upon him who (through utter inability, or in choosing the least evil) gives up his right: giving up a just debt or other demand, or submitting to an unjust one, or submitting to be punished for an offence never committed, by the coercive force of the tax.

A tax upon capital, when the amount is considerable, is regarded as a bad tax. Why? Because, for the sake of a present supply, it nips future prosperity in the bud. The force of the objection, it is evident, depends upon the quantum. The tax may be a very bad one, or it may be as tolerable as most others.

But a tax upon capital would be a blessing, in comparison of the taxes upon justice. It takes men, indeed, as it finds them; but it does not single out the distressed.

The existing taxes upon justice are a tax upon the distressed, falling almost always upon capital, carrying off sometimes this or that proportion of capital, and (by the help of those other taxes upon justice, which are imposed by lawyers for their own benefit, and sunk in the pockets of the collectors) in many instances the whole of it.

They fasten down, in a state of slavery under the rich, not those commonly understood by the name of poor—indigent persons of the labouring classes—but the indigent of all classes.

The tax on medicine, though equally bad in

principle (and the only one that can be so), is, in comparison, owing to its comparative lightness, probably much inferior in mischievousness. If it were possible that a return should be made of the number of persons killed by it in England, in a year, I should not expect to find it amount to more than a few hundreds.

A law-suit is a perpetual blister upon the mind. If your wish be to do as much mischief as possible by another tax to the same amount as that of the impost upon justice (including that part which lawyers have imposed and collect for their own benefit), get a return from the physicians and apothecaries all over England, of the patients under their care, and distribute among them an impost to an equal amount. Proportions are of course no more to be regarded in the one case than they are in the other: but, lest the lawyer and his partner, the law-taxing financier, should leave you behind them, omit not to employ collectors to go about in cold nights to strip the last blanket from the beds of the most wretched of the patients.

The medicine tax, if it kills men, suffers them to die at home. The law-tax sends them to rot, broken-hearted, in jails.

Oh, but the necessities of the country are so great! they furnish us an excuse for bad taxes: be the oppression of the tax more or less, it is too late to think about it. Notable excuse for barbarity and ignorance! Exactly the reverse: the greater the aggregate pressure of the taxes, the more solicitous should be your study to choose the least oppressive.

IX. Remedy the ninth. Remedy the first against delay: and thence against intervening

deperition of evidence, and of the matter of satisfaction. Collection of forthcoming evidence, without waiting for unforthcoming evidence, or for fixed days.

Of those things which ought to be done, what is there that ought not to be done at the only time at which it can be done? Because one lot of evidence cannot yet be had, or because, though it might be had, it is not suffered to be got, is that a reason why another should be lost? In an exclusion thus indirectly put upon a lot of evidence, value unknown, is there anything like common honesty or common sense?

This remedy (so far as it extends) corresponds therefore to two articles in the list of the devices of the technical system, viz. sittings at long intervals, and blind fixation of times; and is no more than a particular application of the remedy already proposed (under the head of sittings uninterrupted) for that barefaced and most pernicious abuse.

The exclusion to which it is a remedy, is purely factitious; the work of the technical system, with its blind or too sharp-sighted arrangements. Six or twelve months must elapse, before any evidence can so much as begin to be collected. What follows? That all the evidence which, having been obtainable within that time, is not obtainable after that time, stands excluded in the lump. Is it possible, that, in the mind that devised these arrangements, any the smallest spark of regard should have been felt for the ends of justice? any more effective feeling for the sufferings of the oppressed, than the wolf has for those of the lamb he slaughters? What is it that the man wanted to

be informed of? Was it a secret to him that witnesses are men, or that men die?

Even now, in the eyes of an English lawyer, this abuse is the very summit of perfection. How should it be otherwise? It gives him holidays: absolutely matchless holidays: it subtracts nothing from the mass of fees. Subtracts? It adds to the mass: it makes business: it forms a capital article in the mass of advantage provided for the encouragement of *malâ fide* demands, and more especially *malâ fide* defences.

Provision being wanted for a new-born orphan, or information lodged for an offence,—what if a justice of the peace were to say, Come again this day six months: then, and not till then, I receive your evidence? But when, from any one of those seats of natural justice, was anything heard thus monstrous? No: the licence to work iniquity descends not upon these unlearned judges: not being granted by them, it has been neither granted to them, nor to their use.

If, in the arrangement of terms and circuits, there be common sense or common honesty, give to diseased indigence, as well as oppressed and plundered innocence, the benefit of it. Extend it from courts of justice to hospitals. Let no hospital be founded in future, without vacations of two months and four months for physicians, surgeons, and nurses. Men die for want of timely medicine. But do not men also die for want of timely sustenance? For want of the substance which the client, by the advice and assistance of his lawyer, has ravished; and which the official lawyer, lest the amusements

of his long vacation should be disturbed, refuses to restore; are not all jails for debt slaughter-houses, filled and emptied for their benefit?

Even courts of justice have not received the benefit of this arrangement to its full extent. The reason has been already given. Against the depredations and violence of the unlicensed malefactor, neither the house, the pocket, nor the person of the lawyer are (happily for mankind) more secure than those of another man: and were the matter of wealth to perish, so would the matter of fees. Accordingly, instead of once or twice in the year, the Old Bailey sits eight times: and the sound of the word *vacation* is not so much as heard in Bow street.

Equity, indeed, has her examinations *de bene esse*, and her examinations *in perpetuam rei memoriam*. For, equity finding more fees to collect than could be got in within the limits of the common law harvest-time, her shops are never shut long together: moreover, her birth-place was on the continent, where men were cursed with no such *regalia beneficia** as terms and circuits.

But, to measure the ratio of this remedy to an adequate one, compare the scanty and irregular and undefined field of equity jurisdiction

* The epithet given by Glanville, who wrote in Henry the Second's time, to the then new-invented grand assize: a sort of circuit, travelled once in seven years. In other words, a licence for injustice, renewable or not at that period: a remedy, which, if worth anything at any time, would have been worth more before the flood than since. Quære, how did the business of justice go on before this grand improvement? Answer: As to times and places, at least, much less badly than at present: for, in those days, the metropolitan courts had not swallowed up the local ones.

with the remainder of the field of law, criminal and non-criminal. Compare the examination of an equity examiner's dark closet with the examination of a police office: efficiency with efficiency, delay with delay, expense with expense.

As to common law; even those resources, miserable and treacherous as they are, are more than she has ever had a heart or a head to give herself. When she is in a mood to have them, she borrows them of equity: for now, the whole trade being consolidated into one vast firm, and all interests mixed together and rendered undistinguishable, shop and shop are upon the best terms imaginable.

On this head, equity has a whim or an artifice, in so general a view scarce worth mentioning, unless it were for curiosity's sake. If your witness is dying, or making off; if, in short, the evidence you depend upon is wanted at any of these odd times; in such case, although you are in the right, and found to be so, you must thus far pay the piper, as if the right were not on your side.

The same whim or the same artifice governed on the continent, as often as, in a suit not criminal, any one of the parties called for the testimony of an adversary.

X. Remedy the tenth. Remedy the second against delay. Provisional decision, without waiting for the best evidence.

When the original of a deed or other written document is so situated that the production of it cannot be effected without a more than ordinary degree of vexation, expense, and delay,—lodged in some place between this and the

antipodes, in the hands of some possessor, who, proprietor or not, does or does not choose to part with it or to bring it;—where such is the situation, or supposed situation, of a supposed or alleged original, at the time that an alleged transcript, or sufficient extract or abstract, is ready to be produced;—a question may arise as between the two documents, the alleged original and alleged transcript, (both certainly not being necessary, one perhaps sufficient), which, if either of them, shall be admitted. Were both present, the admission of the transcript (unless it were for momentary provisional consultation, for the purpose or in the course of argument) would evidently be attended with some (howsoever little danger) and with no use. A transcript, how little soever inferior in point of trustworthiness to the original, can never, so long as man is fallible, be considered as exactly upon a par with it. But the original is so circumstanced, that, rather than load the cause with the vexation, expense, and delay, attached to the production of it, it would be better to exclude it: nay, even although, to the prejudice of the side by which it should have been produced, misdecision were sure to follow. It ought therefore to stand excluded: and thereby the whole of the evidence from that source, were there no other remedy.

But the transcript,—although, in preference to or indiscriminately with the original, it ought not to be produced,—yet, rather than the evidence from that source should be altogether lost, and misdecision take place in consequence, might (if ordinarily well authenticated) might

with much less danger than what is frequently incurred in practice, be (under the conditions above proposed) received instead of it. Nevertheless, mischief from misdecision ought at the same time (so far as is consistent with the regard due to the avoidance of preponderant collateral inconvenience in the shape of vexation, expense, and delay) to be obviated as effectually as possible. Accordingly, previously to execution, obligation (or at least liberty) ought to be in the hands of the judge, for taking from the party thus to be instated, sufficient security for the eventual reinstatement of the other party; in case that, within a time to be limited, the propriety of the opposite decision should have been made appear,—the authenticity of the transcript, or its correctness or completeness with relation to the point in question, having been disproved.

The character ascribed to the proposed arrangement, (viz. that of a remedy succedaneous to the exclusion of evidence), belongs to it beyond dispute. Under English practice, but for this remedy, both would or might have been excluded; the original, and the transcript: the original, by reason of the preponderant inconvenience attending the production of it; the transcript, by reason of its being but a transcript, and the original still in existence, and the production of it, though prudentially, not physically impracticable. In virtue of this arrangement, neither stand excluded: the transcript is admitted absolutely and at the instant; the original left to be produced, eventually and if need be, at another time.

In English practice, the original being lost,—

the previous existence of it, the subsequent deperition of it, and the authenticity of the alleged transcript, being proved by what is regarded as sufficient evidence,—the transcript is received instead of it. The alleged transcript received, when there exists no longer the original with which upon occasion it is capable of being compared! With how much more safety, when the original with which it may be compared is still in existence? when, in case of perjury, the witness swearing to the correctness of the transcript is capable of being detected, convicted, punished?

When received (if received at all) it is, in practice, received absolutely: without any such conditions imposed; conditions, in case of misdecision on the ground of it, providing for the reparation of the injustice.

XI. Remedy the eleventh. Remedy the third against delay. Provisional sequestration.

This is an arrangement of still more entire security, capable of being substituted, upon occasion, to those measures, which would be the natural result of unreserved admission of the evidence, and unreserved decision on the ground of it.

The party in whose behalf this makeshift evidence is produced, instead of the regular evidence from the same source, is (for instance) the plaintiff: the decision regularly called for by this evidence, would be, the putting that party in immediate possession of the subject-matter in dispute, on condition of finding security for eventual restitution in kind, or other adequate satisfaction, as proposed by the last preceding remedy. But, the character or situ-

ation of the plaintiff is not (to the purpose here in question at least) altogether trustworthy: the subject-matter is a female, whose honour and condition in life, in the character of daughter, ward, or wife, claimed as such by one or both the parties, is at stake: the subject-matter, though of the class of things, is an article susceptible of a *pretium affectionis*, and thence of damage not to be repaired by money. On any of these accounts (not to look for others), it may be more advisable upon the whole, that,—until the authenticity of the supposed transcript can be put out of doubt, (for example, by being sent to the original for reauthentication, under official or other altogether unsuspected care)—the subject-matter should either be suffered to remain in the hands of the defendant, (he on his part finding security), or be lodged in the hands of official or other unsuspected third persons, satisfaction in the meantime being made to the plaintiff for the loss of possession sustained by him.

While the bill, without the benefit of which equity will not grant even her *de bene esse* examination, is scribbling by the plaintiff's lawyers, or an answer to it by the defendant's; while the examiner's clerk, closeted with the witness like a confessor with his penitent, is setting down what the witness says, between sleeping and waking, or what he does not say, regardless whether it be sense or nonsense, complete or incomplete, true or false; all this while the defendant (if he be what defendants so often are) is making the best use of the time thus given him, eating the plaintiff's property, or sending or putting it out of reach, according to his humour and his circumstances.

While the boy is running to the chandler's shop to buy the salt to lay upon the sparrow's tail, (an instruction not grudged to infant bird-catchers), the bird hops or flies off at leisure. If it were in the nature of equity, English equity, to be sincere, she would find her emblem in this child. But no: the imputation would be unjust to her, if this lameness were to be ascribed to blindness.

By preventing mischief, mischief in any of the shapes in which equity is at every man's service to prevent it, there would be nothing to be got. By making a shew, and that a false one, of being ready to prevent it, much is to be got, and is got. The groom, who, having a common interest with the horse-stealer, waits till the steed is stolen, and then marches up to shut the stable door in ceremony; he, and not the infant bird-catcher, is the true emblem of English equity.

While the bill is preparing, to ground the writ *ne exeat regno*, the cuckoo swindler that should have been hedged in is winging his way to the continent, laughing at or with the hedgers. While the Injunction Bill, by which waste should have been stayed, is scribbling, the axe of the dissector or malicious life-holder is levelling to the ground the lofty oaks from which the venerable mansion has derived shelter and dignity from age to age. While, in all the luxury of skins and parchment, the female orphan is dressing out to make her appearance in the character of a ward of the court, the sharper whom the charms of her person or her purse have laid at her feet, is clasping her in

his arms, at the temple of the Caledonia hymen, laughing with her to think how the union of hearts has been facilitated by the incompleteness of the union between kingdoms.

Malefactor, whoever you are, you deserve to be confined for idiocy, or your solicitor struck off the roll for ignorance, if ever it be your ill fate to see your schemes anticipated and frustrated by English equity.

Among the almost numberless uses of the initial meeting of the parties in the presence of the judge, one is (as already intimated) the putting an instant stop to so sure a course for eluding the power of justice.

Is the party's solvency out of suspicion, out of danger? No use in conveying him to a jail, or to a spunging-house: as little in forcing him to beg or buy sureties for his eventual forthcomingness. Is his solvency a point too dubious or too complicated to be settled at the first examination? A guard placed over him in his own house would give it all the useful properties of a spunging-house without any of the pernicious: —as if a guard could not as well remain in charge of his person, as at present of his goods! Consign the defendant to either a jail or a spunging-house, for no better or other reason than that (without any doubt of his solvency) the plaintiff believes, or pretends to believe, that the money he claims of him is due! The reason were as good for hanging him.

The inquiry thus made, does his solvency prove dubious? Seizing his person affords no security. In jail, or in a spunging-house, his effects, for every purpose of removal or dissipa-

tion, are as much in his power as if he were at home. Secure the effects themselves, all removal, all dissipation is at end.

Of this same blind arrangement, of which, in some instances exclusion of necessary evidence, in other instances unnecessary vexation, expense, and delay, for the averting the mischief of such exclusion, is the result,—and which arrangement consists itself in the constant and inexorable establishment of factitious delay, without use or shadow of pretence, of which delay a frequent and natural result is deperition of evidence,—another fruit is the deperition of the matter of satisfaction, in the manner above delineated. To secure the subject-matter in dispute from perishing, or going into wrong hands, nothing can as yet be done, for want of evidence. Why? Because it is by evidence alone that the defendant's title to it can be made dubious, the plaintiff's probable: and, to this as to all other purposes, the receipt of evidence, instead of being brought forward as early as possible, is put off as long as possible! Why not brought forward as early as possible? Because (as there has so often been occasion to state) it was against the interest of the founders of the system, that any evidence fit to be acted upon should be brought forward at this early stage.

On all these several points, the interest of the founders of the system was in clear and diametrical opposition to that of the suitors, and more especially to that of the honest among suitors, which is as much as to say, to the ends of justice. It was the interest of these arbiters of human destiny, that as much human misery

should be produced, as the sovereign and the people would bear to see produced: and as much misery as the sovereign and the people have borne to see produced has been produced accordingly. It was their interest that as little relief under this misery should be afforded, as the sovereign and the people would bear to see withholden; and as much relief as could be withholden, has thus been withholden accordingly.

What is, and ever has been, the interest of the people, taken in the aggregate, in their character of suitors, is, that as few of them as possible should go to jail; that as little as possible of the mass of property at the disposal of the judges should either perish, or be lost to the person intitled to receive it; and that, to avert as far as possible both these mischiefs, the defendant (in all cases where his solvency was exposed to doubt, or where in any other way the plaintiff stood exposed to the danger of suffering irreparable damage) should be brought into the presence of the judge, to have, for the benefit of all his creditors, (and, above all, for his own benefit, and at his own request), the state of his pecuniary circumstances laid open to the judge as early as possible.

Unfortunately, on these same subjects and occasions, what all along has been, and still continues to be, the interest of the judges, is, that on neither side (much less on both sides) should the suitors ever be suffered to come into their presence, when it is possible to prevent it: that, above all things, no such unpleasant company should be forced upon them at the outset of the cause: that, instead of this, as many in-

dividuals as possible should go to jail, and (unless when the jails were already so full as to hold no more) be kept there as long as possible: that, while the defendant is so lying in jail, the property which, by law and justice, ought to have been restored or transferred by him or from him to the use of the plaintiff, should remain at the disposal of him, the defendant, to be wasted or embezzled by him, to as large an amount as possible: that, while in those receptacles of infection debtors were rotting in body and mind, while oppressed debtors and injured creditors were dying broken-hearted,—judges, the authors of this misery, with their dependants, protégés, and bottle companions, should have as much time to enjoy and amuse themselves in as possible: and that, lest business should be presented to them in any other than the most pleasant and least troublesome form, the fate of the wretches on both sides should never be disposed of by these its arbiters, on any other ground than that of a sort of evidence utterly unfit for the purpose, and universally acknowledged so to be.*

* What is perfectly known to all lawyers at present, and to all non-lawyers as soon as they please, is, that the practice of imprisonment for debt is the result of a traffick, in which the judges of all the common law courts took a share; and which consisted in selling (on pretences as notoriously false as any swindler was ever punished for) the liberty of the people, in the character of defendants, to all persons who (with or without so much as the pretence of title) found their account in the purchase of it.

It may be considered as a particular branch of the slave trade: with this peculiarity, that the colour of the thing (the person converted into a thing) made no difference. Crowded jails matched with crowded ships: the long vacation, with the long passage.

In complaining of this, as of any other branch of the system of abuse, it has been a practice among men of law to dispute the legality of it.

Not to speak of former struggles; soon after the Restoration, the three great common law courts in Westminster Hall became so many rival shops. Like other shops, they fought for custom: the liberty of the defendant was the *bonus* they each of them made itself master of, and offered as a lure to draw in purchasers. It became, consequently, in the hand of each, a weapon with which he fought his rivals.

It was the King's Bench that began. In criminal suits, of which alone it had been intended by the sovereign that it should have cognizance,* it had been in possession of the undisputed practice, and thence of the right, of enabling the plaintiff (the prosecutor) to consign the defendant (that is, anybody) to prison (a prison of its own) in the first instance, that is, without evidence. The Common Pleas, for which alone of the three courts the cognizance of civil suits had been intended, possessed no such right, unless in a particular and narrow description of causes.

The judges of the King's Bench formed a scheme for filching custom from their brethren of the Common Pleas. Encouragement was given to plaintiffs to bring false accusations against defendants: accusations, the falsehood of which was completely understood, as well by the judges by whom they were received, as by the plaintiffs by whom they were delivered. On the ground of a false accusation of this sort, the defendant, as of course, went to jail in some cases, was supposed to be in jail in others. Being thus, or being supposed to be, in jail, he was at any rate in the power of the judges, to be dealt with as they pleased: being thus in their power, they suffered any other demand to be brought against him, though it were only of a civil nature. In what cases the man was really in their custody, and in what not, it is impossible for us now to know: it was never intended that we should. The mass of jargon called, in Westminster Hall, by the name of a *record*, was (as has been so often observed) a mass of jargon in which an indeterminate quantity of truth,

* For the indeterminateness of the distinction between *civil* and *criminal*, see above: meantime, they may serve, like x and y in algebra, to designate quantities, of which, at the outset, nothing more is known than that they are both undefined, and that they are supposed to be different from each other.

Dispute the legality of a sort of practice persevered in by the superior courts in general, for centuries! Dispute as well the validity of an act of parliament. As if, while legislators con-

in great part useless, was invariably intermixed with an indeterminate mass of falsehood, serving as a screen for whatever injustice it might be deemed profitable and safe to perpetrate. When the man was not in jail, the bonus employed as above to draw custom into the King's Bench shop, was not made use of: what that shop got for itself, was nothing more than the possibility of selling to customers a branch of juridical service, of which, till then, a monopoly had been possessed by the Common Pleas. But, in the cases in question, the Common Pleas not being in the practice of sending a man to jail; the King's Bench, in so far as they took upon themselves to send a man to jail in these same cases, gave themselves thereby an advantage (and through themselves to their customer) in which their brethren on the other side of the hall had as yet no share.

The success of *the king himself* (in his court at Westminster, where, as all the world knows, he is actually and constantly present), was prodigious: the distress and impoverishment of the king not himself, was proportionable: grass threatened to grow in the Common Pleas. Truth being in equal detestation on all sides of the hall, and the practice of making use of her, either for offence or for defence, equally unknown; the king not himself, after lying awhile in the state of the fallen angels, awoke, and, by the help of another falsehood correctly moulded upon the foregoing one, stood upon his defence.

For details, this is not the place. In substance, the story is of course told or alluded to in the institutional books and books of practice. But in the Memoirs of the Life of the lord keeper Guilford, (as related by his brother, natural and professional, the honourable Roger North, one of his majesty's counsel, learned in the law), the whole war, with all its stratagems, is related in considerable detail, and pure of all disguise. The only interests professed to have ever come in view, are the interests of the lawyers: of the partnership in all its branches. Of the interests of the suitors, no more account is taken, or mention made, than, at an auction of a West India estate, of the interests of the Negroes. For

nive or sleep, a law were not exactly what the judges, for the time being, are pleased to make of it.

The cause of this paralogism must be looked for in a notion, entertained through prejudice, or affected from prudence, of the excellence of the law: of its subserviency to the ends of justice: whatever is not reason is not law. Whether the opposite inference would not be the more rational one, the reader is by this time in a way to judge.

The subject-matters of law are persons and things: the force of law is occupied in causing them to be forthcoming: both, incidentally, in the character of sources of evidence; both, ultimately, (and, for precaution's sake, incidentally) in the character of parcels of the matter of satisfaction: persons, besides, (in cases of corporal punishment), in the character of subject-matters of the punishment.

The operations, the object of which is to cause them to be forthcoming for the purpose of satisfaction or punishment, are, in the books

the ends or dictates of justice, no more regard is professed on either side, than on either side in the conferences reported by Thucydides between the Athenians and the Melians.

The honourable and learned author was completely in the secret; if any secret there could be said to be, in a business in which causes as well as effects, motives as well as measures, were so completely in the sunshine. It was under the conduct of his right honourable brother, then chief justice of the Common Pleas, that the defensive part of the warfare was carried on: the success of it is matter of as undisguised a triumph, as ever sat on the brow of a King's Bench or Old Bailey advocate, when relating how, with the aid of his science, a malefactor was rescued from condign punishment by a quibble.

of practice, ranged under the head of *execution*: by them is done, or pretended to be done, that which the decision, judgment, decree, commanded to be done.

In this part of the field of law, as in most others, the dictates of utility, as pointed out by the ends of justice, are plain and simple. General rule:—in no case to omit any operation by which the forthcomingness of the article can be made more sure. Exception, where the operation is either physically or prudentially impracticable: prudentially, because the vexation and expense attached to the execution of the decision, would be a greater evil than that of its not being executed. Memento:—in the pursuit of this object, to take that course, in which the quantity of expense and vexation created shall be the least that can be.

Uncertain, confused, voluminous, and, by its very voluminousness, rendered defective, (for the more abundant the swarm of absurd and pernicious distinctions and diversifications, the more abundant the defects); fraudulent to creditors, oppressive to debtors, beneficial to lawyers, to lawyers of all classes, from the chancellor to the bailiff's follower, and to none but lawyers:—such, in its bearings upon this part of the field of procedure, as upon every other, is the system still in force in England.*

* The distinction between *insolvency* and *bankruptcy*, is of a piece with the distinction between *realty* and *personalty*: each a source of fraud and vexation to the suitor; each a gold mine to the man of law. Precious distinction! a wall of paper to fraud, a wall of adamant to justice. For the purposes of fraud, every debtor is a bankrupt at pleasure: for (not to speak of sham-traders) who can prevent his being

To frame a system free from all these abuses, —a system in which the ends of justice and dictates of utility as above indicated shall be accomplished, and in the compass of from ten

a real one? Every non-trader may be made a bankrupt for the purpose of fraud; no such person can be made a bankrupt for the purposes of justice.

Ages ago, at the touch of the sceptre which sanctioned the laws of bankruptcy, all distinction between realty and personalty in the hands of the bankrupt vanished. On that ground, no hair-splitting as between person, lands, and goods, sometimes one to be had, sometimes another, sometimes all three, (according to the sort of court resorted to, the sort of suit instituted, or process employed,—not to speak of other causes of variation, all equally foreign to the merits), sometimes half of one, or one and a half:—distinctions, which are all kept up against the creditors of non-traders, and cherished with an affection proportioned to their absurdity, their mischievousness, and their consequent fruitfulness in made business.

Your debtor owes you two thousand pounds. Moveable or other personal property not worth recurring to: land or other real property worth a thousand pounds: his body out of the reach of justice. Of his thousand pounds you may have half, and but half:—Why?—Answer:—Because, had you and he lived three or four hundred years ago, it might (unless he were an old man, or an old woman, or a young one, or a child, with a dozen or two of other exceptions, not one of them taken into account) it might have been of use to the purposes of national defence that your debtor should keep in his hands half the property, the whole of which should have been yours: keep it, lest the monarch should want men to attend him in his wars. Even in its prime, the reason was a foolish one: the fund bearing no sort of proportion to the purposes by which in pretension it was designed: and when creditor A had cut off his half, creditor B would come and halve that half, and so on, alphabet upon alphabet, in any number. But at each division the use of the lawyer's knife was to be bought, bought at his own price: and there lurks the real reason at the bottom of the ostensible one.

to fifty pages, would be an easy task: in from one hundred to five hundred pages, an impossible one.

But a reasou which at one time had a shadow of utility, though even that shadow is no more, is of the best and rarest sort. Expect not anything like it but on great occasions.

THE END OF VOL. IV.

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